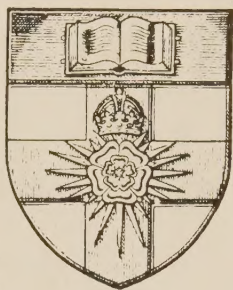


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<i>Purported exercise of belligerent rights</i>	679
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<i>Required</i>	450
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<i>Special reasons</i>	727, 1062, 1069
<i>Special risks</i>	79
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<i>Substantial part of whole rent</i>	875
<i>Surviving</i>	927
<i>Tenant</i>	875
<i>Their servants or agents</i>	294
<i>Thing in action</i>	573
<i>To be held by him and by his eldest son on his decease and to descend to the eldest son of such eldest son and so on to the eldest son of his descendants and I request my son to do all in his power by his will or otherwise to give effect to this my wish</i>	193
<i>To be used otherwise than as offices for the purpose of their business</i>	40
<i>To my brothers A. and B. also C. and D.—equally</i>	131
<i>To my son 10,000 preference shares</i>	270
<i>To the shares of the daughters of mine who shall at the time of the death of such daughter not have been married</i>	955
<i>To the wife of my grandson</i>	303
<i>Total capital of company actually invested in undertaking at time of purchase</i>	782
<i>Value to the tenant</i>	875
<i>Wanton and furious driving</i>	556
<i>With all faults and imperfections</i>	724
<i>Works reasonably executed for temporarily meeting the circumstances created by the damage</i>	444
<i>700</i>	274

CORRIGENDA

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P. 864. MINISTER OF PENSIONS *v.* HIGHAM. Counsel: for "*Crispin*" read "*Wellwood*." P. 866. Solicitors: for "*Culross & Trelawny*" read "*Neil Maclean & Co.*"

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P. 127. WEBSTER *v.* HIGGIN. Line D.7: for "allowed" read "dismissed." P. 130. Solicitors: for "*I. Goldman & Son*" read "*Lieberman, Leigh & Co.*"

P. 223. *Re* THOMPSON (deceased). Counsel: for "*R. L. Megarry*" read "*R. E. Megarry*."

P. 312. BOSTEL BROS., LTD. *v.* HURLOCK. Line D.4: for "defendants" read "plaintiffs."

P. 474. HAMS *v.* DARBY. The dates of hearing were: June 29, 30, July 1, 2.

P. 486. MOATE *v.* MOATE. Counsel: for "*T. R. Waters*" read "*Montague Waters*."

P. 548. EVERITT *v.* EVERITT. Line F.2: for "an appeal a motion" read "an appeal on motion."

P. 551. CARLISH *v.* EAST HAM CORPN. Solicitors: for "*Pritchard, Englefield & Co.*" read "*Sharpe Pritchard & Co.*"

P. 674. COX *v.* S. CUTLER & SONS, LTD. For solicitors as printed read "*Carpenters* (for the contractors); *J. Bingham & Co.* (for the gas company); *Shaen, Roscoe & Co.* (for the plaintiff)."

P. 761. CLIFF *v.* CLIFF. Line B.6: After "in open court" insert: "The word 'thereby' in s. 7 means that the declaration must be made at the same time as the decree *nisi* or at the same time as the decree absolute. This was not done in the present case."

P. 921. HOPES *v.* HOPES. The appearances of counsel should read: "*William Temple* for the wife. *Norman Black* and *Miss A. F. Dixon* for the husband." P. 927. Solicitors: for "husband" read "wife," for "wife" read "husband."

P. 933. *Re* SHEPHERD. Counsel for the plaintiff: for "*J. A. Wolfe*" read "*Jackson Wolfe*."

P. 1041. HORN *v.* MINISTER OF FOOD. Solicitors engaged were: "*Metcalfe, Copeman & Pettefar* (for the seller); *Treasury Solicitor* (for the buyer)."

P. 1108. WILLIAM HILL (Park Lane) LTD. *v.* ROSE. Counsel for the defendant were "*Gallop, K.C.* and *S. W. Magnus*" and not as printed.

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE LAW TIMES REPORTS

RUSSELL (INSPECTOR OF TAXES) *v.* SCOTT.

[HOUSE OF LORDS (Viscount Simon, Lord Porter, Lord Simonds, Lord Normand and Lord Oaksey), April 7, 8, 9, 13, 14, May 13, 1948.]

Income Tax—Property in lands—Annual value—Sand pit—Income Tax Act, 1918 (c. 40), sched. A, No. III, r. 3.

The owner of the freehold of a farm discovered sand in considerable depth under a small portion of the surface of his farm and allowed various contractors to dig the sand and take it away at a price varying with the quality of the sand. A sand-pit was thus formed, a road being constructed to it by one of the contractors from the county road, and the pit was worked continuously for three years until it was practically exhausted. A man was employed to record the tonnage of sand taken, to supervise the pit generally, and to direct the various contractors to the particular part of the pit where each should work, and there was a regular system for rendering accounts, for checking them, and for receiving payments.

HELD: the owner was carrying on "a concern" in connection with the sandpit, but it was not "a concern of the like nature" to those enumerated in r. 3 of No. III of sched. A to the Income Tax Act, 1918, and, therefore, income tax should be charged on the annual value of the farm as a whole and not be separately charged by reference to the profits on sales of sand made by the owner in the preceding year.

Mosley v. Wimpey (George) & Co., Ltd. ([1945] 1 All E.R. 674; 173 L.T. 24), *overruled.*

Edmonds v. Eastwood (1858) (2 H. & N. 811; 30 L.T. (O.S.) 304), *approved.*

[AS TO CONCERNS WITHIN SCHED. A, No. III, see HALSBURY, Hailsham Edn., Vol. 17, pp. 138-149, paras. 279-308; and FOR CASES, see DIGEST, Vol. 28, pp. 8, 9, Nos. 28-43.]

Cases referred to:

- (1) *Mosley v. Wimpey (George) & Co., Ltd.*, [1945] 1 All E.R. 674; 173 L.T. 24; 2nd Digest Supp.
- (2) *Edinburgh Southern Cemetery Co. v. Surveyor of Taxes*, (1889) 17 R. (Ct. of Sess.) 154; *sub nom.*, *Edinburgh Southern Cemetery Co. v. Kinmont*, 2 Tax Cas. 516; 28 Digest 8, r.
- (3) *Edmonds v. Eastwood*, (1858), 2 H. & N. 811; 27 L.J.Ex. 209; 22 J.P. 275; *sub nom.*, *Edmunds v. Eastwood*, 30 L.T.O.S. 304; 28 Digest 9, 42.
- (4) *Heat v. Gill*, (1872), 7 Ch. App. 699; 41 L.J.Ch. 761; 27 L.T. 291; 28 Digest 410, 354.
- (5) *Fry v. Salisbury House Estate, Ltd.*; *Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; Digest Supp.

APPEAL by the Crown from an order of the Court of Appeal of Northern Ireland (ANDREWS, C.J., BABINGTON and PORTER, L.JJ.).

The Special Commissioners of Income Tax held that the taxpayer was carrying on, in connection with a sand-pit discovered on his land, "a concern of the like nature" with those enumerated in r. 3 of No. III of sched. A to the Income Tax Act, 1918. On appeal by way of Case Stated to the King's Bench Division of Northern Ireland, BLACK, J., reversed the view of the commissioners. The

Court of Appeal of Northern Ireland, by a majority, confirmed the commissioners' view that the taxpayer was conducting "a concern," but unanimously rejected the conclusion that it was a "concern of the like nature." On an appeal by the Crown, the House of Lords now affirm both conclusions of the Court of Appeal. The facts appear in the opinion of VISCOUNT SIMON.

Attorney-General for Northern Ireland (L. E. Curran, K.C.) (of the Bar of Northern Ireland), *W. W. B. Topping, K.C.* (of the Bar of Northern Ireland), *R. P. Hills* and *F. A. L. Harrison* (of the Bar of Northern Ireland) for the Crown.

Cyril King, K.C., W. F. McCoy, K.C. (of the Bar of Northern Ireland) and *H. A. McVeigh* (of the Bar of Northern Ireland) for the taxpayer.

The House took time for consideration.

May 13. **VISCOUNT SIMON:** My Lords, the question in this appeal is raised by a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland. The taxpayer is the owner in fee simple of a farm of some twenty-five acres in the county of Londonderry. It was discovered that, under a portion of the surface of this farm extending to about one acre, sand existed in considerable depth and the taxpayer allowed various persons to come on his land, dig sand, and take it away, with the result that a sand-pit was formed which was regularly and continuously worked from January, 1941, until about October, 1944, by which time the pit was practically exhausted. The sand was of different qualities and the taxpayer's charges varied from between 6d. to 1s. per ton according to the quality of the sand gotten. The hours of working at the pit were from 8 a.m. to 6 p.m. daily. A road to the sand-pit from the county road was, with the taxpayer's approval, made by a Mr. Moore who was the earliest and biggest contractor. The demand for this sand principally arose in connection with the construction of aerodromes in Northern Ireland. The sand was excavated by the various contractors' men by shovelling, and was loaded into lorries for removal. The taxpayer employed a man to record the tonnage of sand taken in each case, and this employee supervised the pit generally and directed the various contractors to the particular part of the face of the pit where each should work. There was a regular system for rendering accounts, for checking them, and for receiving payments. The profits made by the taxpayer from the disposal of sand from this sand-pit amounted to £150 in 1940-41, £1,250 in 1941-42 and £3,750 in 1942-43.

The Revenue contends that the taxpayer, in connection with this sand-pit, was carrying on a "concern of the like nature" within the meaning of those words in No. III, r. 3 of the Rules Applicable to sched. A. If so, income tax would be separately charged by reference to the profits made by him in the preceding year. The taxpayer, on the other hand, argues that what he was doing in connection with this sand-pit did not amount to the carrying on of a "concern" at all, and that, even if it did, it was not a "concern of the like nature" within the meaning of r. 3. If this contention prevails, income tax would be charged on the annual value of the farm as a whole, calculated as directed for Ireland by s. 187 of the Income Tax Act, 1918. The commissioners decided against the taxpayer on both points, but stated a Case which admirably sets out the facts found by them, and formulates their decision thus:

We find that the sales of sand by the [taxpayer], which amounted to more than 100,000 tons and extended over three years, were by way of trade, and that they were not merely casual and occasional but constituted a series of transactions carried out in pursuance of a regular method, and we arrive at the conclusion that the sandpit was a "concern" carried on by the appellant. Further, following the decision of the Court of Appeal in *Mosley v. George Wimpey & Co., Ltd.* (1) we hold that it was a "concern of a like nature" with those enumerated in r. 3 of No. III of sched. A. We, accordingly, confirm the assessments appealed against in principle and leave the figures to be agreed between the parties.

When the matter came on appeal before BLACK, J., that learned judge considered himself to be bound by the views expressed in an earlier stage of the same controversy by the Court of Appeal in Northern Ireland, and consequently reversed the view of the commissioners. In the Court of Appeal ANDREWS,

C.J., confirmed the commissioners' view that the taxpayer was conducting a "concern," but rejected the commissioners' other conclusion that it was a "concern of the like nature." BABINGTON, L.J., considered the Crown's contention to be wrong on both points, saying as regards the first that he could find no evidence to justify the finding of the commissioners that the taxpayer carried on any "concern" or did anything more than convert his sand into money. PORTER, L.J., agreed with the view that there was no "concern of the like nature" being carried on by the taxpayer, and thus the Court of Appeal was unanimous in holding that the Revenue's claim failed. From this decision an appeal is now brought to this House.

To reach a correct conclusion in this difficult matter it is necessary to examine the language of parts of sched. A with much care. It is first to be observed that No. I is the general rule to which No. III, like No. II, is an exception. There is nothing, therefore, in the scheme of the schedule to require that No. III should be given a wider interpretation than its terms on their natural construction require. All that will happen when tax under sched. A is charged "in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom" is that, if the case does not fall within either of the rules which constitute exceptions, it will fall under the general rule No. I and the tax will be calculated on annual value as therein defined. No. III is headed, "Rules for estimating the annual value of certain other lands, tenements, hereditaments, or heritages which are not to be charged according to the preceding general rule" and provides as follows:

1. In the case of quarries of stone, slate, limestone, or chalk, the annual value shall be understood to be the profits of the preceding year. 2. In the case of mines of coal, tin, lead, copper, mundic, iron, and other mines, the annual value shall be understood to be the average amount for one year of the profits of the five preceding years. 3. In the case of ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains or levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments or heritages, the annual value shall be understood to be the profits of the preceding year. 4. Tax under the above rules shall be assessed and charged on the person or body of persons carrying on the concern, or on the agents or other officers who have the direction or management of the concern or receive the profits thereof.

Section 28 of the Finance Act, 1926, transferred the calculation of tax in respect of properties included in No. III to Case I of sched. D, and, consequently, the measure is now the profits of the preceding year in r. 2 as well as in rr. 1 and 3.

I agree with ANDREWS, C.J., that what the taxpayer was doing in connection with his sand-pit amounted to the carrying on of a "concern." The question is not, of course, (as the language of the commissioners, if strictly read, might seem to imply) whether the sand-pit was itself a "concern," but whether the taxpayer's activities in connection with it amounted to the carrying on of a "concern," and this, I think, is what the commissioners really meant by their finding. "Concern" is a very wide word, and appears to imply an adequate degree of business organisation for the purpose of carrying on the undertaking, but the amount of organisation needed must depend on the character of the "concern" itself. It will be noted from the language of r. 4 that all the various enterprises in rr. 1, 2 and 3 are spoken of as "concerns" and it is obvious that the amount of organisation needed for a toll or for streams of water would be vastly less than for a mine of coal or for gasworks. The language of r. 4 implies that in order to amount to a "concern" there must be direction or management as well as the receipt of profits. Here the facts found by the commissioners show that there was a regular system of direction and management sufficient for the exploiting of the sand-pit by its owner, and the commissioners had material before them on which they could properly arrive at the conclusion of fact that the taxpayer was carrying on a "concern." Such a conclusion must be accepted unless there were no facts to support it, and, in my opinion, the conclusion can be supported by the material in the Case. I should myself draw the same conclusion.

All this, however, will not assist the Revenue unless the conclusion is also reached that the "concern" was "a concern of the like nature" within the

meaning of r. 3. In view of the heterogeneous list of specific undertakings which precedes this phrase, it is a matter of the greatest difficulty to determine whether the phrase can properly include a sand-pit. Indeed, if a collection of items is heterogeneous, it almost seems a conflict in words to say that they belong to the same genus, but there the words are in the statute, and, if possible, the phrase must be given some meaning. The arguments before the House have sought an interpretation by pursuing two alternative methods. One method is to search for some common feature in the specific items regarded as a single collection. The other method is to treat the phrase as though it ran, "other concerns of the like nature to any one of the above." The two contrasted methods are illustrated in the judgments of SCOTT, L.J., and DU PARCQ, L.J., in *Mosley v. George Wimpey & Co., Ltd.* (1), where the Court of Appeal held that the undertaking of working a gravel-pit by a company which had acquired the exclusive right to do so fell within the words now under examination. In that case SCOTT, L.J., took the view that the list of specific undertakings in r. 3 constituted a single genus because they all involve a special or intensive use of the land with a view to its exploitation for commercial profit as distinguished from what he regarded as the ordinary use of land for agricultural purposes (including forestry) or for the site of buildings and the like. DU PARCQ, L.J., on the other hand, was prepared to hold that a gravel-pit could be regarded as analagous to certain items in the list, *viz.*, "salt works" or "alum works," as these are instances in which profits are made by commercially dealing with mineral deposits on or under the land.

The phrase "other concerns of the like nature" following a whole list of concerns which, with some more recent additions, constituted the specific subject-matters of what is now r. 3 of No. III first appears in the Income Tax Act, 1806, s. 74. "Gas-works" and "railways" were added to the list by the Act of 1842. Counsel for the taxpayer, in resisting the contention that a sand-pit could be included as *ejusdem generis* with what went before, pointed out that in nearly all of the specific cases in r. 3 the ground itself is substantially preserved while the concern is being carried on and there is no abstraction of the land but only a special use of it, whereas in rr. 1 and 2 the profit is made by abstraction of a wasting asset. Hence, he argued, a concern which involves the abstraction and ultimate exhaustion of sand or gravel could not be within r. 3. Moreover, as such concerns as these were neither any of the quarries specified in r. 1 nor mines dealt with in r. 2, it followed that the tax under sched. A of the concern of carrying on a sand-pit did not depend on profits, but fell within the general rule, No. 1. One difficulty in the way of this argument is that an alum mine would, apparently, involve substantial extraction. Moreover, this view of the matter would not only involve dissent from the Court of Appeal's decision in *Mosley v. George Wimpey & Co., Ltd.* (1), but also would be inconsistent with views expressed as to the scope of r. 3 in *Edinburgh Southern Cemetery Co. v. Kinnmont* (2). This last case deserves careful consideration in connection with the present matter, but it is not necessary in this appeal to reach a conclusion whether it is correctly decided or not.

The Crown's contention in the present case involves the drawing of a distinction between the "ordinary" and the "extraordinary" use of land, and by the latter is meant some intensive exploitation of the surface or subsoil by means of which a profit is derived which is likely to vary from year to year, as distinguished from the "normal" user of the land, of which its use for agriculture or forestry or for the site of buildings can be regarded as examples. In the latter case the assessment is by reference to annual value as defined in r. I and such annual value is not likely to vary each year. On this view of the matter No. III applies where the land is specially exploited as distinguished from being normally used. It is suggested that such a contrast, though difficult to work out exactly, corresponds with the common sense of the matter and with the general scheme of income tax, for, although the owner of land thus specially exploited was originally dealt with under sched. A, because his income was primarily derived from his property either in or under the land, it was still desirable to draw a distinction between the proprietor who made a valuable profit by extraordinary use and the proprietor in whose case the use to which the land was put was "normal." Whatever view may be taken of this contention, it does not, to my mind, decide the present issue in favour of the

Revenue. The difficulty of classifying the exploitation of sand-pits or gravel-pits as extraordinary or abnormal uses of land still persists. The digging and carrying away of sand or of gravel have been, I apprehend, one of the normal uses of suitable areas of land from the earliest times. The very fact that a concern depending on a sand-pit requires so little organisation makes me doubt whether an enterprise of this sort can properly be thrown into the "extraordinary" class. If, in the contemplation of the legislature, the exploitation of sand-pits or gravel-pits was an example of the special cases included in r. 3 of No. III, it is difficult to imagine why the rule did not specifically mention so obvious and so common an example. The same consideration applies to clay for making bricks, and in *Edmonds v. Eastwood* (3) a very strong Court of Exchequer held that a brickfield was not within No. III. POLLOCK, C.B., WATSON, B., CHANNELL, B., and MARTIN, B., all took the view that the getting of such material from land would not bring into play the special rule. It does not appear that this decision was brought to the attention of the Court of Appeal in *Mosley v. George Wimpey & Co.* (1), nor is there any reference to it in the judgments delivered in that case. It is possible that it may have been overlooked because *Edmonds v. Eastwood* (3) is not a revenue case, but the importance of what the Court of Exchequer then laid down cannot be minimised.

My conclusion, therefore, is that the concern of working a sand-pit, such as is found to exist in this case, does not fall within the concerns covered by r. 3 of No. III and that the whole farm ought, as the Court of Appeal in Ireland held, to be assessed under the general rule. This conclusion involves the overruling of the *ratio decidendi* of *Mosley v. George Wimpey & Co.* (1). We were informed that concerns for working china-clay have been customarily assessed under r. 3 of No. III, and, in view of the much greater elaboration of that process, which involves operations akin to mining (see the account given in *Hext v. Gill* (4) (7 Ch. App. 699, 703)), the present decision does not necessarily affect that practice. I must add that the language of the rule is so obscure and so difficult to expound with confidence that—without seeking to apply any different principle of construction to a revenue Act than would be proper in the case of legislation of a different kind—I feel that the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected. In the present instance, this reasonable clearness is wanting. I move that this appeal be dismissed with costs.

LORD PORTER : My Lords, I concur.

LORD SIMONDS : My Lords, the relevant facts of this case have been so fully stated that I need not repeat them, nor should I think it necessary to add anything on the general questions of law that arise but for the importance of the case and the fact that it is necessary to consider, and, in effect, overrule, the decision of the Court of Appeal in England in *Mosley v. George Wimpey & Co., Ltd.* (1). The two questions of law, which are, in truth, two branches of one question, are (1) whether that which the taxpayer did in relation to a sand-pit forming part of his farm at Glebe in the county of Londonderry was the carrying on of a "concern" and (2) if so, whether it was a "concern of the like nature having profits from or arising out of any lands" within the meaning of r. 3 of No. III of sched. A to the Income Tax Act, 1918. On the first question I will add nothing to what has been said by my noble and learned friend on the Woolsack. It is on the second question that I wish to make some observations.

My Lords, there is a maxim of income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him. It is necessary that this maxim should on occasion be re-asserted and this is such an occasion. Here it is sought to tax the owner and occupier of land in respect of the profits made by him from the sale of sand on the footing that, in effecting those sales, he is carrying on a concern which is of the like nature to "ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigation, docks, drains or levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, and ferries." I need go no further into the history of this catalogue than to say that with some additions it goes back for nearly 150 years.

During the whole of that time there can have been no more familiar feature of the landscape than pits of sand or gravel or clay, and I cannot doubt that during that time and before it the owners of such pits have been accustomed, in greater or less degree, to exploit them, not only for their own use, but by profitable sales. Yet it is suggested that the legislature, while expressly including in the catalogue such comparatively rare concerns as alum mines or works and salt springs or works, yet left to the precarious embrace of the expression "other concerns of the like nature" the common place operations which it is now sought to tax. Nor does the matter rest there, for the catalogue which I have recited follows immediately after r. 1, which deals with quarries of stone, slate, limestone, or chalk, and r. 2 which deals with mines of coal, tin, lead, copper, mundic, and other mines. Here surely would be the appropriate setting in which, had the legislature so intended, pits of sand or gravel or clay should *eo nomine* have been placed or included by words of general description. I cannot bring myself to suppose that the legislature either overlooked what almost obtrudes itself on the eye of any observer, or, observing it, deliberately refrained either from mentioning it or from putting it in its proper place.

I am brought back, then, to the maxim that I have mentioned. For it appears to me that here is a case in which the subject is entitled to say that the words of the section under which it is sought to tax him do not do so with the clarity which the subject-matter demands. What I have said applies equally to gravel-pits and to sand-pits, and it follows that, in my view, *Mosley's case* (1) was wrongly decided. The argument of the learned ATTORNEY-GENERAL was properly founded on that decision. I must, therefore, observe on it that, while SCOTT, L.J., rested his judgment on the view that "the generic words should . . . be interpreted widely and as disclosing an express intention of Parliament to sweep into the net every concern of the general character I have endeavoured to describe above," DU PARCQ, L.J., disclaimed this view and found in a sand-pit a concern of a like nature to two of the particular concerns included in the catalogue, *viz.*, salt works and alum mines. Your Lordships have not the advantage of knowing the opinion of UTHWATT, J., on this point. My Lords, I agree with DU PARCQ, L.J., in thinking that the general proposition of SCOTT, L.J., cannot be sustained. In the first place, I think with great respect that he ignores that No. III in sched. A comprises exceptions to the general rule which is to be found in No. I. What is not covered by the language of No. III falls within No. I if it is within sched. A at all, and does not fall within the other exceptions, and there is no need to give to No. III a wider meaning than, construed as a taxing statute, it strictly requires. Secondly, I cannot accept what I understand to be the view of SCOTT, L.J., as to the generic conception of the specified concerns, *viz.*, that they have the common feature of a variable economic yield which makes the rack rent an untrue or impracticable measure of annual value and a dissimilarity to the "normal" use of land. It is not, I think, open to the House after the decision in *Fry v. Salisbury House Estate, Ltd.* (5) to say that if a "concern" satisfies these two conditions it must necessarily fall within r. 3 of No. III. Nor, apart from that decision, should I be prepared to accept such a proposition. For, if these two conditions constituted the difference between the cases falling within No. I and No. III, I see no necessity for segregating the items in r. 1 from those in r. 3, nor, indeed, for any catalogue at all. Nor, my Lords, can I accept the view expressed by DU PARCQ, L.J., that a gravel-pit is a concern of like nature to alum mines or salt springs and therefore within r. 3. I would doubt whether, where a list is followed by such general words as "concerns of the like nature," it is proper to regard as covered by those words concerns which have a likeness to one or two of the items but do not exhibit a characteristic common to them all. But, however, this may be, I cannot find a sufficient likeness to the items chosen by DU PARCQ, L.J., to justify the inclusion of concerns which, if they had been intended to be included, would surely themselves have been selected as examples. In this connection I refer to my earlier observations and reinforce them by reference to *Edmonds v. Eastwood* (3), which appears not to have been called to the attention of the Court of Appeal in *Mosley's case* (1). In that case, which was decided 90 years ago and has never, so far as I am aware, been criticised, POLLOCK, C.B., used these words (2 H. & N. 811, 818):

I entertain considerable doubt—indeed more than a doubt—whether brickfields are

to be treated as coal mines or salt works, or any of those matters specifically mentioned in the Rules to Schedule (A) No. III . . . My opinion is that the case of a brickfield was not intended to be included within No. III. With the public notoriety that property of that description exists to a great extent, especially in the neighbourhood of London, it seems almost impossible, if it was intended to include it, that it should not have been inserted by name in the same category as coal mines or salt works.

In this view WATSON, B., expressly concurred. MARTIN, B., observed that he concurred with the Lord Chief Baron that there was considerable doubt whether this was so—*i.e.*, whether a brickfield fell within r. 3 of No. III. He appears to have underestimated the force of the Lord Chief Baron's conviction. CHANNELL, J., doubted whether the case fell within No. I or No. III.

My Lords, I do not think that your Lordships would be justified in disregarding these expressions which have gone so long unchallenged on the meaning and effect of a taxing statute, even if they did not wholly commend themselves, but for myself there is in them not only the force of almost venerable authority but also compelling reason. I would dismiss this appeal accordingly.

I must finally say a few words about the so-called cemetery cases which begin with the *Edinburgh Southern Cemetery Co. v. Kinmont* (2). Your Lordships are not, I think, called on to review the correctness of these decisions. In the cited case the LORD PRESIDENT (INGLIS), without giving any further reason, said (2 Tax Cas. 516, 528) that it appeared to him that the cemetery company there under consideration fell "very fairly within the words 'other concerns of the like nature' as occurring in the rule." LORD SHAND (*ibid.*) said that the true solution of the question was to be found in the fact that "all of these different concerns relate to companies which, having purchased or acquired land, remain in the occupation of that land themselves, and are using it for the purpose of some trade or business whereby they acquire profits." I do not think that the learned judge is here laying any stress on companies as distinguished from natural persons, but I would respectfully suggest that, if he meant that all companies or persons, which satisfy the test that he indicates, at once come within r. 3 of No. III, the proposition is far too wide. It may well be that, if the matter came to be argued before your Lordships, there would be found some common characteristic which would justify the inclusion of cemetery companies in the rule. Remembering the high authority of the LORD PRESIDENT (INGLIS) I am not disposed without argument to decide the contrary, but in this case I do not feel called upon either to attempt a definition of the class which r. 3 embraces or to do more than reject the contention of the Inland Revenue that they have established that a sand-pit is a "concern of the like nature" to the concerns enumerated in r. 3 of No. III or to any one or more of them.

LORD NORMAND : My Lords, I concur in the two speeches which have been delivered by my noble and learned friends.

LORD OAKSEY : My Lords, I agree that the judgment of the Court of Appeal in Northern Ireland is right and should be affirmed. The question is whether the taxpayer in the way in which he dealt with a sand-pit on his farm was carrying on a concern of the like nature with the concerns referred to in r. 3 of No. III of sched. A. I agree with your Lordships that there was evidence on which the commissioners could find that the taxpayer was carrying on a concern. The question remains whether it was a concern of a like nature to the other concerns mentioned in r. 3. On this question I agree with the observations of my noble friend LORD SIMONDS on the maxim of income tax law that the subject is not taxed unless the words of the taxing statute unambiguously impose the tax on him.

It has been argued by the ATTORNEY-GENERAL for Northern Ireland that No. III of sched. A should be construed to include all concerns connected with land which are in their nature commercial and which produce varying profits, that the characteristic suggested by the taxpayer's counsel, namely, extraction of part of the soil, is inconsistent with the inclusion of salt springs and alum mines in r. 3, and further is unconnected with any reason for treating such concerns differently from any other concern connected with the land. It was also suggested that No. I dealt with the agricultural uses of land and No. III with all other uses. I am unable to accept these arguments. I do not think the

interpretation of such provisions as sched. A, Nos. I and III, can be approached in this general way. It may be that it would have been perfectly reasonable to tax every profit arising from land, other than agricultural profit, in a different way from agricultural profit, but it is necessary to consider the words used and the frame of the schedule.

Schedule A provides by No. I :

General rule for estimating the annual value of lands, tenements, hereditaments or heritages. In the case of all lands, tenements, hereditaments, or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II and No. III of this schedule), the annual value shall be understood to be :—(1) the amount of the rent . . .

No. III is one of the exceptions and everything not dealt with in the exceptions must fall within the general provisions of No. I. No. I is not confined to agricultural uses of land, but refers to all uses except those in Nos. II and III. No. III, r. 1, I think, deals with quarries and r. 2 with mines exhaustively, with the single exception of alum mines, and it is conceded that sand-pits are not included in rr. 1 or 2. Now the digging of sand, gravel, clay or peat are, and have been from time immemorial, ordinary and well-known uses of land, and it is, in my view, impossible to construe r. 3, which deals expressly with a variety of subjects, none of which bears anything like such a close resemblance to digging for sand as do the subjects dealt with expressly in r. 1, as including sand-pits merely because alum mines are included in r. 3.

The reason why such subjects as sand-pits were omitted from the list in No. III (though it is not for the court to find a reason) was, I imagine, because the concern of using a sand-pit or the like was considered to be an ordinary use of land. In any event sand-pits are not expressly referred to in No. III and to bring them in under such words as "other concerns of the like nature" in r. 3 appears to me to be an unjustifiable extension of general words in an exception. For my own part, I am not at present prepared to hold that it is necessary to find a category to which all the subjects enumerated in r. 3 belong and that concerns of a like nature must fall within that category, but, in my opinion, digging sand is not of a like nature to any of the enumerated subjects, having regard to the context of rr. 1 and 2 in which r. 3 occurs. Apart from these reasons of construction, I think it is not unimportant that as long ago as 1859 in *Edmonds v. Eastwood* (3) POLLOCK, C.B., and BARONS MARTIN and WATSON all expressed the view that No. III did not include digging for clay. This case does not appear to have been cited to the Court of Appeal in England in *Wimpey v. Mosley* (1), where it was held that the extraction of gravel for commercial purposes was a concern within No. III. For the reasons which I have given, that case must, in my opinion, be over-ruled. I cannot agree with the view of SCOTT, L.J., that the widest possible interpretation ought to be given to the exceptions contained in No. III, nor can I agree with DU PARCQ, L.J., in holding that digging of gravel is a concern of a like nature with alum mines.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Rising & Ravenscroft*, agents for *William J. G. Seeds*, Belfast and Limavady (for the respondent).
[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

JOZWIAK v. HIEROWSKI.

[COURT OF APPEAL (Scott, Asquith and Bucknill, L.J.J.), April 21, 22, 23, May 10, 1948.]

Rent Restriction—Furnished letting—Rent of furniture substantial portion of whole—Date when comparison to be made—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2) (i) (as amended by the Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 10 (1)).

In considering whether, for the purposes of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2) (i) (as amended by the Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (1)), the rent attributable to the use of furniture forms a substantial portion of the total rent, the date on which to compare the rent so attributable with the total rent is that on which the original contract of tenancy is made.

[AS TO PAYMENTS FOR THE USE OF FURNITURE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 314, 315, para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 560, 561, Nos. 7078-7084.]

Cases referred to :

- (1) *Neale v. Del Soto*, [1945] 1 All E.R. 191; [1945] 1 K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 89 Sol. Jo. 130; 2nd Digest Supp.
- (2) *Palser v. Grinling*; *Property Holding Co., Ltd. v. Mischeff*, [1948] 1 All E.R. 1; [1948] L.J.R. 600; *affg.*, *Palser v. Grinling*, [1946] 2 All E.R. 287; [1946] K.B. 631; 175 L.T. 204; *Property Holding Co., Ltd. v. Mischeff*, [1946] 2 All E.R. 294; [1946] K.B. 645; 175 L.T. 192; 2nd Digest Supp.

APPEAL by the landlord from an order of His Honour JUDGE HARGREAVES at West London County Court, dated July 28, 1947, refusing an order in favour of the landlord for possession of certain premises. The Court of Appeal allowed the appeal on the ground that the part of the total rent fairly attributable to the furniture let with the premises was a substantial proportion thereof, and that, therefore, the letting was a furnished one. The facts appear in the judgment of the court.

C. A. Morgan Blake for the landlord.

R. Willis for the tenant.

Cur. adv. vult.

May 10. **ASQUITH, L.J.**, read the following judgment of the court. The landlord claimed that the tenancy was not protected by the Rent Restrictions Acts for two reasons—(i) that the premises were let at a rent which included payments in respect of the use of furniture and that the amount of rent fairly attributable to its use “formed a substantial portion of the whole rent” within s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, modifying s. 12 (2) (i) of the principal Act; and (ii) that the letting was of three rooms (two on the first floor and one on the ground floor back) plus joint user with another tenant or tenants of an essential living room, namely, the kitchen, and that the premises were, in accordance with the principle laid down in *Neale v. Del Soto* (1) and other cases, not “let as a separate dwelling.” The tenant counterclaimed for rent overpaid on the basis that he was and is a statutory tenant, and the judge, having found him such, awarded him £15 18s. 4d. under this head.

The landlord and tenant are both refugee Poles. In December, 1945, the landlord, finding the tenant unemployed and houseless, befriended him and let to him the three rooms in question. The terms of the letting are in dispute, but *de facto* it is clear that for the first week or two the tenant paid no rent, that for the month of February he paid £4 rent, that for subsequent months up to July he paid £6 a month, and that thenceforward he paid £10 a month. It is also clear that from the first the letting included certain furniture, but how much was in dispute. The furniture which figures in this case falls into three classes—items 1 to 7, which the landlord bought from one Heath from whom he also bought the house (I call these the Heath furniture); items 8 to 25 inclusive and item 33, which the tenant bought for the landlord as the landlord’s agent after the tenancy had started and of which the tenant had the use (these may be called the intermediate items); and, lastly, items 26 to 32 inclusive, which consisted of items supplied by the Polish Union (which

may be called the Polish Union furniture). The landlord was treasurer or secretary of the Polish Union, a body whose function it was to make charitable provision for the needs of derelict Poles in this country, and, by the use of his influence as such, as the county court judge has found, he caused the Polish Union to lend these items gratuitously to the tenant. We think the judge was justified in so finding. He goes on to infer (which is more disputable) that no part of the rent paid by the tenant was in respect of these items. The exact nature of the contract of tenancy is not easy to ascertain since the whole transaction was coloured with a charitable element which did not make for precision. It is clear that the landlord intended from the start to provide the tenant with a substantially furnished tenancy (by which we mean such a tenancy as is described in s. 10 (1) of the Act of 1923). It is not clear whether progressive rises in the rent were provided for when first the contract of tenancy was entered into or whether from time to time the *quantum* of rent was revised by agreement to keep pace with the tenant's increased capacity to pay and also with the accession of new increments of furniture placed at his disposal.

We proceed to consider the two grounds on which the landlord relies in claiming that the tenant is unprotected by the Rent Restrictions Acts and that he, the landlord, is entitled to possession, having served on the tenant what the county court judge has held (and, in our view, rightly held) to be a valid notice to quit. The first ground is that this was a "furnished letting." The first point to determine under this head is what furniture was included in the letting. On any view, what I have called the Heath furniture (items 1 to 7) was let from the start. This furniture cost £75, and that may reasonably be taken as its capital value. Let us assume, first, that no more was let at any time. The county court judge has taken the annual value of this furniture at 15 per cent. of its capital value. Fifteen per cent. of £75 is between £11 and £12. The next thing to ascertain is the amount of the contractual rent in order to see whether £11 or £12 represents a "substantial portion of it." The county court judge found that the contractual rent was £6 per calendar month. We do not think there was any evidence to support this finding. It was not the rent, in fact, paid for the first month in which any rent was paid at all, namely, £4. It was not the rent being paid at the time of the hearing. That was £10. It was argued that the county court judge, in finding this figure, was simply accepting and acting on the evidence of the tenant to the effect that the rent originally contracted for was 10s. per week per room, which on three rooms would amount to £6 for 4 weeks, but this would, if accepted, point to a rent of £6 per lunar month and would be no evidence of an agreed rent of £6 per calendar month which the judge has found. Moreover, a rent book kept by the tenant in his own hand has entries showing £4 as the amount actually paid in February, the first month when anything was paid at all, and £6 or larger sums thereafter. Each such entry is opposite the first day of each calendar month. We do not think there was any evidence to support the judge's finding of a £6 monthly rent, and, in our view, the evidence before him left him with no alternative but to find the original tenancy was at £4 per month. That is £48 a year and, without treating any mere arithmetical formula or ratio as decisive, we think £11 or £12 must on any basis be accounted as representing a substantial portion of £48. We are further of opinion that the relevant date on which to compare the part of the rent attributable to the use of furniture with the whole rent is the time when the original contract of tenancy is made. In *Property Holding Co., Ltd. v. Mischeff* (2) in the Court of Appeal, where the rent was raised from £275 to £375 in the last 6 months of the tenancy, that court assumed (and on this point was not questioned by the House of Lords) that the original figure was the material one, though it happened that for the purpose of that case it did not matter which. To take any other date would create serious inconvenience and uncertainty. A house could be removed from the protection of the Acts by an agreed rise in the rent and later reinvested with their protection by an increase in the amount of furniture placed at the tenant's disposal. We are not overlooking the proviso to s. 12 (1) (a) of the Act of 1920 dealing with "progressive" rents in a different connection and providing that the maximum rent shall be standard. If we are wrong in holding that £4 a month was the governing figure so far as rent was concerned in deciding whether the letting was

substantially a furnished letting, and if either £6 or £10 ought to be taken in its place, yet the evidence leaves us in no doubt (a) that a large amount of furniture, additional to the "Heath furniture" was, in fact, bought by the landlord and made available to the tenant at various times after he entered (items 8 to 25 and 33 that have been called "the miscellaneous items") leaving aside altogether the Polish Union furniture, and (b) that this was done in pursuance of a contractual undertaking which from the first was to provide the tenant with a "substantially" furnished letting, and (even allowing for the higher rents assumed) had that effect. We should add that the learned judge applied the arithmetical formulae of 15 per cent and 20 per cent, suggested by the Court of Appeal in *Palser v. Grinling* (2) and *Property Holding Co., Ltd. v. Mischeff* (2), which decisions had not then been reversed on this point or questioned on this point by the House of Lords. Since his decision the House of Lords has disapproved of such formulae, at all events as in themselves decisive. We are, therefore, of opinion that the landlord's first point succeeds.

On his other point, the contention that there was a sharing or joint user of the kitchen *de facto* or *de jure*, and that, consequently, the premises were not "let as a separate dwelling" and were outside the Acts, the learned judge found that no such sharing or joint user had been established. Having regard to the view that we take on the earlier issue, it is unnecessary for us to express any view on this point. The appeal must be allowed with costs. There must be judgment for the landlord both on the claim and on the counterclaim, for the latter proceeds on the assumption, which we have decided to be ill founded, that the Rent Acts apply, the question of arrears of rent and mesne profits to be referred to the learned registrar in the county court for assessment.

Order accordingly.

Solicitors: *H. Davis & Co.* (for the landlord); *Willis & Willis*, agents for *Freeborough & Co.*, West Kensington (for the tenant).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

Distinguished. W. T. LAMB & SONS
v. RIDER. [1948] 2 All E.R. 402.

LOUGHER v. DONOVAN.

[COURT OF APPEAL (Scott and Asquith, L.JJ., and Jenkins, J.), May 3, 4, 11, 1948.]

Limitation of Action—Landlord and tenant—Possession—Warrant obtained 14 years before claim for order to extend time for execution—Limitation Act, 1939 (c. 21), s. 2 (4)—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 5 (4).

The Limitation Act, 1939, s. 2 (4) provides: "An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable . . .", and by s. 31 (1) "action" includes "any proceeding in a court of law."

On Jan. 23, 1929, the landlord obtained an order for possession of a house which was suspended if and so long as the rent was paid. After Jan. 18, 1932, no rent was paid, and at some date before May 17, 1933, a warrant for possession was obtained by the landlord. On May 17, 1933, the time for executing the warrant was extended for six months. In 1937 the tenant died, but his widow remained in occupation continuously until July 4, 1947, when she was substituted as defendant in the action for possession against her husband. In August, 1947, the landlord's executor claimed an order further extending the time for executing the original warrant for possession.

HELD: the claim was barred by s. 2 (4) of the Limitation Act, 1939, which was not overridden by s. 5 (4) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

[FOR THE LIMITATION ACT, 1939, s. 2 (4), see HALSBURY'S STATUTES, Vol. 32, p. 226.]

APPEAL by defendant (a tenant) from an order of His Honour JUDGE THOMAS, made at Pontypool County Court dismissing an appeal from an order of the registrar whereby he gave leave to the plaintiff (the landlord's executor) to extend the time for the execution of a warrant for possession obtained by the landlord 14 years previously. The appeal was allowed. The facts appear in the judgment of the court read by SCOTT, L.J.,

R. G. Micklethwait and Olson for the defendant.

N. MacDermot and T. Stringer for the plaintiff.

Cur. adv. vult.

May 11. **SCOTT, L.J.**, read the following judgment of the court. This is an appeal by the defendant, Margaret Donovan, from an order of His Honour JUDGE THOMAS in the Pontypool county court dismissing an appeal by her from an order of the registrar of Aug. 20, 1947, whereby he gave leave to the plaintiff, as surviving executor of the will of the original owner, to extend by three months the time for execution of a warrant for possession of a house, known as "No. 12, The Woodlands," at Talywain in the county of Monmouth. The house was originally let by the testator, as owner, to the defendant's late husband, John Donovan, at some previous time, not in evidence, but before January, 1929. On Jan. 23, 1929, the court made an order against him and in favour of the landlord for possession, but suspended it if and so long as the rent was paid. On Sept. 15, 1930, the local authority made a closing order, and on Jan. 18, 1932, a demolition order, both under the Housing Act, 1925, but no action was taken under those orders, apparently because the local authority were unable to provide alternative accommodation. No rent was ever paid after January, 1932, when the demolition order was made. At some date, not now in evidence, but before May 17, 1933, a warrant for possession had been obtained from the county court by the landlord, presumably under s. 59 of the County Courts Act, 1888, and certainly under the County Court Rules, Ord. 25, r. 71, and Form 200 (which is printed in *extenso* in the ANNUAL COUNTY COURTS PRACTICE for 1942 at p. 699). On May. 17, 1933, the time for executing it was extended by the court for six months. At some date thereafter, though not now in evidence (but I think agreed as having taken place in 1937) John Donovan died, but his widow remained in occupation continuously, except recently, when for a very short period she was absent, but returned to the house before the present proceedings were started, which was on July 4, 1947. On that date the plaintiff made an application to the registrar of the Pontypool county court to substitute the widow's name as defendant in the old action for possession against her husband pursuant to an affidavit by the plaintiff's solicitor, Mr. F. H. Dauncey, filed on behalf of the plaintiff, and an order was made by him accordingly. No rent had ever been claimed or paid from the date of the demolition order in January, 1932, and the last payment recorded in the rent book was April, 1931. Repeated requests had been made, subsequent to John Donovan's death, to the widow to go out, but she had remained in occupation. Obviously, her possession was adverse from the angle of the Limitation Act, 1939.

The above facts appear in another affidavit of the said F. H. Dauncey which was sworn on July 22, 1947. In his last paragraph that deponent asked for "a further extension of time for enforcing the warrant for possession," namely, the old warrant issued before May, 1933, more than 12 years before. The informality of that claim was waived and a defence was filed on Aug. 11, 1947, pleading the Statute of Limitations (i) to the claim for possession, and (ii) to the proceedings on the order of Jan. 23, 1929. That application for extension of time was clearly an "action" within the definition contained in s. 31 (1) of the Limitation Act, 1939. The widow, so substituted as defendant by the registrar, appealed to the judge, but he affirmed the order of the registrar and the present appeal is from his order. The learned judge was asked by the defendant's solicitor for a copy of his notes, but, improperly, he refused. It is difficult to understand how the learned judge could have been guilty of what in the circumstances amounted to so grave an act of injustice. Fortunately, counsel on both sides have agreed a note of what took place before him and so make it possible for us to decide the important question raised by his order.

The present appeal is solely on the question whether the claim to an order extending the time for executing the 14 years old warrant was not barred by the Limitation Act, 1939. Section 2 (4) of that Act provides: "An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable . . .", and the definition of "action" in s. 31 (1) of the Act reads as follows: "'Action' includes any proceeding in a court of law, including an ecclesiastical court." If the appeal succeeds the plaintiff will be left to take such other steps as he may be advised

for the purpose of meeting the defendant's claim to a possessory title under the Act.

In the argument below and before us reliance has been placed on behalf of the plaintiff on s. 5 (4) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which reads as follows :

Notwithstanding anything in s. 143 of the County Courts Act, 1888, or in s. 1 of the Small Tenements Recovery Act, 1838, every warrant for delivery of possession of, or to enter and give possession of, any dwelling-house to which this Act applies, shall remain in force for three months from the day next after the last day named in the judgment or order for delivery of possession or ejectment, or, in the case of a warrant under the Small Tenements Recovery Act, 1838, from the date of the issue of the warrant, and in either case for such further period or periods, if any, as the court shall from time to time, whether before or after the expiration of such three months, direct.

In our opinion, that sub-section is irrelevant. It cannot be interpreted as over-riding the Limitation Act, and we say no more about it. Another argument for the plaintiff was that a statutory tenant within the Rent Restrictions Acts cannot acquire title by possession. That contention, whether well or ill-founded, will be open to the plaintiff if he starts a new action for possession against the present defendant, but it is not relevant to the issue now before us on the order extending the time for execution of the warrant. Even if it be well-founded, it assumes and depends on the plaintiff having shown the defendant to be a statutory tenant. In our opinion, the learned judge had no evidence before him to justify any such inference. The late husband was a contractual tenant when he died, and there is no evidence that notice to quit was given by the landlord to the President of the Probate Division under s. 9 of the Administration of Estates Act, 1925. I do not think that the Rent Restrictions Acts have any relevance to this appeal. For these reasons, we are clearly of opinion that the order appealed from was wrong and that the extension of time for executing the defunct warrant must be set aside, with costs to the defendant here and below. The costs in the court below will be on the same scale as previously.

Appeal allowed with costs in both courts.

Solicitors : Collyer-Bristow & Co., agents for D. G. West, Newbridge, Mon. (for the defendant) ; Vizard, Oldham, Crowder & Cash, agents for Dauncey & Sons, Newport, Mon. (for the plaintiff).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

DALY v. ELSTREE RURAL DISTRICT COUNCIL.

[COURT OF APPEAL (Scott and Asquith, L.JJ., and Jenkins, J.), May 7, 1948].

Housing—Working classes—“Insanitary” house—“Fit for human habitation” —General standard in district—Hot water system out of order—Other facilities for heating water—Housing Act, 1936 (c. 51), ss. 9 (1), 188 (4).

A local authority, pursuant to s. 9 (1) of the Housing Act, 1936, served a notice on the owner of a house suitable for occupation by persons of the working classes within s. 9 (1) requiring him to execute certain work in connection with the hot water system in the house. On appeal to the county court the judge found, *inter alia*, that the hot water system worked by an Ideal boiler was at all material times out of order, but that the house had running water and a gas cooking stove and that gas and electricity were laid on. He also found that 25 per cent. of comparable houses in the district had no hot water system. On those facts he held that the absence of a domestic hot water system did not constitute the house “unfit for human habitation” within the meaning of s. 9 (1) of the Act, having regard, as required by s. 188 (4) of the Act, to the general standard of accommodation for working classes in the district :—

Held : the judge was not bound by the particular proportion which houses of a certain standard in the district bore to houses of a lower standard to say that the house was not up to the general standard, since s. 188 (4) of the Act did not lay down that exclusive regard must be had to that factor, and, there being no dichotomy between houses which were up to the general standard, on the one hand, and houses which were unfit for

human habitation, on the other, it did not follow that a house was unfit for human habitation because it was below the general standard, and the judge was, therefore, right in his conclusion.

[AS TO REPAIR OF INSANITARY HOUSES OF THE WORKING CLASSES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 550-554, paras. 1162-1166; and FOR CASES, see DIGEST, Vol. 38, pp. 214, 215, Nos. 489-502.]

APPEAL by the local authority from an order of His Honour JUDGE WHITMEE, at Barnet County Court, dated Sept. 25, 1947, whereby he quashed a notice served on the owner of a working class house under s. 9 (1) of the Housing Act, 1936, requiring him to execute certain works in connection with the supply of hot water in the house. The appeal was dismissed. The facts appear in the judgment of SCOTT, L.J.

L. A. Blundell for the local authority.

The owner appeared in person.

SCOTT, L.J.: This is an appeal from a county court judge, who, under s. 15 of the Housing Act, 1936, had jurisdiction, on an appeal, to "make such order either confirming or quashing or varying" a notice from the local sanitary authority requiring the person having control of a working class dwelling to execute the works which were specified in the notice "as he thinks fit," a wide discretionary power on fact and law, in the exercise of which he made an order with regard to an order by the local authority under s. 9 (1) of the same Act, which reads as follows:

Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any house which is occupied, or is of a type suitable for occupation, by persons of the working classes is in any respect unfit for human habitation, they shall . . . serve upon the person having control of the house a notice requiring him, within such reasonable time . . . as may be specified in the notice, to execute the works specified in the notice and stating that, in the opinion of the authority, those works will render the house fit for human habitation.

A notice was served on the owner or person having control of a house within the meaning of the section, No. 61, Whitehouse Avenue, Boreham Wood. Before the learned judge the sanitary inspector of the rural district council said that he had inspected the cottage and found that the hot water system was out of order and needed repair and that the tenant had to heat water on the gas stove which he had for cooking in the kitchen. He then said:

I have examined records of properties in our district up to a rateable value of £25. 995 houses have a hot water system like this. 331 have no domestic hot water system. These are generally older types of property in the district. Nothing to prevent tenant putting geyser in bathroom.

The learned judge made these findings of fact:

(1) The hot water system worked by an Ideal boiler was at all material times out of operation. (2) The cottage, nevertheless, had running water and facilities—a gas cooker—for heating it. (3) The cottage had gas and electricity laid on. (4) The Ideal boiler was used for providing hot water and to some extent, incidentally, heating the kitchen which also had a gas cooker. (5) No complaint was made about the cottage except the broken hot water system. (6) Neither the landlord nor the tenant was contractually liable to the other for repairs. (7) Out of some 1,326 houses in the district with a rateable value of £25 or less, 331 have no hot water system at all.

He held:

(1) That the cottage was of a type suitable for occupation by persons of the working classes within s. 9 of the Housing Act, 1936. (2) That the absence of a working hot water system in this cottage which, nevertheless, had running water and facilities for heating it, did not constitute the cottage in any respect unfit for human habitation within the meaning of s. 9 of the Housing Act, 1936, having regard to the general standard of accommodation for working classes in the district.

The latter phrase comes from s. 188 (4) of the Act which provides:

In determining for the purposes of this Act whether a house is fit for human habitation, regard shall be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls short of the provisions of any byelaws in operation in the district or of any enactment in any local Act in operation in the district dealing with the construction . . . of new streets or of the general standard of housing accommodation for working classes in the district.

Counsel for the local authority has argued that the learned judge must be taken to have misdirected himself in law in coming to those conclusions because this house for the time being was not in accord with the standard of three-quarters of the houses in the district, which would constitute the general standard of accommodation. In my view, the learned judge was not bound by any numerical proportion to say that this house was not up to the general standard. I think myself that, there being an existing means of heating water by gas in the kitchen and potential means by the electricity which was laid on, and the house being in other respects fit for human habitation, the judge was right in coming to the conclusion that it had not fallen short of the standard required by the Act and in allowing the appeal in favour of the owner. The present appeal must, accordingly, be dismissed.

ASQUITH, L.J.: I agree. *Prima facie*, the question whether premises are fit for human habitation is a question of fact, but it is said by counsel for the local authority that s. 188 (4) of the Housing Act, 1936, imports an element of law. So it does, in my view, to the extent to which it provides that "regard shall be had to the extent to which the house falls short of the general standard of housing accommodation for working classes in the district." If it could be shown on the face of the judgment that the learned county court judge paid no regard to that factor, his judgment might be open to attack in the sphere of law, but the section is careful not to say that exclusive regard must be had to the general local standard. It does not say that that factor is to be decisive, and there is nothing to show that the learned county court judge has left it out of account. He has, no doubt, taken other factors into account, such as the fact that there is running water in the house which can be heated on the gas cooker, and that, although it is inconvenient, it is not impossible to get hot water. Indeed, it seems to me that some part of counsel's argument, at any rate, proceeded on the assumption that, if the house were below the general standard, it was, therefore, unfit for human habitation. That appears to me to be a *non sequitur*. There is no dichotomy between houses which are up to the general standard, on the one hand, and houses which are unfit for human habitation, on the other. One can imagine at least three classes of houses. A house may be unfit for human habitation, it may be fit for human habitation though below the general local standard, or it may be equal to or above the local standard. For those reasons, and the reasons given by my Lord, I agree that the appeal should be dismissed.

JENKINS, J.: I agree. Notwithstanding the attempt made by counsel for the local authority to show that the judge proceeded on some wrong principle, it seems to me to be plain that, after taking into consideration all relevant facts that were before him, including the general standard of accommodation for the working classes in the district, he came to the right conclusion, namely, that the mere fact that this house—in other respects adequate—has no domestic hot water system, but did have other means of heating water, could not be said to constitute that house unfit for human habitation within the meaning of the Act.

Appeal dismissed, with costs.

Solicitors: *Turner & Evans* (for the local authority).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

KARA v. KARA AND HOLMAN.

[COURT OF APPEAL (Lord Greene, M.R., Bucknill, L.J., and Hodson, J.),
March 15, 16, 17, 18, 19, 22, 23, 24, April 26, May 12, 1948.]

*Divorce—Cruelty—Evidence—Order of court of summary jurisdiction on similar
issue—Matrimonial Causes Act, 1937 (c. 57), s. 6 (2).*

*Divorce—Costs—Appeal—Wife's costs of husband's appeal—Discretion of court
—Wife's allegation of husband's cruelty—Liability of co-respondent on issue
of cruelty.*

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A husband's petition for divorce on the ground of the wife's adultery was refused, and the wife was granted a decree *nisi* on the ground of the husband's cruelty. The husband appealed, and the Court of Appeal, having reviewed the evidence, held that the wife had committed adultery. Before the divorce proceedings a court of summary jurisdiction had given a decision in favour of the wife on an issue of cruelty which was substantially the same as that raised in the divorce proceedings. The Matrimonial Causes Act, 1937, s. 6 (2) provides that, on a petition for divorce, the court may treat an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1925, "as sufficient proof of the adultery, desertion or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner."

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Held: (i) a finding of a court of summary jurisdiction against one of the parties to a divorce suit, who was accused of a matrimonial offence, might be admitted as evidence that he or she had committed the offence charged, but the court hearing the divorce suit was not absolved from examining the evidence given at the trial on the issues there raised; the "evidence of the petitioner" referred to in s. 6 (2) of the Act of 1937 was intended to relate to evidence directed to the main issue in the case and was not confined to such matters as absolute and discretionary bars; and, on the facts, the charge of cruelty was not proved, notwithstanding the decision of the court of summary jurisdiction, and the husband was entitled to a decree *nisi*.

(ii) since the facts showed that his association and eventual adultery with the wife were bound up with the matrimonial disputes from which the allegations of cruelty arose, the co-respondent must pay to the husband the costs of the whole proceedings, including the costs of the issue of cruelty.

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(iii) the proposition that a wife who had obtained a decree was entitled to defend herself on appeal and that the husband should pay the costs of the appeal even if he succeeded was too wide and would operate as a fetter on the exercise of the discretion of the court. Although it was necessary, in the exercise of the discretion in regard to the costs of an unsuccessful wife *vis-a-vis* her husband, to consider her means and her right to defend her position in the Court of Appeal, the court should also consider other points, *e.g.*, (a) the desirability of enabling the wife to litigate a reasonable case; (b) the importance of a point of law, raised and decided; (c) the fact that the wife had manifestly committed perjury; (d) the discouragement of speculative actions; and (e) the misconduct of the wife, or her advisers, in respect of the litigation.

[As to COSTS IN DIVORCE PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 758-767, paras. 1197-1209, and pp. 780, 781, para. 1234; and FOR CASES, see DIGEST, Vol. 27, pp. 463-470, Nos. 4826-4937, and pp. 473, 474, Nos. 4976-4987.]

Cases referred to:

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(1) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest 321, 2995.
(2) *Darnborough v. Darnborough and Smith*, (1926), 96 L.J.P. 24; 136 L.T. 384; Digest Supp.
(3) *Otway v. Otway*, *Otway v. Otway and Hoffer*, (1888), 13 P.D. 141; 57 L.J.P. 81; 59 L.T. 153; 27 Digest 368, 3539.
(4) *Earnshaw v. Earnshaw*, [1896] P. 160; 65 L.J.P. 89; 74 L.T. 560; 60 J.P. 377; 27 Digest 557, 6124.
(5) *Medway v. Medway*, [1900] P. 141; 69 L.J.P. 56; 82 L.T. 627; 64 J.P. 120; 27 Digest 556, 6104.

APPEAL by the husband from a decision of Mr. COMMISSIONER TYNDALE, K.C., dated June 24, 1947, refusing the husband's petition for a divorce on the ground of the wife's adultery and granting a decree *nisi* to the wife on the ground of the husband's cruelty. The Court of Appeal now allowed the appeal.

The report deals only with the decision of the court (i) on the effect of a previous finding of a court of summary jurisdiction in favour of the wife on an issue of cruelty which was substantially the same as that raised in the divorce proceedings, and (ii) the costs of the proceedings.

Colin Duncan and James Campbell for the husband.
Gorst for the wife.

Cur. adv. vult.

Apr. 26. LORD GREENE M.R., read the following judgment of the court. The husband is seeking a decree of divorce from the wife on the ground of her alleged adultery with the co-respondent during the husband's absence on military service. The wife successfully resisted the claim before Mr. COMMISSIONER TYNDALE, K.C., and obtained from him a decree *nisi* of divorce on the ground of cruelty by the husband alleged to have taken place both before and after his departure on military service. The husband appeals against the dismissal of his suit and against the decree *nisi* obtained by the wife.

It is obvious that, if the learned commissioner erred in believing the evidence of the wife and the co-respondent on the issue of adultery, this, in itself, will provide serious reasons for doubting the truthfulness of their evidence on the issue of cruelty. [His LORDSHIP, after reviewing the evidence, held that the wife had committed adultery with the co-respondent, and continued:—] There remains to be considered the finding of the stipendiary magistrate in favour of the wife on the issue of cruelty, which was substantially the same as that raised in the divorce proceedings. In divorce cases, for special reasons, as explained by FLETCHER MOULTON, L.J. ([1909] P. 123, 142) in *Harriman v. Harriman* (1) no estoppel is created. There may, however, be something less than an estoppel, *i.e.*, the findings may be treated as of strong probative value. The Matrimonial Causes Act, 1937, s. 6, must be considered in this connection. The wife having obtained an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, on the ground of cruelty, the court may treat the order as sufficient evidence of cruelty, under s. 6 (2). The same sub-section provides: " . . . the court shall not pronounce a decree . . . without receiving evidence from the petitioner." In our opinion, the evidence of the petitioner referred to in this sub-section is intended to relate to evidence directed to the main issue in the case, and is not confined to such matters as absolute and discretionary bars to a decree of divorce. There is nothing in the wording of the sub-section to constrain the court to limit the meaning of the word "evidence" within such narrow bounds, and the evidence of the parties at the trial was, in our opinion, rightly directed to the charges which had already been the subject-matter of proceedings in the magistrate's court. A finding of a court of summary jurisdiction against one of the parties to a divorce suit who is accused of a matrimonial offence may be admitted as evidence that he or she has committed the offence charged, but, in our opinion, this does not absolve the court from examining the evidence given at the trial on the issues there raised. In the result, notwithstanding the decision of the stipendiary magistrate, the charge of cruelty is not proved to our satisfaction, and the findings of the learned commissioner on this issue must also be reversed.

[After hearing argument by counsel in regard to costs, their LORDSHIPS indicated the order to be made and intimated that they would put their reasons into writing.]

Cur. adv. vult.

May 12. HODSON, J., read the following judgment of the court. In this case the order of the court has already been made directing the co-respondent to pay to the husband the costs of the proceedings, here and below, including the costs attributable to the allegation of cruelty made by the wife against

the husband. It was further ordered that the husband should pay to the wife her costs in this court, not limited to the security ordered, and that the husband should be at liberty to recover those costs from the co-respondent. It was further ordered, that the order for costs against the husband in the court below be set aside. No order for costs was made, or sought, against the wife.

It is desirable that some explanation should be given showing the reasons why this order was made in the exercise of the discretion of the court and to indicate certain considerations which may be of assistance generally in the exercise of discretion as to costs in matrimonial appeals. The suit was instituted by the husband for divorce on the ground of the alleged adultery of the wife. Both the wife and the co-respondent denied adultery by their answers, and, in addition, the wife made allegations of cruelty and claimed a divorce on that ground. The case came to trial without the wife having obtained or asked for security for her costs. The husband failed on both issues and on the prayer of the petition being rejected and a decree being pronounced in favour of the wife, the husband was condemned in the costs of the wife and of the co-respondent. On appeal, the findings of the court below were reversed. We condemned the co-respondent in the costs of the allegations of cruelty on the ground that the history of the case showed that his association and eventual adultery with the wife were bound up with the matrimonial disputes from which the allegations of cruelty arose. In particular, he was closely concerned with the final act of cruelty relied on and was a discredited witness called to support the wife in respect of this final act. In this connection the court was referred to a decision of HILL, J., in *Darnborough v. Darnborough and Smith* (2), in which considerations of this kind actuated the learned judge to make a like order.

The wife, though successful in the court below, was found on appeal to have succeeded wrongfully, and, since she had not applied in that court for security and, accordingly, must be taken to have been in a position to litigate independently of her husband's resources, it was considered proper that the order for costs in her favour should be set aside as well as that which had been made in favour of the co-respondent. The position of a wife who obtains a decree and seeks to uphold her order in opposition to the husband's appeal has been considered in this court in *Otway v. Otway* (3), and there are statements in textbooks, e.g., RAYDEN ON DIVORCE, 4th ed., p. 391, based on the decision in this case, to the effect that such a wife is entitled to defend herself and the husband must pay the costs of the appeal even if he succeeds. Similar language also appears in cases which have been heard before the Divisional Court on appeal from courts of summary jurisdiction, e.g., *Earnshaw v. Earnshaw* (4) and *Medway v. Medway* (5). In our view, the proposition so stated is too wide and would appear to operate as a fetter on the exercise of the discretion which ought to be struck off. It remains true that the proposition enunciates an important consideration which commonly arises in matrimonial appeals. The position of the wife in matrimonial litigation has developed from the days when, broadly speaking, she could hold no property independently of her husband, and the decision in *Otway v. Otway* (3), decided in 1888, recognises the possible effect of the Married Women's Property Act, 1882, on her position. The wife in that case had been married before the passing of the Act so that the effect of the Act did not arise. The position at the present time is that, although some wives have independent means, a very large proportion are dependent on their husbands wholly or in part. The Act of 1882, therefore, does not affect the position of many litigant wives and it is necessary in the exercise of the discretion as to the costs of an unsuccessful wife, *vis-a-vis* her husband, to consider her means.

In the present case, the wife obtained a limited order for security for costs of the appeal on the footing that she was without means to uphold the judgment in her favour and on the strength of an under-estimate of the length of the hearing. The wife having obtained such an order for security on this basis and the hearing having lasted for longer than was anticipated, this court has thought it fit in the circumstances of this particular case to order the husband to pay her the whole costs of the appeal, with a remedy over against the co-respondent. That the wife should be able to defend her position

in the Court of Appeal and the amount of her means are not the only considerations which, in our view, should affect the mind of the court in the exercise of its discretion. There are other considerations which might properly be taken into account, such as : (i) the desirability of enabling a wife to litigate a reasonable case ; (ii) the importance of a point of law, raised and decided ; (iii) the fact that the wife has manifestly committed perjury ; (iv) the discouragement of speculative actions ; (v) the misconduct of the wife, or her advisers, in respect of the litigation. Finally, we would emphasise that, in making the above suggestions, we have no intention of limiting the discretion of the court as defined by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50.

Appeal allowed. Co-respondent to pay the husband's costs of the proceedings, here and below. The husband to pay the wife's costs on the appeal, and the order for costs against the husband in the court below to be set aside.

Solicitors : *Franks, Charlesly & Co.* (for the husband) ; *J. C. Clifford Watts* (for the wife).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

RACKETT v. ASTON & CO., LTD. AND ANOTHER.

[COURT OF APPEAL (Scott and Asquith, L.JJ., and Jenkins, J.), May 10, 1948.]

Lease—New lease—Claim by tenant—Notice of willingness to grant—Notice served only by superior landlord more than two months after tenant's claim—Landlord and Tenant Act, 1927 (c. 36), ss. 4 (1) proviso (b), 5 (1), 8 (1).

Proviso (b) to s. 4 (1) of the Landlord and Tenant Act, 1927, provides that a tenant shall not be entitled to compensation under that section in respect of goodwill "if within two months after the making of the claim the landlord serves on the tenant notice that he is willing and able to grant to the tenant, or obtain the grant to him of a renewal of, the tenancy of the premises at which the trade or business is carried on at such rent and for such term not exceeding 14 years as, failing agreement, the tribunal may consider reasonable ; and if the tenant does not within one month from the service of the notice send to the landlord an acceptance in writing of the offer the tenant shall be deemed to have declined the offer . . ."

The tenant's lease was due to expire on May 8, 1949, and that of his mesne landlord on May 9, 1949. On May 10, 1946, the tenant served on the mesne landlord a notice under s. 5 (1) of the Act, claiming a new lease or, in the alternative, compensation for loss of goodwill. On May 23, 1946, the mesne landlord forwarded the notice to the head landlord, who, on July 18, 1946, sent a notice to the tenant, which purported to be pursuant to s. 4 (1), proviso (b), that, in lieu of compensation, he, the head landlord, was willing and able to grant a new tenancy direct. The offer was not accepted within one month of receipt of the notice.

HELD : proviso (b) to s. 4 (1) contemplated an offer of willingness to grant a new lease from the tenant's immediate landlord within the time limit therein prescribed, and no such offer had been made in this case ; the offer of the superior landlord (which, in any event, was out of time), and its rejection, were a nullity, and could not disentitle the tenant to compensation under s. 4 of the Act ; and there was nothing to disqualify the tenant from claiming a new lease under s. 5 of the Act.

[AS TO TENANT'S RIGHT TO A NEW LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 297-301, paras. 340-345 ; and FOR CASES, see DIGEST Supp.]

APPEAL by the tenant from an order of His Honour DEPUTY JUDGE KONSTAM, made at Worthing County Court, and dated Oct. 14, 1947, dismissing an application for a new lease under s. 5 of the Landlord and Tenant Act, 1927. The facts appear in the judgment of SCOTT, L.J. The appeal was allowed and the case remitted to the county court.

L. A. Blundell and Curtis-Raleigh for the tenant.

Anthony Harmsworth for the landlords.

SCOTT, L.J.: The notice of appeal in this case is in these terms :

This court will be moved . . . that the judgment of His Honour DEPUTY JUDGE KONSTAM made herein on Oct. 14, 1947, wherein he gave judgment for the [landlords] dismissing the [tenant's] application for a new lease under s. 5 of the Landlord and Tenant Act, 1927, may be reversed. The following are the grounds of appeal. (1) That the learned judge was wrong in law in holding that the serving of a notice dated July 18, 1946, on the [tenant] by the . . . superior landlord, whereby a new tenancy was offered to the [tenant] on terms therein stated, disentitled the [tenant] from claiming a new lease under s. 5 of the Landlord and Tenant Act, 1927. (2) That the learned judge wrongly gave effect under s. 4, proviso (b), of the said Act to a notice not served within the limit of time mentioned in the said proviso to the said section.

In substance the appeal will be disposed of on ground 2.

The application in respect of which judgment was given against the tenant was an application under s. 5 of the Landlord and Tenant Act, 1927, for a new lease which he was claiming under the terms of that section on the ground that there was what the courts now know as an adherent goodwill in respect of which he was entitled to compensation under s. 4 of the Act. Section 5, which confers a conditional right to a new lease, provides by sub-s. (1) :

Where the tenant alleges that, though he would be entitled to compensation under [s. 4], the sum which would be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him.

The tenant's immediate landlords were Aston & Co., Ltd., who had a lease from the head landlord, Mr. Cornelius, who was the freeholder. The time within which that sub-section requires the claim for a new lease to be made is the same as the time for making a claim for compensation under s. 4, which in so far as relevant, runs as follows :

(1) The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner . . . (ii) . . . not more than 36 nor less than 12 months before the termination of the tenancy; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached . . . Provided that . . . (b) the tenant shall not be entitled to compensation in respect of such goodwill if within two months after the making of the claim the landlord serves on the tenant notice that he is willing and able to grant to the tenant, or obtain the grant to him of a renewal of, the tenancy of the premises at which the trade or business is carried on at such rent and for such term not exceeding 14 years as, failing agreement, the tribunal may consider reasonable; and if the tenant does not within one month from the service of the notice send to the landlord an acceptance in writing of the offer the tenant shall be deemed to have declined the offer . . .

There is a further provision in s. 25 of the Act, defining the word "landlord" as having its ordinary meaning of a person who, under a lease, is, as between himself and the tenant, for the time being entitled to the rents and profits. In addition, there is in s. 8 (1) provision for the common position, such as existed in this case, of a series of relationships of landlord and tenant from the freeholder down to the last sub-tenant :

Where, in the case of any holding, there are several persons standing in the relation to each other of lessor and lessee, the following provisions shall apply:—Any mesne landlord who . . . is liable to pay compensation . . . shall, at the end of his term, be entitled to compensation from his immediate landlord in like manner and on the same conditions as if he had himself made the improvement or created the goodwill in question, except that it shall be sufficient if the claim for compensation is made at least two months before the expiration of his term: A mesne landlord shall not be entitled to make a claim under this section unless he has, within the time and in the manner prescribed, served on his immediate superior landlord copies of all documents relating to proposed improvements and claims which have been sent to him in pursuance of this Part of this Act: Where such copies are so served, the said superior landlord shall have, in addition to the mesne landlord, the powers conferred by or in pursuance of this Part of this Act in like manner as if he were the immediate landlord of the occupying tenant, and shall, in the manner and to the extent prescribed, be at liberty to appear before the tribunal and shall be bound by the proceedings . . .

A The lease of Aston & Co., Ltd., the mesne landlords, was due to expire on May 9, 1949, the lease of the tenant, party to this appeal, was due to expire on May 8, 1949, and Mr. Cornelius, the freeholder, was the reversioner of the lease of Aston & Co., Ltd. On May 10, 1946, a notice was served by the tenant on his immediate landlord, giving notice of a claim, following the terms of s. 5 (1), for a new lease, or, in the alternative, for £1,000 as compensation for loss of goodwill. That would satisfy the requirements of s. 5 (1) that the tenant, to be entitled to a new lease, must allege a right to compensation under s. 4. On May 23 Messrs. Bowles & Stevens, solicitors for Aston & Co., Ltd., wrote this letter to Mr. Cornelius, the freeholder.

We send you herewith notice in duplicate under the Landlord and Tenant Act. Kindly acknowledge receipt on the duplicate copy sent herewith.

B On July 18 the solicitors for Mr. Cornelius sent a notice, which purported to be pursuant to the Act, to the tenant or his solicitors :

C In reply to your notice of claim for compensation for goodwill dated May 10, 1946, and addressed to Aston & Co., Ltd., your immediate landlords, and forwarded to Mr. C. E. Cornelius of Findon Road, Worthing, Sussex, under notice bearing date May 20, 1946, by Messrs. Bowles & Stevens, as solicitors for and on behalf of Aston & Co., Ltd., I hereby give you notice, as solicitor for and on behalf of Mr. C. E. Cornelius, that in lieu of such compensation he is willing and able to grant you a tenancy direct from him of the premises known as No. 28a Findon Road, Worthing, aforesaid, at which the trade or business in respect of which your claim for goodwill is carried on at the rent of £120 per annum for the term of seven years or at such rent and for such term not exceeding 14 years as failing agreement between us the tribunal may consider reasonable.

D In my view, that counter-notice was not a notice given within the time required by s. 4 (1), proviso (b). The learned judge held that it was, but I think it was too late. The scheme of the Act is clearly to deal with each relationship of landlord and tenant between that tenant and his landlord, and for that reason, in my opinion, the notice of willingness to grant a new lease which gives the landlord the right to free himself from the obligation to pay compensation must be a notice from the tenant's immediate landlord to him, and it is that notice which must be within the limited period of two months imposed by proviso (b). Whether a superior landlord might give a notice on behalf of himself and also on behalf of the mesne landlord is a question which it is not necessary to decide, because the right of the landlord to escape his obligation to pay compensation is a right given to the landlord who is primarily liable to the tenant for compensation, *i.e.*, the immediate landlord whose lease the tenant holds, and nobody else, and, if the tenant who is claiming compensation does not get a notice within two months, proviso (b) has no application at all.

F If that be the case, the argument addressed to the court by counsel for the landlords—that the tenant lost his right to compensation, and, therefore, his right to a new lease under s. 5 (1)—falls to the ground. The first premise of that argument was that a right to a new lease is made, by s. 5 (1), absolutely conditional on a title to compensation under s. 4. He says, therefore, if s. 4 (1), by proviso (b), removes the right to compensation, it has gone for the purpose also of s. 5. That is a perfectly just argument, but the point which was taken by the learned judge was a false point, for he assumed that the notice of the offer of a lease by the superior landlord was an offer by the landlord referred to in s. 4 (1), proviso (b). I only add that s. 8 seems to me definitely to bear out that interpretation of s. 4. That section shows that in each case of a tier of landlords the Act is aimed primarily at the relationship of tenant and landlord between each couple and at nothing else. That is the interpretation I put on s. 4 (1) (b). The counter-offer here was out of time, and the proceedings will have to continue, therefore, on the claim for a new lease made on May 10, 1946. That condition precedent to the right having failed, the whole question must be gone into as if no such offer had ever been made. The appeal will be allowed, with costs here and below.

H ASQUITH, L.J.: I agree. To claim a new lease under s. 5 the tenant has to show, *inter alia*, that he would be entitled to compensation under s. 4. It is said that in this case he would not be entitled to compensation under s. 4 because the provisions of s. 4 (1), proviso (b), apply and disentitle him to such

compensation. It is said, in other words, that there was an offer of a new lease and a rejection thereof, complying with the requirements of s. 4 (1), proviso (b). I agree with my Lord that there was no such offer complying with the time limits laid down in the proviso. The date of the making of the claim for the purposes of s. 4 (1), proviso (b), was May 10, 1946, and not later—the date when the tenant made his claim against his immediate landlord. The offer of the superior landlord was made more than two months after and so, was out of time, and it and its rejection are, accordingly, a nullity. Being a nullity, the offer and its rejection cannot disentitle the tenant to compensation under s. 4. There is nothing in this transaction to disqualify him from claiming a new lease under s. 5. I agree that the appeal should be allowed.

JENKINS, J. : I also agree. Reading proviso (b) to sub-s. (1) of s. 4 of the Act in the light of the definition of “landlord” contained in s. 25 of the Act, but disregarding for the moment the provisions of s. 8, it is plain that the landlord for the purposes of proviso (b) is the immediate landlord, and he is given a period of two months after the making of the claim to serve notice offering a new lease. Thus, in this case the person to give the notice would be the immediate landlords, *i.e.*, Aston & Co., Ltd., and they would have two months to serve that notice from May 10, 1946, when the occupying tenant made the claim for compensation. The meaning of the word “landlord” may be extended by virtue of the provisions of s. 8 so as to include a superior landlord, *i.e.*, in the present case, Mr. Cornelius. Section 8 provides that where copies of claims and documents, etc., are served by the intermediate landlord on a superior landlord “the said superior landlord shall have, in addition to the mesne landlord, the powers conferred by or in pursuance of this Part of this Act in like manner as if he were the immediate landlord.” That, as my Lord has observed, may have the effect of entitling the superior landlord to serve a notice on behalf of himself and the intermediate landlord, but I can find nothing in that part of the language of s. 8 to extend the time within which the superior landlord is allowed to serve that notice. The time seems to me to be fixed once and for all by proviso (b), which provides a period of two months from the making of the claim. There is nothing in s. 8, so far as I can see, which would warrant the court in inferring a new period of time, running from the date when the superior landlord received the copies of the particular notice. For these reasons, in addition to those given by my Lord, I agree that the appeal should be allowed.

Appeal allowed with costs. Case remitted to County Court.

Solicitors: *Petch & Co.*, agents for *Bowles & Stevens*, Worthing (for the tenant); *Carter & Barber*, agents for *V. H. O. Jackson*, Littlehampton (for the landlords). [Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re LUCAS (deceased), SHEARD v. MELLOR.

[COURT OF APPEAL (Lord Greene, M.R., Somervell, L.J., and Jenkins, J.), April 29, 30, May 14, 1948.]

Charitable Bequest—Gift to institution—Institution closed in lifetime of testatrix—Funds of charity applied cy pres—Whether gift to endowment or towards maintenance of particular premises.

By her will, dated Oct. 12, 1942, the testatrix, who died on Dec. 19, 1943, bequeathed a legacy to “the Crippled Children’s Home Lindley Moor Huddersfield,” and a share of her residuary estate to “the Crippled Children’s Home” without repeating the address, but clearly intending to refer to the same object. The home which had existed at that address and had been called “The Huddersfield Home for Crippled Children,” had been closed on the expiration of the lease on Apr. 6, 1939, but on Oct. 17, 1941, as funds still remained, a scheme, maintaining the primary purpose of the charity, was sealed by the Charity Commissioners, under the title of “The Huddersfield Charity for Crippled Children.” The testatrix was unaware at the time of making her will that the home had been closed and that a scheme was in operation.

HELD : on their true construction, the bequests were by way of addition to the endowment of the charity and not merely for the upkeep of the particular premises of the home, and were effective gifts to the Huddersfield

Charity for Crippled Children.

Decision of ROXBURGH, J. ([1947] 2 All E.R. 773), reversed.

[AS TO GIFTS TO INSTITUTIONS WHICH CEASE TO EXIST, see HALSBURY, Hailsham Edn., Vol. 4, p. 180, para. 243; and FOR CASES, see DIGEST, Vol. 8, pp. 310-312, Nos. 911-927.]

Cases referred to:

(1) *Re Faraker, Faraker v. Durell*, [1912] 2 Ch. 488; 81 L.J.Ch. 635; 107 L.T. 36; 56 Sol. Jo. 688; 8 Digest 311, 921.

(2) *Re Rymer, Rymer v. Stanfield*, [1895] 1 Ch. 19; 64 L.J.Ch. 86; 71 L.T. 590; 43 W.R. 87; 39 Sol. Jo. 26; 12 R. 22, C.A.; 8 Digest 312, 926.

APPEAL by the Attorney-General from an order of ROXBURGH, J., dated Nov. 21, 1947 ([1947] 2 All E.R. 773), who held that gifts under the testatrix's will were for the upkeep of a particular institution and lapsed when that institution ceased to exist in the testatrix's lifetime. The Court of Appeal reversed that decision, holding that the gifts were additions to the endowment of the charity which continued to subsist under a *cy pres* scheme. The facts appear in the judgment of the court.

Danckwerts for H.M. Attorney-General.

Wilfrid Hunt for the trustees under the will.

C. A. J. Bonner for a trustee of the Huddersfield Charity for Crippled Children.

Jennings, K.C., and *B. S. Tatham* for the Huddersfield & District Victoria

Nurses Association (a residuary devisee).

Newsom for the next of kin.

Cur. adv. vult.

May 14. LORD GREENE, M.R., read the following judgment of the court. In this case the testatrix, Elizabeth Lucas, who died on Dec. 19, 1943, by her will dated Oct. 12, 1942, made a number of charitable bequests including a legacy of the sum of £500 to "the Crippled Children's Home Lindley Moor Huddersfield" and a gift of three equal twenty-second parts of her net residuary estate to "the Crippled Children's Home," without repeating the address, but clearly intending to refer to the same object.

The facts relevant to the destination of these gifts to "the Crippled Children's Home Lindley Moor Huddersfield" are as follows. By a trust deed dated Mar. 29, 1915, the executors of the will of a testator named John Sykes, pursuant to arrangements initiated by him in his lifetime and directions for the completion of those arrangements contained in his will, established a charity called "The Huddersfield Home for Crippled Children." This deed contained assignments by the executors to the trustees therein named of (i) a leasehold site at Lindley Moor, Huddersfield, held for a term of 25 years from Apr. 6, 1914, on which buildings designed for use as a home had been or were in the course of being erected and equipped, and (ii) a terminable annuity of £120 per annum payable half yearly from Apr. 6, 1915, down to Oct. 6, 1938. Part I of the deed contained a number of definitions of which it is only necessary to mention "the institution," defined as meaning "the home which is now in course of erection as aforesaid together with the buildings annexed or appurtenant thereto," but, as clearly appears from other provisions of the deed, also used to denote the charitable undertaking to be carried on thereunder as opposed to the mere premises, and "the endowment," defined as meaning the terminable annuity mentioned. Part II of the deed (headed "Name and Objects") was (so far as material) in the following terms:

2. The institution shall be called "The Huddersfield Home for Crippled Children."
3. The objects of the institution are to provide a holiday home for poor crippled children living within the district and to supply gratuitous medical and surgical advice and aid and maintenance and education to such crippled children as shall for the time being be resident in the institution; and also (during such times as the institution shall not be used as such holiday home) to provide a home to which convalescent or other patients of the infirmary [*i.e.*, the Huddersfield Royal Infirmary] may be sent for rest or treatment . . . 4. In furtherance of the objects of the institution the income of the institution may also be expended to such amount as the committee [*i.e.*, the committee of management appointed under the deed] may sanction from time to time in subscriptions to convalescent homes and other similar institutions and in sending patients to and maintaining them at such institutions.

Part III of the deed, which contained the assignments to the trustees of the leasehold property and endowment, conferred on the trustees (by cl. 9) a discretionary power of sale of any of the trust property or effects and provided

that the proceeds of any such sale should be applied and dealt with in such manner in every respect as the trustees should think fit consistently with the trusts and provisions of the deed, and provided (by cl. 10) that, if at any time thereafter the trust property or effects or the endowment should not be required for the purposes provided in the deed, the same should be transferred to or used for the benefit of the infirmary. The only other provisions of the deed to which it is necessary to refer are those contained in Part VIII. These (so far as material) were to the effect (cl. 39) that, the primary object of the institution being to provide a holiday home for poor crippled children residing in the district, the institution should be used solely for that purpose from May 15 to Sept. 15 each year; (cl. 40) that during this yearly period the control and management of the institution should be delegated to the committee of the Cripples Huddersfield Mission Guild; and (cl. 41) that, subject to the payment of certain expenses and outgoings, the income resulting from the endowment (together with any subscriptions or donations which might be specifically given to the Cripples Guild or for the benefit of crippled children) should be paid to and applied by the committee of the Cripples Guild primarily for the purposes of the institution as such holiday home, and any surplus income of the endowment not so applied should be accounted for by the committee of the Cripples Guild to the committee of the institution and (together with any subscriptions, donations or other income which might be available for the other purposes of the institution) should be applied for the other purposes of the institution as set forth in the deed.

The lease of the premises at Lindley Moor, Huddersfield, expired on Apr. 6, 1939. The premises were, accordingly, vacated, the home formerly carried on there was closed, and no other premises for use as a home were acquired. The last payment of the terminable annuity had been received on Oct. 6 in the previous year, but the trustees still held on the trusts of the deed funds in the form of cash in hand or bequests receivable amounting to some £1,700. In these circumstances the trustees applied to the Charity Commissioners for a scheme under the Charitable Trusts Acts, 1853 to 1939, and on Oct. 17, 1941, the Charity Commissioners duly sealed a scheme entitled:

In the matter of the charity consisting of the endowments of the Huddersfield Home for Crippled Children formerly carried on at Lindley Moor in the county borough of Huddersfield . . .

The scheme (so far as material) provided:

1. *Administration of charity.* The above-mentioned charity and the endowments thereof specified in the schedule hereto and all other the endowments of the charity shall be administered and managed, subject to and in conformity with the provisions of this scheme under the title of the Huddersfield Charity for Crippled Children by a body of trustees consisting of the members for the time being of the finance committee of the institution called "The Huddersfield Royal Infirmary in the county borough of Huddersfield . . ." 4. *Application of income . . .* the yearly income of the charity shall be applied by the trustees in or towards sending poor crippled children to holiday or convalescent homes.

The position both at the date of the testatrix's will and at the date of her death, therefore, was that there were no longer any premises in use as a home for crippled children at Lindley Moor, and that the charity which formerly had for its primary (though not its sole) object the maintenance and operation of such a home (but not necessarily at that address) for the benefit of poor crippled children living within the Huddersfield district had been converted by the scheme into a charity differently named and constituted and having for its object the sending of poor crippled children to holiday or convalescent homes provided by other organisations, the class of crippled children eligible as beneficiaries being no longer expressly confined to those living within the Huddersfield district, though a similar limitation might, perhaps, be implied from the retention of "Huddersfield" as part of the name, or might, at all events, result, in practice, from the fact that the trustees were to be the members for the time being of the finance committee of the Huddersfield Royal Infirmary. It may, however, fairly be said that the essential primary purpose of the charity, namely, the provision of holidays under suitable care and in suitable surroundings for poor crippled children, was preserved by the scheme although the means originally prescribed of carrying out that purpose were altered to suit the altered

circumstances. In these circumstances the question arose whether the gifts made by the testatrix to "the Crippled Children's Home Lindley Moor Huddersfield" took effect as gifts to the Huddersfield Charity for Crippled Children (that is to say, to the charity established by the trust deed of Mar. 29, 1915, in the reconstituted form in which it was continued under the scheme), or whether they lapsed as gifts made for a particular charitable purpose which had wholly failed with the closing of the home at Lindley Moor, with the result that the legacy so given fell into residue and the share of residue so given was undisposed of by the will and passed as on intestacy.

It is settled by authority binding on this court that so long as there are funds held in trust for the purposes of a charity the charity continues in existence and is not destroyed by any alteration in its constitution or objects made in accordance with law, as, for example, by a scheme under the Charitable Trusts Acts: see *Re Faraker* (1). There is no doubt that the facts stated regarding the charity established by the trust deed of Mar. 29, 1915, in the present case are such as to bring it well within this principle. Accordingly, if the gifts made by the testatrix were on their true construction gifts to the charity, that is to say, gifts simply in augmentation of the funds held by the trustees of the trust deed of Mar. 29, 1915, for the objects of the Huddersfield Home for Crippled Children as defined by the deed, they took effect as gifts to that same charity in the re-constituted form in which it was continued under the scheme, *i.e.*, as gifts in augmentation of the funds held by the trustees appointed by the scheme for the modified objects thereby prescribed. On the other hand, it is equally well settled that (in the absence of general charitable intention which is not in question here) a gift for a particular charitable purpose which has wholly failed is subject to the ordinary doctrine of lapse: see *Re Rymer* (2). Accordingly, if the testatrix's gifts were, on their true construction, gifts for the upkeep of the premises at Lindley Moor as a home for crippled children and for no other purpose, they lapsed with the consequences indicated above, as gifts for a particular charitable purpose which had wholly failed in the lifetime of the testatrix, and, indeed, before the date of the will, with the expiry of the lease and consequent closing of the home. The learned judge was, therefore, perfectly right in holding, as he did, that the case turns on this short question of construction. His conclusion on it was to the effect that the gifts, on their true construction, were gifts for the upkeep of the particular home and not gifts by way of addition to the endowment of the charity, and, accordingly, that they lapsed on the second of the two principles stated above. He based this conclusion mainly on two grounds—(i) the inclusion of the address "Lindley Moor Huddersfield" as indicating a localisation "more appropriate to a particular institution than to its endowment," and (ii) on the use of the description "The Crippled Children's Home" as being a mis-description if applied to the charity, and as pointing, in conjunction with the accurate address, to a reference to the particular establishment located at that address rather than to the charity. He seems also to have founded himself to some extent on the absence of evidence that the testatrix knew anything about the constitution or objects of the charity as distinct from the existence of a particular home for crippled children at the particular address, the point of this being that, if she knew nothing of the charity, but did know of the existence of the particular home and assumed it to be still in use as such, she could only have intended to benefit the particular home and nothing else.

We find ourselves unable to accept the learned judge's view. It seems to us that the inclusion of the address was just as necessary or desirable and just as appropriate for the purpose of identifying the charity as for the purpose of identifying the particular home carried on at the address, more especially if the testatrix was in doubt as to the correct name. A reference to "The Crippled Children's Home" without any address would obviously have been insufficient on either view. As to the misdescription (*i.e.*, "the Crippled Children's Home" for "the Huddersfield Home for Crippled Children") the description given by the testatrix was no more an accurate description of the particular home than it was of the charity. If the testatrix did not know or had forgotten the correct name of the charity, the misdescription can obviously throw no light on her intention. If she did know the correct name of the charity (*i.e.*, "the Huddersfield Home for Crippled Children") and had intended to use some other ex-

pression to show that her bounty was to be limited to the upkeep of the particular home, it is, we think, inconceivable that she should have used an expression so ambiguous in this vital respect as "The Crippled Children's Home," without the addition of some specific reference to its upkeep or maintenance. To infer that the testatrix intended to confine her bounty to the upkeep of the home from the absence of evidence that she knew anything about the constitution or objects of the charity seems to us to involve the construction of the will by reference to what is really a mere guess at the testatrix's state of mind. The mere fact that the testatrix, when she made her will, was under the impression that the particular home was still being carried on in the premises at Lindley Moor (and this is, we think, a legitimate inference from the terms of the gift) is clearly no indication that she intended to benefit only and exclusively the particular home as distinct from the charity carrying it on.

We think it pertinent to consider what the position would have been if the home at Lindley Moor had, in fact, remained subject to the trusts of the trust deed of Mar. 29, 1915, and in use in accordance with its provisions, down to a date subsequent to the death of the testatrix. If, in this assumed state of affairs, the court had been called on to decide the destination of the testatrix's gifts to "The Crippled Children's Home Lindley Moor Huddersfield," we think it is reasonably plain that the court, on evidence that there was a charity called "The Huddersfield Home for Crippled Children," established by the trust deed of Mar. 29, 1915, with the objects therein mentioned, and carrying on a home for crippled children at the address specified by the testatrix, would have held that the description given by the testatrix was a mere misdescription of "The Huddersfield Home for Crippled Children," and would, accordingly, have construed the gifts as equivalent to gifts expressed to be made simply to "The Huddersfield Home for Crippled Children." On being apprised of the constitution of the charity, the court would, we think, have held further that the gifts took effect as gifts to the trustees for the time being of the trust deed of Mar. 29, 1915. If the court had further been called on to decide on what trusts the trustees would hold the gifts when received, we think the answer would necessarily have been: "On the trusts of the trust deed as an addition to the funds subject to those trusts." This conclusion would, we think, have followed from the absence of any words in the will to indicate that the gifts were to be held for some special or restricted purpose as distinct from the general purposes of the charity. No such indication could have been collected from the references to crippled children and to a home in the inaccurate description used by the testatrix, inasmuch as the correct description itself contains similar references. In a word, the court would, we think, have properly construed the gifts as gifts to the trustees of the charity for the general purposes of the charity. If that would have been the right construction of the gifts on the footing that the home at Lindley Moor had remained in use under the provisions of the trust deed until after the death of the testatrix, it must, in our view, still be the right construction in the events which actually happened. The fact that the home had actually been closed before the date of the will and the testatrix's apparent ignorance of that fact cannot alter the meaning of the language which she used. The effect in the events which have happened of the gifts as so construed is determined, so far as this court is concerned, by *Re Faraker* (1).

For these reasons we hold that the appeal should be allowed and that the order of ROXBURGH, J., should be varied by substituting for the declaration therein contained a declaration to the effect that the gifts in question constitute valid and effectual charitable bequests and that the trustees of the Huddersfield Charity for Crippled Children are entitled to such bequests by way of addition to the endowment of such charity, and by omitting the inquiry and directions consequential thereon. There will be the same order as in the court below with respect to the costs of this appeal.

Appeal allowed, costs of all parties as between solicitor and client out of the estate.

Solicitors: *the Treasury Solicitor*; *Dixon, Hunt & Tayler*, agents for *Cartwright & Fieldhouse*, Huddersfield (for the plaintiff); *Gregory, Rowcliffe & Co.*, agents for *Ramsden, Sykes & Ramsden*, Huddersfield (for the first defendant); *Crossman, Block & Co.*, agents for *Eaton Smith & Downey*, Huddersfield (for the second defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

READING v. REGEM.

[KING'S BENCH DIVISION (Denning, J.), May 10, 1948.]

Master and Servant—Profits obtained by servant dishonestly by virtue of employment—Recovery by master—Soldier—Bribes by civilian—Recovery by Crown.

If a servant takes advantage of his service and violates his duty of honesty and good faith to make a profit for himself, in the sense that the assets of which he has control, the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money as distinct from merely affording the opportunity for getting it, *i.e.*, if they play the predominant part in his obtaining the money, he is accountable for it to his master, and it matters not that the master has not lost any profit or suffered any damage or that the master could not have done the act himself.

A sergeant in the army stationed at Cairo on several occasions while in uniform boarded a private lorry and escorted it through Cairo, thus enabling it to pass the civilian police without being inspected. The lorry was loaded with cases, the contents of which were unknown. On each occasion the sergeant received from a civilian a large sum of money of which the military authorities later took possession. On a petition of right for its return :—

HELD : the wearing of the uniform of the Crown and his position as a servant of the Crown was the sole cause of his obtaining the money, which he did dishonestly, and, although the Crown had suffered no loss, the money belonged to the Crown as his master.

A.-G. v. Goddard, (1929) (98 L.J.K.B. 743), *distinguished*.

[AS TO RECEIPT OF BRIBES BY AGENT OR SERVANT, see HALSBURY, Hailsham Edn., Vol. 1, p. 252, para. 426; and FOR CASES, see DIGEST, Vol. 1, pp. 480-483, Nos. 1601-1627.]

Case referred to :

(1) *A.-G. v. Goddard*, (1929), 98 L.J.K.B. 743; Digest Supp.

PETITION OF RIGHT for the restitution of money had and received to the use of the suppliant with interest or for the payment to the suppliant of money taken possession of on behalf of the Crown.

The suppliant was at all material times in the service of the Crown as a soldier in the regular Army. After Sept. 3, 1939, he was stationed at the general hospital in Cairo and in May, 1946, he held the rank of sergeant in charge of medical stores at the hospital. The Crown admitted taking possession of the sums claimed, but said that they were part of the proceeds of bribes improperly accepted by the suppliant for accompanying a loaded lorry in and about Cairo while dressed in uniform and for thereby falsely representing himself as acting in the course of his military duties as a servant of the Crown in order to avoid police inspection of the lorry, and that the suppliant accordingly became accountable to the Crown for the bribes which he held in trust for the Crown. The court upheld the Crown's contentions. The facts appear in the judgment.

Salmon, K.C., Colin Pearson and Cassels for the suppliant.

The Attorney-General (Sir Hartley Shawcross, K.C.), Barry, K.C., and H. L. Parker for the Crown.

DENNING, J. : The suppliant joined the army in 1936, and at the beginning of 1944 he was a sergeant in the Royal Army Medical Corps stationed at the general hospital in Cairo, where he was in charge of the medical stores.

The suppliant had not had any opportunities, in his life as a soldier, of making money, but in March, 1944, there were found standing to his credit at banks in Egypt, several thousands of pounds, and he had more thousands of pounds in notes in his flat. He had also acquired a motor car worth £1,500. The Special Investigation Branch of the army looked into the matter, and he was asked how he came by these moneys. He made a statement, from which it appears that they were paid to him by a man by the name of Manole in these circumstances. A lorry used to arrive loaded with cases, the contents of which were unknown. Then the suppliant, in full uniform, boarded the lorry, and escorted it through Cairo, so that it was able to pass the civilian police without being inspected. When it arrived at its destination, it was unloaded, or the contents

were transferred to another lorry. After the first occasion when this happened, the suppliant saw Manole in a restaurant in Cairo. Manole handed him an envelope which he put in his pocket. On examining it when he arrived home, he found that it contained £2,000. Two or three weeks later, another load arrived, and another £2,000 was paid. £3,000 was paid after the third load, and so it went on until eventually some £20,000 had gone into the pocket of the suppliant. The services which he rendered for that money were that he accompanied this lorry from one part of Cairo to another, and it is plain that he got it because he was a sergeant in the British army, and, while in uniform, escorted these lorries through Cairo. It is also plain that he was clearly violating his duty in so doing. The military authorities took possession of the money. The money in the bank was taken under a military proclamation then in force, the military governor of the Cairo area ordering the banks to place the money at the disposal of the headquarters of the British Middle East Forces. The money in the suppliant's flat was taken possession of by the special investigation branch.

In this petition of right, the suppliant alleges that these moneys are his and should be returned to him by the Crown. In answer, the Crown say: "These were bribes received by you by reason of your military employment, and you hold the money for the Crown. Even if we were wrong in the way in which we seized them, we are entitled to recover the amount of them, and to set off that amount against any claim you may have." In these circumstances, it is not necessary to dwell on the form of the claim. The question is whether or not the Crown is entitled to the money. It is not entitled to it simply because it is the Crown—moneys which are unlawfully obtained are not *ipso facto* forfeited to the Crown. The claim of the Crown rests on the fact that at the material time it was the suppliant's employer.

There are many cases in the books where a master has been held entitled to the unauthorised gains of his servant or agent. At law, the action took the form of money had and received. In equity it was put on the basis of a constructive trust due to a fiduciary relationship. Nowadays it is unnecessary to draw a distinction between law and equity. The real cause of action is a claim for restitution of moneys which, in justice, ought to be paid over. In my judgment, it is a principle of law that, if a servant takes advantage of his service and violates his duty of honesty and good faith to make a profit for himself, in the sense that the assets of which he has control, the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money as distinct from merely affording the opportunity for getting it, that is to say, if they play the predominant part in his obtaining the money, then he is accountable for it to his master. It matters not that the master has not lost any profit nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant has unjustly enriched himself by virtue of his service without his master's sanction, the law says that he ought not to be allowed to keep the money, but it shall be taken from him and given to his master, because he got it solely by reason of the position which he occupied as a servant of his master. Instances readily occur to mind. Take the case of the master who tells his servant to exercise his horses, and while the master is away, the servant lets them out and makes a profit by so doing. There is no loss to the master, the horses have been exercised, but the servant must account for the profits he makes. The ATTORNEY-GENERAL put in argument the case of a uniformed policeman who, at the request of thieves and in return for a bribe, directs traffic away from the site of the crime. Is he to be allowed to keep the money? So, also, here, the use of the facilities provided by the Crown in the shape of the uniform and the use of his position in the army were the only reason why the suppliant was able to get this money. It was solely on that account that he was able to sit in the front of these lorries and give them a safe conduct through Cairo. There was no loss of profit to the Crown. The Crown would have been violating its duty if it had undertaken the task, but the suppliant was certainly violating his duty, and it is money which must be paid over to his master—in this case, the Crown.

Attorney-General v. Goddard (1), where a police sergeant was ordered to hand over bribes which he had received, is parallel to this case, but it does not cover it, because ROWLATT, J., put his decision on the ground that Sergeant Goddard

got the money in the course of making confidential enquiries. The present case goes a step further. There was not, in this case, a fiduciary relationship. The suppliant was not acting in the course of his employment. In my opinion, however, those are not essential ingredients of the cause of action. The uniform of the Crown and the position of the suppliant as a servant of the Crown were the only reasons why he was able to get this money, and that is sufficient to make him liable to hand it over to the Crown. The case is to be distinguished from cases where the service merely gives the opportunity of making money. A servant may, during his master's time, in breach of his contract, do other things to make money for himself, such as gambling, but he is entitled to keep that money himself. The master has a claim for damages for breach of contract, but he has no claim to the money. So, also, the fact that a soldier is stationed in a certain place may give him the opportunity, contrary to the King's Regulations, of engaging in trade and making money in that way. In such a case, the mere fact that his service gave the opportunity for getting the money would not entitle the Crown to it, but if, as here, the wearing of the King's uniform and his position as a soldier is the sole cause of his getting the money and he gets it dishonestly, that is an advantage which he is not allowed to keep. Although the Crown has suffered no loss, the court orders the money to be handed over to the Crown, because the Crown is the only person to whom it can properly be paid. The suppliant must not be allowed to enrich himself in this way. He got the money by virtue of his employment, and must hand it over.

Petition dismissed with costs.

Solicitors : *Lewis & Lewis & Gisborne & Co.* (for the suppliant); *the Treasury Solicitor* (for the Crown).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

DENNANT v. SKINNER AND ANOTHER.

[KING'S BENCH DIVISION (Hallett, J.), May 4, 5, 1948.]

Auction—Passing of property—Unconditional sale—Representations made after fall of hammer—Subsequent undertaking that property should not pass until cheque honoured—Sale of Goods Act, 1893 (c. 71), s. 58 (2).

On Nov. 8, 1946, the plaintiff at an auction knocked down a van to the highest bidder, and inquired his name. The bidder replied that his name was King, and that he was the son of the proprietor of King's Motors, of Oxford, a well known and reputable firm, which he was representing at the sales. The plaintiff knocked down five more vehicles to King including a Standard motor car. After the sales, King said he would like to pay by cheque, and the plaintiff replied that it was not his practice to accept cheques from people he did not know. King repeated his representations as to his connection with King's Motors, and produced the counterfoils in his cheque book according to which he had been paying large amounts to well known auctioneers. The plaintiff then accepted the cheque, King signing a form which stated : "I hereby certify my cheque No. — will be met on presentation at my bank. Furthermore, I agree that the ownership of the vehicles will not pass to me until such time as the proceeds of my cheque have been credited to South London Motor Auction account at Lloyds Bank." King was permitted to remove the vehicles, and he sold the Standard car to the third party, C., who sold it to the defendant, S. The cheque was dishonoured on presentation and it transpired that King had no connection with King's Motors. The plaintiff sought from S. the return of the car or payment of its value.

HELD : (i) there being no mistake as to the identity of the contracting parties at the time when the contract of sale was made, which was at the fall of the plaintiff's hammer, the plaintiff's assent to the sale and to the passing of the property to King was not vitiated.

Phillips v. Brooks, Ltd. ([1919] 2 K.B. 243; 121 L.T. 249), *applied*.

Heap v. Motorists Advisory Agency, Ltd. ([1923] 1 K.B. 577; 129 L.T. 146), *distinguished*.

(ii) the contract for sale was unconditional, and, therefore, the property in the car passed on the fall of the hammer under the Sale of Goods Act, 1893, s. 18 (1), and the plaintiff's right under s. 39 (1) (a) of that Act to retain the car until payment was made was relinquished when he gave possession to King.

(iii) the certificate signed by King could not have the effect of preventing the ownership of the car from passing to King because it had already passed, and it was ineffective to divest King of the ownership and re-vest it in the plaintiff.

[AS TO MISTAKE AS TO PERSON, see HALSBURY, Hailsham Edn., Vol. 7, pp. 95, 96, para. 134; and FOR CASES, see DIGEST, Vol. 35, pp. 97-99, Nos. 64-75.]

Cases referred to:

- (1) *Lake v. Simmons*, [1927] A.C. 487; 35 Digest 97, 64.
- (2) *Smith v. Wheatcroft*, (1878), 9 Ch.D. 223; 47 L.J.Ch. 745; 39 L.T. 103; 35 Digest 98, 71.
- (3) *Phillips v. Brooks, Ltd.*, [1919] 2 K.B. 243; 88 L.J.K.B. 953; 121 L.T. 249; 24 Com. Cas. 263; 39 Digest 533, 1451.
- (4) *Heap v. Motorists Advisory Agency, Ltd.*, [1923] 1 K.B. 577; 92 L.J.K.B. 553; 129 L.T. 146; 67 Sol. Jo. 300; 39 Digest 531, 1441.
- (5) *Folkes v. King*, [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; 67 Sol. Jo. 227; 28 Com. Cas. 110; 86 J.P. Jo. 552; Digest Supp.
- (6) *London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.*, [1934] 2 K.B. 206; 103 L.J.K.B. 429; 151 L.T. 124; 78 Sol. Jo. 413; 39 Com. Cas. 290; Digest Supp.

ACTION for the return of a motor car or for its value.

The plaintiff was a certificated auctioneer who had sold the car at an auction sale to a person fraudulently representing himself to be the Portsmouth representative of a well known and highly reputable firm in the motor vehicle trade at Oxford and the son of its proprietor. In reliance on these representations the plaintiff had accepted a cheque in payment, together with a written undertaking that the ownership of the car should not pass until the cheque was met, and had then given delivery of the car. He now sought to recover the car from the defendant, who had acquired it in good faith from a person whom he brought in as third party and who had also acquired it in good faith. The fraudulent purchaser had meanwhile been convicted of obtaining the property by false pretences, but the plaintiff's claim was based on the ground that the offence he had actually committed was larceny by a trick and that the property in the car had never passed to him. The plaintiff also contended that in the special circumstances the property had never passed, particularly having regard to the undertaking signed by the purchaser. HALLETT, J., held that the offence had been obtaining property by false pretences, that the property in the car had passed on the fall of the hammer at the auction sale, and that, by delivering the car to the purchaser, the plaintiff had lost his right of lien and of re-sale on non-payment and so had no such property in or possession of the car as would entitle him to bring an action. The facts appear in the judgment.

D. F. Brundrit for the plaintiff.

Mattar for the defendant.

Landau for the third party.

HALLETT, J.: This case raises questions of some interest, but not, I think, having regard to the evidence called before me, of any real difficulty. The plaintiff, George Edward Kenneth Dennant, carries on business as the South London Motor Auctions and is a certificated auctioneer. On Nov. 8, 1946, he held an auction sale at which there were some 35 motor vehicles for sale and some 150 people present as prospective buyers. A Standard saloon motor car was knocked down by the plaintiff to a man named George Albert King for £345. After the sale the plaintiff delivered that car to King in exchange for a cheque for £1,190 which represented the price of the car together with five other vehicles which had also been knocked down to King by the plaintiff at the sale. The cheque was dishonoured on presentation, and, on Apr. 12, 1947, King was convicted at Surrey Quarter Sessions at Croydon, of obtaining the six motor vehicles from this firm by false pretences with intent to defraud and was sent to prison. Subsequently, the plaintiff discovered that the Standard

motor car was in the possession of the defendant in this action, Mr. Leslie Cecil Skinner, and on Feb. 14, and again on Feb. 21, 1947, by his solicitor he demanded delivery up to him of the car. The defendant having refused delivery, this action was started for the return of the car or its value. The defendant, on whose good faith there has been no reflection whatever, had bought the car from a Mr. Collom, with the warranty of good title implied by virtue of the Sale of Goods Act, 1893, and, accordingly, the defendant brought in Mr. Collom as a third party. There was no imputation against the third party's good faith.

The plaintiff having knocked this car down to King and delivered it and allowed him to take it away, the onus is on him (the plaintiff) to establish to the satisfaction of the court that he was still entitled to possession of the car at the time when he demanded possession from the defendant. He seeks to discharge that burden in three ways. In the first place, he says that the transaction which led to King having possession of the car amounted to what is sometimes known as "larceny by a trick." Although King was convicted of obtaining that car and five others by false pretences, the view taken in the criminal proceedings is not in any way binding on or even helpful to me for various reasons. King ultimately pleaded Guilty, and in any case, as is pointed out in ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE, the distinction between larceny by a trick, on the one hand, and obtaining by false pretences, on the other, has now for the purpose of criminal cases, become of little importance, because of the provisions of the Larceny Act, 1916, s. 44. In this case, however, the distinction is of vital importance and in some cases there is no doubt that the distinction between the two offences is very difficult to draw. At p. 503 of ARCHBOLD, 31st ed., it is suggested that the most intelligible distinction is as follows:

In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud.

Certain other tests have been suggested, however, in various cases, for instance, in *Lake v. Simmonds* (1) where LORD HALDANE ([1927] A.C. 501) cites the passage which was adopted by FRY, J., in *Smith v. Wheatcroft* (2) (9 Ch.D. 230):

"Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."

There was no catalogue of this auction, but certain printed terms or conditions of sale are said to be exhibited in the auction room, and I have been furnished with a copy of that document. I feel considerable doubt how far it is satisfactorily proved that those conditions of sale were brought to the notice of the bidders so as to render it right to incorporate them in the contract of sale, but I do not propose to allow that doubt to influence me in my decision which proceeds on other grounds.

During the sale the plaintiff offered a vehicle called a Commer van for which the highest bid was made by King. The plaintiff had never seen him before and did not know who he was. The plaintiff said: "I sold the van to him. When I knocked it down I asked his name." It is agreed by counsel for the plaintiff that on a sale by auction a contract is completed on the fall of the hammer, and it is agreed also that *prima facie* the property in the lot knocked down then passes to the bidder. In so far as the printed conditions have any relevance, condition 3 provided that on the fall of the hammer the lot, with all errors of description, was to be at the risk and cost of the buyer. Up to that time the plaintiff had not inquired the name of the bidder or concerned himself in any way with his identity. He had knocked down that Commer van, or, in his own language, he had sold it, to the man who had made the highest bid irrespective of his identity. When asked his name, the man said it was King, and he was from King's Motors of Oxford, and, in fact, was the son of the

proprietor of that firm. King's Motors of Oxford is well known to the plaintiff as a highly reputable firm in the motor vehicle trade, and the plaintiff accepted these statements. They were untrue, and George Albert King has no connection with the firm and is not the son of the proprietor. The plaintiff knocked down five more vehicles to George Albert King, including the Standard motor car with which I am concerned, and when the sale was over King went to the plaintiff's office in the usual way to arrange for payment and removal. At this time, subject to the second aspect of the matter which I shall discuss presently, the property in the Standard car, to my mind, had passed to King. The contract of sale had been made with King, and there seems to me to be no ground whatsoever on which I could properly hold that the consideration of the person with whom the plaintiff was willing to contract entered as an element into the contract which he was willing to make. At an auction sale, apart from any question of the reserve price, the lot is knocked down to the highest bidder, whoever the highest bidder may happen to be. When it comes to removing the lot without paying cash for it, other questions arise, but, so far as the contract is concerned and the passing of the property in the object sold, ordinarily the identity of the buyer does not enter into the question any more than it ordinarily does on the sale of an article in a retail shop. In these days the identity of the customer may influence the willingness of the shopkeeper to sell something to him where, for instance, goods are kept for registered customers, but in normal and sane times the shopkeeper is not concerned with the identity of the customer in deciding whether to sell goods to him, although he is concerned in deciding whether, having effected the sale, he should give the purchaser credit. When King went to the plaintiff's office the plaintiff asked him how he meant to pay, and King replied that he would like to pay by cheque, to which the plaintiff rejoined that it was not his normal practice to accept cheques from people he did not know. King had appeared to be in possession of trade plates, which would suggest he was in the business, and he had some drivers there to drive away the vehicles. King repeated that he was of King's of Oxford, was running the Portsmouth branch, and that he was the son of the proprietor, and he showed to the plaintiff the counterfoils in his cheque book, according to which he had been paying away large amounts to other well known auctioneers. The plaintiff believed those representations and took the cheque for £1,190 to which I have referred.

Two sentences from the plaintiff's evidence seem to me to be crucial. He said :

When I took the cheque from King I believed him to be King's of Oxford. If I had not so believed him I should not have accepted the cheque.

That seems to be really important on the question of the effect the verbal representation had on the plaintiff's mind. There is no evidence, it seems to me, that the plaintiff was induced to sell the car to King in the belief that King was connected in the manner which he had described with this highly reputable firm. That seems to have been entirely immaterial from the point of view of selling the car. The Commer van had been sold before King's identity was mentioned at all, and the mention of his identity was only made in the ordinary way, as I interpret the evidence, for the purpose of the plaintiff's completing the auctioneer's memorandum. The effect which the misrepresentation had on the plaintiff's mind was to induce him to accept the cheque instead of requiring cash to be paid before the vehicle was delivered. The conditions again, if they are of any relevance, which I doubt, provided that the entire purchase money was to be paid before the lots were removed on the day of the sale, and conditions 10 and 11 dealt with cheques being tendered in payment, it being stated that : "Cheques tendered in payment will not be accepted unless satisfactory references are given." When the plaintiff, persuaded by those lies, consented to take the cheque for £1,190, he procured the signature by this man King to a form which is before me :

I hereby certify my cheque No. — will be met on presentation at my bank. Furthermore, I agree that the ownership of the vehicles will not pass to me until such time as the proceeds of my cheque have been credited to South London Motor Auction account at Lloyds Bank.

I can now express my judgment at once on the question whether the trans-

A action by which this car passed into the possession of King amounted to larceny by a trick. To my mind *Phillips v. Brooks, Ltd.* (3) is in principle indistinguishable, and so far as I am aware the correctness of that decision has never been judicially in question. There have, of course, been many cases since then where questions as to the distinction between larceny by a trick and obtaining by false pretences have been considered, but my attention has not been called to any case which is as much in point as *Phillips v. Brooks, Ltd.* (3). The case was mentioned in *Lake v. Simmons* (1) already cited, and in his speech, immediately after the passage of FRY, J., which I have already quoted, LORD HALDANE deals ([1927] A.C. 501) with *Phillips v. Brooks, Ltd.* (3). I can see nothing there to suggest that he doubted the correctness of the earlier decision. Counsel for the plaintiff, however, have drawn my attention to what is said in the well known text book, ANSON ON THE LAW OF CONTRACT. In the 17th ed., published in 1929, given to me in the first instance, at pp. 158 and 159, the learned authors of that edition, SIR JOHN MILES and PROFESSOR BRIERLEY, dealing with *Phillips v. Brooks, Ltd.* (3) in a footnote say :

~ This case does not appear to be affected by the decision in *Lake v. Simmons* (1), for in that case when the jeweller handed the goods to the swindler he did so merely to enable her to show them to a supposed intending purchaser. He intended to make her his bailee and not to enter into a contract of sale with her.

C I respectfully agree with that note. I think if one looks at some of the cases on which the plaintiff here might seek to rely, the distinction between them and the present case is obvious. In *Heap v. Motorists Advisory Agency, Ltd.* (4) the plaintiff never gave any real consent to the fraudulent person having or passing the property in the motor car in question. The car was put into the possession of the fraudulent person, and LUSH, J., had to consider, as I have to consider, the difference between larceny by a trick and obtaining goods by false pretences. LUSH, J., came to the gist of the whole matter in three sentences : ([1923] 1 K.B. 583) :

D It is said by counsel for the defendants that it is a case of obtaining a car by false pretences, and not by larceny by a trick. In order to make that out he has to establish that the plaintiff intended to part with the property in the car to North. If he can establish that then he is right, but if he cannot he is wrong.

E The learned judge held on the facts of that case that the plaintiff never intended to part with the property in the car to North, but merely intended to let North have the custody of the car in order that he might drive it to Uxbridge, show it to the entirely imaginary person named Hargreaves, and if possible sell it to Hargreaves for £210. There never was a Hargreaves. There was no question of passing the property, according to the intention of the plaintiff, to a person called Hargreaves who just did not exist, and to whom the car was going to be shown by the fraudulent person, North. Such a case seems to me to be very easy to explain. I have read what is said in regard to *Phillips v. Brooks, Ltd.* (3) in the 17th ed. of ANSON ON LAW OF CONTRACT, but in the 19th ed. of that work, published in 1945, where PROFESSOR BRIERLEY is the sole editor, he appears to have taken a different view (p. 158). I need not read what he says, but he clearly suggests that *Phillips v. Brooks, Ltd.* (3) is a wrong decision, and that LORD HALDANE's decision in *Lake v. Simmons* (1) is a right decision on the wrong grounds. I am not, however, bound in any way by the opinion of text book writers, however eminent they may be, and, indeed, I prefer to decide this case not on authority so much as on principle. Two more cases I will mention : *Folkes v. King* (5) and *London Jewellers, Ltd. v. Attenborough* (6). While those cases deal with other points which do not arise here, on the essential points they seem to me to indicate where I should be if I relied solely on *Phillips v. Brooks, Ltd.* (3). In *London Jewellers, Ltd. v. Attenborough* (6) SCRUTTON, L.J., refers ([1934] 2 K.B. 217) to *Phillips v. Brooks, Ltd.* (3), but without expressing any opinion about the decision and saying merely that the effect of the statement between the parties may have to be considered at some future time. In the present case, I am of the opinion, on the evidence, that there was no mistake as to the contracting parties at the time the contract of sale was made and so no mistake affecting the plaintiff's assent to the sale and the passing of the property. Accordingly, the plaintiff's case, as far as it depends on the contention that this was larceny by a trick, in my judgment, fails.

The second point on which the plaintiff relies is that the property in the circumstances of this case did not pass until the price was paid by the cheque being in order or cash substituted for it. A contract of sale is concluded in an auction sale on the fall of the hammer, and, indeed, the Sale of Goods Act, 1893, s. 58 (2), so provides. Section 18 provides :

Rule 1 : Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.

Accordingly, on the fall of the hammer the property of this car passed to King unless that *prima facie* rule is excluded from applying because of a different intention appearing or because there was some condition in the contract which prevented the rule from applying. In my view, this was clearly an unconditional contract of sale, and I can see nothing whatever to make a different intention appear. The only evidence on which it was ever suggested to exist was the printed conditions, but I can see nothing in those conditions to negative an intention that the property should pass on the fall of the hammer. I think the conditions are entirely consistent with such an intention. If, however, the conditions are to be regarded as incorporated in the contract of sale, as to which I have some doubt, that makes no difference to the claim of the plaintiff. By the Sale of Goods Act, 1893, s. 28 : " Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions," and, finally by s. 39 (1) (a) and (c), an unpaid seller of goods has a lien on the goods or right to retain them for the price while he is in possession of them and he also has a right of re-sale as limited by the Act. However, the passing of the property and the right to possession are two different things. Here, in my judgment, the property had passed on the fall of the hammer, but still the plaintiff had a right to retain possession of the goods until payment was made. If, when he was ready to deliver the goods, payment was not made, he could have sued for the price, or he could have exercised powers of re-sale, and he could have secured himself by way of lien on the goods for the price, but once he chose, for reasons good, bad, or indifferent, as a result of statements fraudulent or honest, to part with the possession of the vehicle by giving delivery of it, he then lost his seller's lien and he no longer had a right to possession of the vehicle. He had a right until it was delivered, but as the right of retainer was not exercised he had no right in the vehicle. The property in the vehicle had passed to King. In my view, therefore, the second contention for the plaintiff also fails. His right to the property had gone and his right to possession had gone.

There was a third aspect of the matter arising out of the document which I have read. The document contemplates that the ownership of the vehicle has not passed to the bidder, but, as I have already said, in my judgment, it had passed on the fall of the hammer, and, if subsequently the bidder executed the document acknowledging that the ownership of the vehicle would not pass to him, that could not have any effect on what had already taken place. Accordingly, the only way it seems to me in which this document could be used to satisfy the plaintiff's argument is to find that it had the effect of divesting the property from King and re-vesting it in the plaintiff, the seller. I do not think that such a view of the document is sound. In my view, the property had passed on the falling of the hammer. The right to possession had passed when the plaintiff, persuaded and misled by King's lies, parted with his seller's lien, and there was nothing left on which he could found a claim in detinue against some third person, in this case the defendant, who was thus put in possession of the vehicle. The result seems to me to be that there must be judgment for the defendant with costs. As regards proceedings between the defendant and the third party, the third party is entitled to judgment against the defendant with costs.

Since the plaintiff knew perfectly well that he had not sold the car to the defendant, he must have contemplated when these proceedings were pending that the defendant had acquired the car from somebody else, a third party, and in those circumstances it was at least highly probable that, if the defendant were sued, he would desire to bring in that third party, whoever it might be, for his own protection. Secondly, I think it was obviously reasonable for the defendant here to take proceedings against the third party to protect himself

in the light of the claim which had been brought against him by the plaintiff, and which in the result has been shown to be unsustainable. If a defendant incurs costs reasonably to protect himself against a claim by a plaintiff which fails, it seems to me there are good grounds on which a judge, exercising his judicial discretion, should say that those costs incurred by the defendant should be borne by the plaintiff. Accordingly, in this case I propose to add to my order that the costs payable by the plaintiff to the defendant should include all costs properly incurred by the defendant in the third party proceedings.

Judgment for the defendant against the plaintiff with costs. Judgment for the third party against the defendant with costs. Order for defendant's costs against the plaintiff to include all party and party costs of defendant and third party proceedings.

Solicitors: *W. F. Hollands & Son* (for the plaintiff); *Amery-Parkes & Co.*, (for the defendant); *Simon, Haynes, Barlas & Cassels* (for the third party.)

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

ASKEY v. GOLDEN WINE CO., LTD., AND OTHERS.

[KING'S BENCH DIVISION (Denning, J.), May 5, 6, 7, 14, 1948.]

Fraud—Conspiracy—Damages—Supply of contaminated goods to wholesaler—Wholesaler fined for selling goods—Repayment by wholesaler to retailers—Recovery of damages from supplier by wholesaler.

It is a principle of our law that the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment. In every criminal court the punishment is fixed having regard to the personal responsibility of the offender in respect of the offence, to the necessity for deterring him and others from doing the same thing again, to reform him, and, in cases such as the present, to make him and others more careful in their dealings, to make him choose with more discrimination his suppliers or his servants, and to make him more exact and scrupulous in his supervision of the matters for which he is responsible. All these objects would be nullified if the offender could recover the amount of the fine and costs from another by process of the civil courts.

From Dec. 20, 1943, onwards the defendants supplied large quantities of liquor for cocktails to the plaintiff who resold it to retailers. On Sept. 22, 1944, the defendants were charged with selling for human consumption liquid contaminated with methylated spirit, and they were all fined, two of them also being sentenced to terms of imprisonment. The plaintiff was assured by the defendants that their conviction had nothing to do with the liquor they manufactured for him, and he went on dealing with them. In January, 1945, the plaintiff was himself convicted *inter alia* of selling cocktails unfit for human consumption, and fined £316. In consequence of this conviction, all bottles in the hands of retailers were returned to the plaintiff, and he had to refund £1,735. On a claim by him for damages for fraud and conspiracy against the defendants,

HELD: (i) although the plaintiff was not a party to the conspiracy to do an unlawful act of which the defendants were guilty, as a result of which he had suffered damage, he had been guilty of gross negligence, and so could not recover as damages the amount of the fine and costs imposed on him, nor damages for the injury to his reputation by reason of his conviction.

Principle expressed by LORD LYNDHURST, C.B., in *Colburn v. Patmore* (1834) (4 Tyr. 677, 688) and ROWLATT, J., in *Leslie (R.), Ltd. v. Reliable Advertising and Addressing Agency, Ltd.* ([1915] 1 K.B. 652, 658; 112 L.T. 947, 948), applied.

(ii) the money which the plaintiff had to repay to the retailers was reparation for his own crime, and public policy required that there should be enforced no right of indemnity or contribution or damages in respect of it.

Haseldine v. Hosken ([1933] 1 K.B. 822; 148 L.T. 510) and *Beresford v. Royal Insurance Co., Ltd.* ([1938] 2 All E.R. 602; [1938] A.C. 586; 158 L.T. 459), *applied*.

Tinline v. White Cross Insurance ([1921] 3 K.B. 327; 125 L.T. 632), *James v. British General Insurance Co., Ltd.* ([1927] 2 K.B. 311; 137 L.T. 156), *Crage v. Fry* (1903) (67 J.P. 240) and *Cointat v. Myham & Son* ([1913] 2 K.B. 220; 108 L.T. 556), *distinguished*.

[AS TO DAMAGES FOR CRIMINAL CONVICTION OWING TO DEFENDANT'S WRONGFUL ACT, see HALSBURY, Hailsham Edn., Vol. 10, p. 118, para. 148; and FOR CASES, see DIGEST, Vol. 17, pp. 113, 114, Nos. 235, 236; and Vol. 35, p. 50, No. 455.]

Cases referred to:

- (1) *Colburn v. Patmore*, (1834), 4 Tyr. 677; 1 Cr. M. & R. 73; 3 L.J.Ex. 317; 149 E.R. 99; 42 Digest 980, 111.
- (2) *Leslie (R.), Ltd. v. Reliable Advertising and Addressing Agency, Ltd.*, [1915] 1 K.B. 652; 84 L.J.K.B. 719; 112 L.T. 947; 17 Digest 114, 236.
- (3) *Haseldine v. Hosken*, [1933] 1 K.B. 822; 102 L.J.K.B. 441; 148 L.T. 510; Digest Supp.
- (4) *Beresford v. Royal Insurance Co., Ltd.*, [1938] 2 All E.R. 602; [1938] A.C. 586; 107 L.J.K.B. 464; 158 L.T. 459; Digest Supp.
- (5) *Tinline v. White Cross Insurance*, [1921] 3 K.B. 327; 90 L.J.K.B. 1118; 125 L.T. 632; 29 Digest 408, 3214.
- (6) *James v. British General Insurance Co., Ltd.*, [1927] 2 K.B. 311; 96 L.J.K.B. 729; 137 L.T. 156; 71 Sol. Jo. 273; Digest Supp.
- (7) *Crage v. Fry*, (1903), 67 J.P. 240; 1 L.G.R. 253; 17 Digest 113, 235.
- (8) *Cointat v. Myham & Son*, [1913] 2 K.B. 220; 82 L.J.K.B. 551; 108 L.T. 556; 77 J.P. 217; 11 L.G.R. 760; 17 Digest 97, 123.
- (9) *Simon v. Pawson and Leafs, Ltd.*, (1932), 38 Com. Cas. 151; 148 L.T. 154; Digest Supp.
- (10) *Fitzgerald v. Leonard*, (1893), 32 L.R.Ir. 675; 17 Digest 107, n.

ACTION for damages for breach of contract against the Golden Wine Co., Ltd., and for fraud and conspiracy against the other defendants, who were those principally concerned with the manufacture of wine sold by the company to the plaintiff. The company went into liquidation and the action against it was stayed. DENNING, J., dismissed the remaining claim on the general ground of public policy. The facts appear in the judgment.

F. Whitworth for the plaintiff.

L. Caplan for the defendant, Oestreicher.

E. Dennis Smith and *D. R. Davis* for the defendant, Grunberg.

A third defendant was not represented.

Cur. adv. vult.

May 14. DENNING, J., read the following judgment. In 1944 there appeared on the market a quantity of so-called cocktails which contained methylated spirit and on that account were unfit for human consumption. The principal participators have been convicted in the criminal courts. This case is the outcome in the civil courts.

Mr. Askey, who was the wholesale merchant marketing the mixture, is the plaintiff. The Golden Wine Co., Ltd., which manufactured it, is the defendant, together with the individuals principally concerned in the manufacture. In October, 1943, the plaintiff, then trading as Gordon Products, was introduced to the Golden Wine Co., Ltd., which was run by three men named Oestreicher, Junger and Grunberg. Only Grunberg spoke English. The others understood a little English, but could not speak it intelligibly. The company had a ramshackle factory in the east end of London, where they professed to make wine. The plaintiff visited the factory and, as a result of discussions with the three men, he paid the company, on Dec. 20, 1943, the sum of £100 as a deposit for the manufacture of cocktails. From that time onward, a large amount of business was done between them. The company made the liquid and bottled it. The plaintiff supplied the labels for the bottles, which described the contents as "Red Lady" or "Paradise" cocktails and the proprietors as Gordon Products. The plaintiff had no warehouse of his own. He used to collect the cases of bottles from the factory of the Golden Wine Co., Ltd., and deliver it direct to the retailers to whom he sold it. He used to pay the Golden Wine Co., Ltd., 7s. 6d. a bottle. He would resell to retailers at 12s. 6d. a bottle. The retailers sold to the public at 15s. 9d. a bottle. He advertised

it as being "in full strength." It was a great success. Intoxicating liquor was in short supply and there was a great demand for it. By the middle of 1944, the plaintiff had bought and paid for quantities to the value of £6,600.

Then there was a new development. The Customs and Excise officers visited the premises of the Golden Wine Co. They came to see whether duty had been paid on their products. It had not. While there, the officers examined the liquid that was there and found that it was contaminated with methylated spirit. The result was that the company and the three men were brought before the Old Street magistrate on Sept. 22, 1944. All pleaded Guilty. The company was fined £535 and £47 5s. costs for evasion of duty and for offences against the Food and Drugs Act, 1938, notably for selling and possessing wine to which methylated spirit had been added. Junger, who was the wine maker, was sentenced to twelve months' imprisonment and fined £325 and £26 5s. costs. Grunberg was sentenced to three months' imprisonment and fined £340 and £26 5s. costs. Oestreicher, who only pleaded Guilty to a customs offence, was fined £50 and £26 5s. costs. Junger and Grunberg appealed to quarter sessions against their sentences of imprisonment, and they were allowed out on bail pending appeal. When news of the conviction came to the plaintiff's ears, he went to the company's premises and saw all the three men. They assured him that the conviction had nothing to do with the wine they manufactured for him and that the contaminated liquid had been destroyed. He then accepted that assurance and went on dealing with them. In the next three months he did a much larger business than before. The price had gone up to 9s. a bottle and he bought and paid for quantities to the value of £9,300 in three months. By that time a well known firm had objected to his using the name "Gordon Products" and he changed the name to Dallington Wine Products. The appeals of Junger and Grunberg against sentence were heard in November, 1944, and were dismissed. So those two men went to prison, but the other man, Oestreicher, remained out and carried on the company's business. The plaintiff continued his purchases, paying large cheques and receiving large supplies.

In January, 1945, this very profitable business came to an end. The plaintiff was himself summoned in the justices' courts at Aylesbury, Acton, Guildford and Chelmsford for offences under the Food and Drugs Act, such as selling cocktails containing methylated spirit, selling cocktails unfit for human consumption, selling cocktails not of the nature, substance and quality demanded, unlawfully giving labels and publishing advertisements calculated to mislead, and for being the person responsible for offences by retailers. The summonses were heard in March and April, 1945. When the first summonses were heard, he pleaded Not Guilty, but was found Guilty. On the later summonses, he pleaded Guilty. In all, he was fined £316 15s. and £83 costs. In consequence of these convictions, all the bottles then in the hands of retailers were returned and the plaintiff had to refund them the amount they had paid him, namely, £1,735 17s. 8d. The Press also refused to accept advertisements from him. So his loss was severe. He now seeks to get it all back in this action. He claims against the company damages for breach of contract, and against the three men damages for fraud and conspiracy. The company is now in liquidation and the action is stayed against it. Junger agreed to give evidence for the plaintiff on condition that the plaintiff would not proceed further against him, so the action is not effective against him. Grunberg and Oestreicher remain the only effective defendants. Even Grunberg is in America and did not appear personally at the trial, so I only saw Junger and Oestreicher.

Inasmuch as the action is stayed against the company, I have only to consider the claims in tort against the personal defendants. They were not, of course, liable for the company's breach of contract, nor for inducing that breach, but they are liable for their own torts. They were clearly under a duty to exercise care and to be honest in their manufacture of these cocktails. They owed this duty to every person who might be concerned in the selling or consumption of them, including the plaintiff. They broke that duty. I find that they were all three guilty of a conspiracy to do an unlawful act, namely, to put methylated spirit into this liquid and that, as a result of that conspiracy, the plaintiff did, in fact, suffer the damage that he claims. The important question in the case, however, is whether in law he can recover in respect of

that damage. He was himself guilty of criminal offences in selling this liquid to the retailers. Is he to be allowed to come to this court and ask to be indemnified against the consequences? He was not himself a party to the conspiracy, but I am satisfied he was much to blame in that he did not take proper steps to see that the liquid was fit for sale. Even after he knew that three men had been convicted and two of them had gone to prison, he went on dealing with the third one and dealt on a large scale. He did not even have the stuff analysed. He was, I find, tempted by the large profits he was making to take a risk on it. It suited him to accept the assurances of these men at their face value without taking any steps to verify them. This view of the facts is confirmed by the convictions which were recorded against him. If he could have proved that he had used all due diligence and that he had no reason to believe that the liquid was contaminated, he would have had a defence to the summonses and he could have thrown the responsibility on to the company and the three other defendants: see the provisions of the Food and Drugs Act, 1938, ss. 83, 84 and 86. But he did not prove it. He did not even bring the Golden Wine Co., and the three men before the justices' court, as he might have done under s. 83 of the Act, if he alleged that the contravention was due to their act or default. In these circumstances, the conclusion is irresistible that, although he was not a party to the conspiracy, he was guilty of gross negligence.

What are the consequences of this finding? I am clearly of opinion that the plaintiff cannot recover any of the fines imposed on him by the justices, nor the costs he was ordered to pay, nor his own costs. Nor can he recover damages for the consequences of the convictions so far as they affected his reputation. It is, I think, a principle of our law that the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment. In every criminal court the punishment is fixed having regard to the personal responsibility of the offender in respect of the offence, to the necessity for deterring him and others from doing the same thing again, to reform him, and, in cases such as the present, to make him and others more careful in their dealings, to make him choose with more discrimination his suppliers or his servants, and to make him more exact and scrupulous in his supervision of the matters for which he is responsible. All these objects would be nullified if the offender could recover the amount of the fine and costs from another by process of the civil courts. This was the view expressed by LORD LYNTHURST, C.B., in *Colburn v. Patmore* (1) and by ROWLATT, J., in *R. Leslie, Ltd. v. Reliable Advertising and Addressing Agency, Ltd.* (2).

More difficulty exists with regard to the payments of £1,735 17s. 8d. by the plaintiff to the retailers in respect of contaminated goods which were returned. There are three reasons why the plaintiff had to repay the retailers:—(i) the fact that the liquid was contaminated by the addition of methylated spirit; (ii) the fact that the plaintiff had sold the contaminated liquid and had been negligent in not discovering that it was not contaminated, and (iii), the fact that the plaintiff had, in consequence been convicted of the offence. If he had never been prosecuted and the inevitable publicity attaching to it had thus been avoided, it is very possible that in many cases the contamination would not have been discovered by the retailers or consumers. The contamination was not apparent in the small doses in which cocktails are usually taken. It was only apparent by its ill effects when the cocktails were taken copiously. If it were not for these prosecutions, therefore, the plaintiff might have escaped without repaying the money. Thus, two out of the three cases for the repayments (being the second and third clauses above) were due to his own criminality, not in the sense of a positively wicked mind, but in the sense of a grossly negligent one—negligence which the legislature considered so serious that it should be regarded as a crime. Does that debar him from claiming damages from those guilty of the contamination? I think it does. Speaking generally, public policy requires that no right of indemnity or contribution or damages should be enforced in respect of expenses which the plaintiff has incurred by reason of being compelled to make reparation for his own crime. That principle is to be gathered from *Haseldine v. Hosken* (3) and *Beresford*

v. *Royal Insurance Co., Ltd.* (4). This case comes within that principle. The money which the plaintiff had to repay the retailers was reparation for his own crime, that is, the crime of selling contaminated liquor without lawful excuse.

I am aware that in *Tinline v. White Cross Insurance* (5) and *James v. British General Insurance Company, Ltd.* (6), both cases of motor manslaughter, the judges held that policies against third-party liability were enforceable, but, as GREER, L.J., pointed out in *Haseldine v. Hosken* (3) ([1933] 1 K.B. 838), in those cases the act to be indemnified was one intended by the law that people should insure against. In cases such as the present, however, the policy of the law is different. The wholesale merchant is a critical link in the chain of distribution from manufacturer to consumer. If he is careful in selecting his manufacturer and in seeing that the goods are pure, it will be a great help in ensuring that the public receive wholesome goods. If he is careless and accepts anything that is offered for the sake of quick and large profits, there is a real risk of contaminated food being distributed. So important is this that the Food and Drugs Act, 1938, makes his conduct criminal unless he can prove that he acted with due diligence. That affords a guide to the public policy which the civil courts should adopt. If it appears in the course of the case, as it does here, that the plaintiff was plainly guilty of the criminal offence of selling contaminated food without lawful excuse and has no defence to it, then the court, whether the point is pleaded or not, will not assist him to recover the expenses to which he has been put by reason of his own crime. It leaves all those in the chain of distribution who are guilty of a crime to the strong arm of the criminal law and will not assist them to adjust their money claims between one another. If they were allowed to be negligent and yet recover damages, it would offer an inducement to them to turn a blind eye to contamination. Take the present case. The £300 or £400 which the plaintiff had to pay in fines and costs is a trifling sum compared to the large profits he has made. If he is left himself to bear the loss of the £1,735 refunded to the retailers, it will tend to reduce the profits and thus be an added deterrent.

There are two decisions of judges of first instance which may appear at first sight to conflict with the law as I have stated it, namely, the decision of KENNEDY, J., in *Crage v. Fry* (7) and of COLERIDGE, J., in *Cointat v. Myham & Son* (8). In neither of them, however, was the question of public policy considered. Moreover, in *Crage v. Fry* (7) the judge found that the plaintiff had no reason to suspect that the fish was not fit for the ordinary purposes of food, and the judgment in *Cointat v. Myham & Son* (8) was set aside on appeal on another ground and a new trial ordered. In a subsequent case, SCRUTTON, L.J., said that he disagreed with the reasoning of COLERIDGE, J.: see *Simon v. Pawson and Leafs, Ltd.* (9) (38 Com. Cas. 158). He said that he preferred the reasoning of HOLMES, J., in the Irish case of *Fitzgerald v. Leonard* (10), which seems to me to be in accordance with the principle I have stated. I would only add that, in so far as KENNEDY, J., and HOLMES, J., gave damages in respect of goods which were worthless and had to be destroyed, that is a different matter. The crime which I have considered is the crime of selling contaminated food to third persons without lawful excuse, which is a crime of such a character that, in my judgment, no person is entitled to reparation for the expenses to which he has been put by reason of it. This action is, therefore, dismissed, but I shall not give the defendants any costs. They, too, will not get any assistance from this court.

Action dismissed without costs.

Solicitors: *Russell & Arnholz* (for the plaintiff); *Kingsley, Napley & Co.* (for the defendant Oestreicher); *Leonard Tubbs & Co.* (for the defendant Grunberg).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WILSON v. FYNN AND OTHERS.

[KING'S BENCH DIVISION (Denning, J.), April 22, 23, 26, 1948.]

Lease—Forfeiture—Breach of covenant—Premises not to be sub-let without landlord's previous consent—Consent not to be unreasonably withheld—Reasonableness—Landlord to have time for consideration—Lessees not to permit premises "to be used otherwise than as offices for the purpose of their business"—Sub-lessees' business different from that of lessees. A

W., a chartered accountant, was the tenant of the second and third floors of a building. In 1945 he sub-let the second floor to G., another chartered accountant. In 1946 G. became a partner in a firm of chartered accountants, S. & Co., and obtained a sub-lease of the second floor for his firm. The lease, dated Feb. 15, 1947, was from Aug. 1, 1946, to Michaelmas Day, 1949, and contained (*inter alia*) the following covenants by the tenants: (a) not to make alterations without consent, (b) not to use or permit the premises or any part thereof to be used except for offices "for the purpose of their business," and (c) not to underlet without the previous written consent of the landlord, "such consent however not to be unreasonably withheld in respect of a respectable and responsible tenant," and there was a proviso for re-entry. There was a collateral agreement in regard to various facilities to be enjoyed by the parties on each other's premises. In June, 1947, S. & Co., obtained other offices for themselves, and on Aug. 21, they wrote to W. stating that they were giving "temporary occupation" in the premises leased from W. to T., a client of theirs, and hoped that the arrangement would not be unsatisfactory to W. W. was away at the time and his representative replied to S. & Co. on Aug. 22, informing them of that fact, and requesting them not to part with possession of the premises until W. had had an opportunity of considering the matter. S. & Co. replied on Aug. 23, stating that the matter was urgent and that their client would be moving in on Aug. 25. On Aug. 25, T. & Co., Ltd., who were manufacturers of kitchen equipment, moved into the premises and immediately changed the lock on the outer door so that the facilities provided for in the collateral agreement could not be carried out. W. claimed possession of the premises on the ground of breaches of covenant:— B C D E

HELD: (i) while, if the lessees during the period of the lease had changed the nature of their business, they would not have been in breach of the covenant not to permit the premises to be used "otherwise than as offices for the purpose of their business," that covenant meant otherwise than for the purpose of the business for the time being of the lessees or their assigns, namely, that of chartered accountants, and the lessees were in breach of that covenant. F

(ii) the proviso that the landlord's consent to an underletting was not to be unreasonably withheld in respect of a respectable and responsible tenant did not do away with the necessity for asking for the consent and giving the landlord a reasonable time to consider the matter, and, accordingly, the lessees were in breach of the covenant not to underlet without obtaining the landlord's permission. G

(iii) the landlord was entitled under the lease to refuse his consent to the underletting, even though there was no dispute that the proposed sub-tenants were respectable and responsible tenants, and, in deciding whether or not the landlord's consent was unreasonably withheld, the court was entitled to consider not merely the terms of the lease but also the collateral agreement between the parties when the lease was made. H In the circumstances of the case, the landlord was justified in withholding his consent and the tenants were not entitled to relief from forfeiture.

Observations of VISCOUNT DUNEDIN *in* *Tredegar v. Harwood* ([1929] A.C. 72, 78), *applied*.

Case referred to :

(1) *Tredgar v. Harwood*, [1929] A.C. 72 ; 97 L.J.Ch. 392 ; 139 L.T. 642 ; Digest Supp.

ACTION for possession of premises on the ground of breaches of covenant by the tenants (a) in sub-letting the premises without the previous consent of the landlord, and (b) in allowing them to be used otherwise than as offices for chartered accountants, the business of the tenants.

A The landlord, a chartered accountant, was the tenant of the second and third floors of 28a, Devonshire Street, Marylebone, London. In 1945, his own business being insufficient to enable him to occupy both floors, he let the second floor to a Colonel George, another chartered accountant, with the intention that he and Colonel George should work in collaboration. In 1946, Colonel George became a partner in a firm of chartered accountants, Smallfield, Lindsay, Fynn, Fitzhugh, Tillett & Co., and obtained a lease of the second floor for this firm. The lease, dated Feb. 15, 1947, was from Aug. 1, 1946, to Michaelmas Day, 1949, and there was a collateral agreement in regard to various facilities to be enjoyed by the parties on each other's premises. The lease contained covenants by the tenants not to make alterations without consent, not to permit the premises to be used except for the purpose of their business, and not to assign or underlet the premises without the consent of the landlord, whose consent was not to be unreasonably withheld. In June, 1947, the tenants, Smallfield & Co., obtained other offices for themselves, and on Aug. 21, they wrote to the landlord stating that they were giving "temporary occupation" of the premises leased from him to Mr. Julius Trup, a client of theirs, and that "we shall be glad to hear that this arrangement will not be unsatisfactory to you." The landlord was away at the time, and on Aug. 22 his representative replied to the tenants, informing them of that fact and requesting them not to part with possession of the premises until the landlord had had an opportunity of considering the matter. The letter also said that, as the landlord was not the head lessor, "it is not within his power to agree to the suggested arrangement without first obtaining the consent of the head lessor, and for this purpose he will require . . . a note of the precise use to which the premises are to be put by Mr. Trup. Such use will, of course, be subject to the same conditions as stated in the head lease and in your firm's sub-lease." On Aug. 23, the tenants wrote stating that the matter was urgent and that their client would be moving in on Aug. 25. On Aug. 25, Messrs. Nathaniel Trup & Co., manufacturers of kitchen equipment, entered into occupation of the premises, and after a day or two they changed the lock on the outer door, so that the facilities provided for in the collateral agreement could not be carried out. When the landlord returned on Sept. 1, 1947, his solicitors gave notice, under the Law of Property Act, 1925, s. 146, specifying the breaches of the lease which they contended had occurred and requiring them to be remedied within seven days as otherwise proceedings would be commenced. The breaches were not remedied by Sept. 30, 1947, and the landlord brought this action. The tenants claimed that, on the true construction of the lease, there had been no breaches of covenant, and, in a counterclaim, applied for relief from forfeiture under the Law of Property Act, 1925, s. 146 (2). DENNING, J., held that there had been breaches of covenant and that, in the circumstances of the case, the tenants were not entitled to relief.

Roy Wilson for the landlord.

Comyn for the tenants.

H DENNING, J., [after stating the facts] : Questions have arisen whether there have been breaches of the agreement, and whether, if there are breaches, there should be relief or not. The lease, dated Feb. 15, 1947, and made between the landlord and the four partners in Smallfield & Co., is for just over three years, and in it the lessees covenant not to make alterations without consent, and [by cl. 9] not to use or permit the demised premises or any part thereof to be used except for offices for the purpose of their business. Clause 13 is also important :

Not to assign, underlet or part with the possession of the demised premises without the previous written consent of the lessor, such consent however not to be unreasonably

withheld in respect of a respectable and responsible tenant.

There is the usual proviso for re-entry.

The first clause with which I have to deal is cl. 9 whereby the lessees covenant :

Not to use or permit the premises to be used otherwise than as offices for the purpose of their business.

Counsel for the landlord says that that covenant has been broken because the business of Trup & Co., Ltd., is the business of making kitchen equipment, whereas the business of the lessees is that of chartered accountants. The clause gives rise to difficulties of construction. The material words are "for the purpose of their business." Counsel for the landlord put it as high as to say that that means for the purposes of the lessees' business at the date of the lease. I think that that is too narrow a view. I think that, if the lessees during the period of the lease changed the nature of their business from chartered accountants to some other business, they would not be in breach of that clause. The phrase does not mean the business of the original lessees as persons, because the covenant is for them and their assigns. If the firm has a change of partners, the phrase would include their business or that of their heirs or assigns. It does not, however, assume as wide a meaning as is contended for by counsel for the lessees. It seems to me the words, "for the purpose of their business," mean for the purpose of the business for the time being of the lessees or their successors or their assigns. If, however, the lessees or their successors or assigns wish to use the premises, or any part of them, or allow them to be used, for any other business, then they can only do so if they obtain the landlord's consent for the purpose. Throughout this case, the business of the lessees or their successors in title or assigns has been, and it still is, that of chartered accountants. The business of Nathaniel Trup & Co., Ltd., who are now in occupation under an underlease, is not the business of the lessees or their successors in title or their assigns. Therefore, it seems to me that for Smallfield & Co. to permit the demised premises to be used for the business of Trup & Co., Ltd., is a breach of the covenant in cl. 9 in the lease.

The next clause I have to consider is cl. 13, whereby the lessees were not to assign the demised premises without the consent of the lessor. In this case it is quite plain that on Monday, Aug. 25, 1947, Smallfield & Co. parted with the possession of the demised premises without the previous written consent of the lessor, and there was, therefore, a breach of that covenant. I bear in mind the proviso that such consent is not to be unreasonably withheld in respect of a respectable and responsible assignee or tenant. The proviso does not, however, do away with the necessity for the lessees to perform that part of the covenant with regard to obtaining the consent of the landlord, or, at any rate, asking for his consent, and giving him a reasonable time to consider the matter and to give or withhold his consent. In the letter dated Aug. 21, 1947, a Thursday, a Mr. Julius Trup is mentioned as the person suggested as occupier, some inquiries on behalf of the landlord were made on Aug. 22, 1947, and then on Monday, Aug. 25, 1947, Nathaniel Trup & Co., Ltd., were let into occupation. It seems to me that that was a plain breach of cl. 13 of the lease and the proper notice which was required by the Law of Property Act, 1925, s. 146, was given on Sept. 1, 1947. The breach was not remedied by Sept. 30, 1947, when the writ was issued. In these circumstances, it seems plain to me that, at the date of the writ, the premises were liable to forfeiture.

The question then is whether or not I should give relief. I find that consent was not obtained nor was any reasonable time given with regard to the matter, but, nevertheless, if it were a case in which the landlord could not withhold his consent, then the breach might well be said to be a technical matter and I should certainly give relief. I have, therefore, to consider whether this is a case where the landlord could, or could not, withhold his consent. It is not in dispute that Trup & Co., Ltd., were respectable and responsible tenants. The question is whether the consent was unreasonably withheld, notwithstanding that fact. It is not sufficient, as seems to be thought by the lessees, for the assignees to be respectable and responsible. The landlord is still entitled to consider the matter, because there may be reasonable grounds on which he

A can withhold his consent, however respectable they may be. The personnel of the proposed sub-tenant, and the nature or character or the user are material matters which the landlord should have an opportunity of considering. It is contended by the landlord that he could reasonably withhold his consent, because, apart from the words in cl. 9 of the lease, there was the understanding with Colonel George when the matter was initiated that the second floor of the premises was to be occupied by chartered accountants or professional men, and, since the tenants of the two floors had to live in close proximity and share facilities common to both, the personnel of the sub-tenants was of the utmost importance. The landlord says that he was also entitled to consider the collateral agreement made at the time of the lease. On that part of the case it seems to me, following what VISCOUNT DUNEDIN said ([1929] A.C. 72, 78) in *Tredegar v. Harwood* (1), that reasonableness does not refer only to something which touches both parties to the lease, but should be read in a general sense. I do not think it is necessary to lay down specific grounds whether conduct is reasonable or unreasonable. The circumstances of each case must be considered, and, in considering that point, I am not confined to the evidence with regard to the construction of the lease, but am entitled to have regard to the understanding that was contemplated by the parties when the lease was instituted. In my judgment, cl. 9 of the lease does not permit the premises to be used otherwise than as offices for the purposes of the business of the lessees and their assigns, and that covenant largely goes to support the landlord's view as to the user. Having regard to the close proximity of the parties on these two floors and the necessity for having people of corresponding outlook, and in view of the collateral agreement made when Colonel George and his firm became lessees, this is, in my opinion, a case where the landlord could reasonably withhold his consent.

B On Nov. 7, 1947, after the writ had been served, Trup & Co., Ltd., made an agreement with the lessees from which it is plain that Trup & Co. were to go out of legal possession for a few days, while the lessees re-took possession. The lessees were, thereupon, going to inform the landlord that the breach had been remedied, and they would then apply for a fresh licence to grant a sub-tenancy to Trup & Co., Ltd. The agreement further provided that, if the lessees were satisfied that Trup & Co., Ltd., were respectable and responsible, then in 18 days Trup & Co., Ltd., were to be re-allowed into possession under a tenancy agreement by the lessees, whatever the landlord had to say on the matter, because it is expressly stated in that agreement that, if the licence to sub-let was not granted, then Trup & Co., Ltd., were to be let into possession of the premises. Indeed, in the notice which they gave to the landlord's solicitors, the lessees' solicitors said :

F We are advised that your client has no right to refuse to grant a licence to sub-let the premises in the case of a respectable and responsible sub-tenant. We have to give you notice that after Nov. 22, 1947, our clients will let Messrs. Nathaniel Trup & Co. into the premises.

The lessees are there misconstruing the clause of the lease, because it is not sufficient for the purpose for the sub-tenant to be respectable and responsible. The landlord is entitled to have time to consider whether or not he should give his consent, and the lessees are not entitled to sub-let without that consent if the landlord has not had an opportunity of considering the matter. How can they say that the landlord is unreasonably withholding his consent unless they know his reasons for so doing and what his grounds are ? In these circumstances it seems to me that the lessees were not interpreting their lease correctly in acting as they did and insisting that, in any event, they should be granted a licence, because they were omitting to take into consideration the very relevant word, "unreasonably." They were treating the lease as if the words were "not to be withheld," instead of "not to be unreasonably withheld." In some circumstances, the question whether the proposed sub-tenants are respectable and responsible may be all that matters, but in this case it is not. Many other matters (*e.g.*, the personnel of the sub-tenants, their action in altering locks without leave, and their whole conduct in this matter) have to be considered in deciding whether it is reasonable or unreasonable to withhold consent, and it seems to me that, even apart from the terms of cl. 9 of the lease, the landlord acted reasonably in withholding his consent.

The result, therefore, is that there was a breach by the lessees in parting with the premises in August, 1947, and a further breach in November, 1947, in under-letting the premises without the consent of the landlord in circumstances in which the landlord could withhold his consent. The breach has been persisted in, and I see no reason on the facts of the case for saying that there should be relief. Accordingly, I give judgment for the plaintiff for possession and mesne profits from the date of the writ at £250 a year until delivery of possession with costs.

Judgment for the plaintiff with costs.

Solicitors: *Underwood & Co.* (for the landlord); *Francis & Calder* (for the tenants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BRITISH CELANESE, LTD. v. MONCRIEFF.

[COURT OF APPEAL (Lord Greene, M.R., Somervell, L.J., and Vaisey, J.), May 11, 12, 13, 1948.]

Master and Servant—Invention—Agreement for inventions made during employment to become exclusive property of master—Servant trustee for master—Obligation of servant, after termination of employment, to procure patent protection for master in other countries—Effect of agreement terminating service agreement.

M. was employed by a company as a research chemist, his service agreement, dated Dec. 24, 1942, containing the following provisions. By cl. 4, M. agreed to treat as confidential the affairs of the company and not to divulge them during the period of his employment or for 5 years thereafter, and, by cl. 5, he agreed, so long as he was bound by the agreement, to communicate to the company all inventions or improvements which he might make or discover. Clause 5 further provided that all such inventions and improvements without payment should become the sole exclusive property of the company, which would give M. such remuneration in respect of them as it thought reasonable, and M. would, if required by the company, but at its cost, apply to obtain letters patent or other equivalent protection for such inventions or improvements in all such countries as the company might require, would vest such letters patent or other protection in the company or as it should direct, and would do all he could to help the company to obtain and maintain them. In 1943, M. made certain inventions for which letters patent in Great Britain were obtained. By an agreement made between the company and M., and contained in a letter dated June 29, 1945, the service agreement was "terminated" as from June 30, 1945. Clause 3 of the leaving agreement provided: "In consideration of the termination of the agreement and the release by the company from your duties thereunder, you hereby agree and undertake with the company as follows . . ." Clause 3 (a) was a repetition of cl. 4 of the service agreement and cl. 3 (b) was, with certain modifications, a repetition of cl. 6 of the service agreement, with the variation, in each case, that M.'s obligation thereunder should cease on June 30, 1950. There was, however, no clause in the leaving agreement dealing with the future of the subject-matter contained in cl. 5 of the service agreement, *i.e.*, in regard to the facilitating of the obtaining of patents for inventions made by M. during his employment by the company. In 1947 the company asked M. to assist it to obtain patent protection for the inventions in foreign countries, but he refused on the ground that his duty to do so under cl. 5 of the service agreement had been terminated by the leaving agreement:—

HELD: the effect of the service agreement was to set up by contract the relationship of trustee and *cestui que trust* in respect of the inventions, and, since M. was under a continuing obligation to hold the inventions as the sole exclusive property of the company and would not be fulfilling that obligation unless he was prepared to give the company the benefit of obtaining the patents, the leaving agreement did not terminate his obligation to execute the documents necessary to enable

the company to secure patent protection in foreign countries. The obligations in regard to facilitating the obtaining of patents, which were set out in cl. 5 of the service agreement, were mere machinery for giving effect to the grant of the sole exclusive property in the inventions which the company was to have, and, therefore, express reference to them in the leaving agreement was not necessary, since they would have been implied by law in the undertaking by M. that the invention should be the sole exclusive property of the company. The object of the use of the words "termination" and "duties" in the leaving agreement was merely to put the parties in the same position (with slight modifications) as they would have been put if the service agreement had come to an end by effluxion of time.

Vokes, Ltd. v. Heather (1945) (62 R.P.C. 135), considered. *Triplex Safety Glass Co. v. Scorah* ([1937] 4 All E.R. 693), explained.

Decision of ROMER, J. ([1948] 1 All E.R. 123), affirmed.

[AS TO AGREEMENTS BETWEEN MASTER AND SERVANT IN REGARD TO INVENTIONS, see HALSBURY, Hailsham Edn., Vol. 24, p. 537, para. 1028; and FOR CASES, see DIGEST, Vol. 36, pp. 538-540, Nos. 40-58, and Supplements.]

Cases referred to:

(1) *Vokes, Ltd. v. Heather*, (1945), 62 R.P.C. 135; 2nd Digest Supp.

(2) *Triplex Safety Glass Co. v. Scorah*, [1937] 4 All E.R. 693; [1938] Ch. 211; 107 L.J.Ch. 91; 157 L.T. 576; Digest Supp.

APPEAL by the defendant from an order of ROMER, J., dated Dec. 19, 1947, and reported [1948] 1 All E.R. 123, in an action by the plaintiff company for a declaration that the defendant was a trustee for the company of certain inventions and for orders on the defendant to assign to the company his interest in applications for letters patent for the inventions in some of the Dominions and in certain foreign countries. ROMER, J., held that, on the true construction of a service agreement between the company and the defendant, the defendant was the trustee for the company of the inventions, notwithstanding that the service agreement had been determined and the defendant had left the company's employment, and, accordingly, he was bound to execute the documents in question. The defendant appealed, but the Court of Appeal now dismissed his appeal. The facts and the relevant clauses of the service agreement and of an agreement to terminate the service agreement appear in the judgment of LORD GREENE, M.R.

Shelley, K.C., and *H. J. B. Brewis* for the defendant.

Salt, K.C., and *Teague* for the plaintiff company.

LORD GREENE, M.R.: The controversy which has given rise to this appeal is due to the fact that the parties have not succeeded in expressing their contractual wishes in as clear and precise a manner as might, perhaps, have been desired, but, after a full and careful argument, I have come clearly to the conclusion that the decision of ROMER, J., was right and that the reasons that he gives are the right ones. The plaintiff company desired in the action to obtain the execution by the defendant of certain documents required for the purpose of making patent applications in various countries of the world. The proposed applications related to certain inventions for which patents had already been obtained in this country and, I think, the United States of America and Canada. The inventions had been made by the defendant when he was in the service of the plaintiff company and it is not disputed that, under the terms of the current service agreement, which was dated Dec. 24, 1942, he would have been liable to facilitate the applications for these foreign patents if the agreement had still been on foot. The difficulty arises from the fact that on June 29, 1945, an agreement was come to (which has been conveniently referred to as "the leaving contract") which terminated the service agreement, and the question is whether, on the true construction of that leaving agreement, read in its application to the service agreement and the nature of the subject-matter and other relevant surrounding circumstances, the defendant is freed from the obligation to facilitate the foreign applications which lay on him under the service agreement and would, undoubtedly, have had to be carried out by him if that agreement had not been put an end to.

The service agreement of 1942 took the place of an earlier service agreement of a similar character and cl. 15 of the 1942 service agreement provided that it should supersede as from June 1, 1943, the earlier agreement, which was dated June 13, 1938. It was thought that the inventions in question in this case had been discovered by the defendant during the currency of the 1942 agreement. The only thing, apparently, that was known by the plaintiff company was that the inventions had been made in 1943, but it so turned out that the inventions, or some of them, were made in the early part of 1943, at which time the 1938 agreement was still current. Nothing, however, in practice results from that, for the following reason. Counsel for the plaintiff company said that, the whole action having been framed and fought on the footing that the inventions were discovered during the currency of the 1942 agreement, he did not propose to argue that the question before us was governed otherwise than by the leaving agreement. In other words, we are to do what was obviously done in the court below, *i.e.*, we are to treat the obligations, if any, of the defendant in respect of those inventions as having arisen under the 1942 agreement and having been cancelled or got rid of, or not cancelled or not got rid of, as the case may be, by the leaving agreement.

The defendant was employed as a research chemist under the service agreement which was to remain in force for a period of three years. The company was to have the right to terminate the agreement on May 31, 1946, by giving six months' notice in writing. If it was not terminated, it was then to run for a further three years, and so on. The agreement contains various provisions designed to protect the company in respect of matters connected with the defendant's duties. He was engaged to perform such duties as might be allocated to him by the managing directors of the company, and was to devote the whole of his time to such work as the managing directors might require. Then come three clauses, cl. 4, 5 and 6, all of which are relevant to the question which we have to decide and one of which, cl. 5, is most particularly relevant. Clause 4 deals with the confidential affairs of the company, their processes and so forth, which the defendant agrees to treat as confidential and undertakes not to divulge during the period of his employment or for five years thereafter. Clause 6 restrains the defendant during the period of his employment and for five years thereafter from being engaged or interested in a competing business without the written consent of the company, with the proviso that, if the company were to refuse his request for its consent, it was to pay him compensation or consideration, to be calculated in accordance with a formula there laid down. Clause 5 is as follows :

The employed agrees so long as he is bound by any of the provisions of this agreement to at once communicate to the company all inventions or improvements of every nature which he may make or discover or may control or be in a position to communicate. Such inventions and improvements shall without payment become the sole exclusive property of the company if they desire to have them and the company shall give to the employed in respect of any such discovery invention or improvement whether patented or not such remuneration as they in their absolute discretion shall think reasonable. And the employed will if required by the company so to do but at the cost of the company apply for through patent agents or others nominated by the company and do all acts necessary to obtain letters patent or other equivalent protection for the said inventions or improvements in all such countries as the company may require and will vest such letters patent or other equivalent protection in the company or as they shall direct . . .

Then comes a provision that the company may use the name of the employed for the purpose of obtaining patents. He undertakes to render all possible assistance in obtaining and helping the company to obtain and maintain patents and not to disclose or give any information in respect of such inventions except as the company may direct.

The argument on behalf of the defendant may be summarised in this way. The leaving agreement, it is said, put an end to all obligations of the defendant under the service agreement, and one of the obligations under the service agreement so terminated was to do acts necessary to obtain foreign patents. Counsel for the defendant submitted that the learned judge had based himself on a wrong principle. That wrong principle, he says, was that there existed side by side with the contractual obligations of the defendant a different, separate and independent obligation arising from a relationship of trust, not

based on the contract and not arising out of it. I do not think that the comment of counsel for the defendant in any way does justice to the judgment of the learned judge, which to me seems to be quite clear and to avoid any such erroneous statement of the law. It was said in this court in *Vokes, Ltd. v. Heather* (1) that the obligations of confidence in the case of master and servant were based on the contract of employment—either on the express terms of such a contract or on the terms which the law would imply having regard to the relationship of the parties and to the subject-matter with which the contract was concerned. Of course, nothing that was said in that case was in any way intended to suggest that the contract might not of itself and by its own force create a trusteeship in the employed person. The court merely said (in answer to argument to the contrary effect addressed to it) that there cannot exist side by side in a contract of employment two quite separate obligations, one arising from the contract and the other disconnected from the contract and arising, not by virtue of the contract, but by virtue of some equitable doctrine. Counsel for the defendant suggested that the principle there laid down was different from something which had been said by FARWELL, J., in *Triplex Safety Glass Co. v. Scrorah* (2). That, in my opinion, is a misreading of what FARWELL, J., said. FARWELL, J., certainly found a relationship of trust in that case, but he found it, not as something independent of the contract of employment, but as something which arose out of the unwritten contract of employment and having, therefore, a contractual basis. That case is entirely consistent with the decision of this court in *Vokes, Ltd. v. Heather* (1). Not only did FARWELL, J., not fall into the error of which counsel for the defendant accuses him, but the learned judge in the present case did not fall into that error either. In the present case, ROMER, J., referred to the *Triplex* case (2) for one purpose and one purpose only—as confirming the view that he himself took that what is described as an invention in the service agreement in this case was a subject-matter susceptible of a relationship of trustee and *cestui que trust*. Beyond that he did not use the *Triplex* case (2). He found that the effect of the service agreement was to set up by contract the relationship of trustee and *cestui que trust* in respect of these inventions. I do not read his judgment as in any way finding the existence of some relationship other than that which depended on and arose from the contract itself.

I will now examine the leaving agreement. It was entered into, apparently, because the parties had in some way come to a difference of opinion with one another. It provides as follows. Clause 1 says that it is mutually agreed “that your service agreement dated Dec. 24, 1942, be and it is hereby terminated as from June 30, 1945.” I call attention to the word “terminated.” Clause 2 provides for compensation for loss of office. Clause 3 is very important. It runs as follows :

In consideration of the termination of the agreement and the release by the company from your duties thereunder, you hereby agree and undertake with the company as follows . . .

Then come two lettered paragraphs (a) and (b). Paragraph (a) is a reproduction, with a variation which I will mention, of cl. 4 of the service agreement, which deals with the keeping secret of confidential information belonging to the company. The variation is that, whereas cl. 4 of the service agreement did not, and, indeed, could not, give a precise date for the life of the obligation of confidence, para. (a) of cl. 3 of the leaving agreement inserted the period of five years from July 1, 1945. That corresponds to what in the service agreement was described as five years after the period of the employment. Paragraph (b) gives the defendant the consent of the company to accept a particular engagement with a named company, but imposes on him an obligation, similar to that imposed by cl. 6 of the service agreement, not to accept other employment save with the company's consent. Refusal of that consent was to entitle the defendant to compensation or consideration, as had been provided by cl. 6 of the service agreement for a similar situation. Paragraph (b) however, although in substance it reproduces cl. 6, differs from it in three respects—(i) it gives the company's consent to a particular named employment; (ii) it gives the limit during which the obligation of the defendant not to accept employment without consent is to last, that limit being five years

from the date of the leaving agreement, i.e., June 30, 1950, as in the case of para. (a); (iii) it fixes in terms of pounds, shillings and pence the compensation to be paid by the company in the event of their refusing leave to the defendant to engage in another employment. Under cl. 6 of the service agreement that compensation had been left to be determined by the formula there laid down.

I make particular mention of those two paragraphs (a) and (b), because they have an important bearing on the argument, and the argument based on them is a serious one, deserving of careful consideration. What is said is this. Here in the service agreement were three particular clauses, cl. 4, 5 and 6. In the leaving agreement cl. 3 (a) takes care for the future of the subject-matter intended to be protected by cl. 4 of the service agreement, and cl. 3 (b) of the leaving agreement similarly takes care for the future of the subject-matter intended to be taken care of by cl. 6 of the service agreement. Where is the corresponding clause to take care for the future of the subject-matter covered by cl. 5, viz., the facilitating of the obtaining of patents, if I may use that comprehensive phrase to cover all the obligations expressed in that respect in cl. 5? It is said that the fact that no such obligations under cl. 5 are preserved for the future, as had been the case with the obligations under cl. 4 and 6, shows that the parties did not intend that the obligations under cl. 5 should be continued after the date when the leaving agreement became operative. The argument is, at first sight, no doubt, an attractive one, but, in my opinion, it cannot prevail when certain fundamental considerations are borne in mind. Clause 5 of the service agreement is a very special clause. It deals with something of an entirely different character from what is dealt with by cl. 4 and 6—something which *prima facie* would belong to the employee. It provides that the inventions or improvements which the employed shall make are, if the company so desire, to be the sole exclusive property of the company. Clause 5, therefore, purports to deal with property which is going to belong to the company and property which obviously will be in the possession of the defendant, in the sense that the invention or the improvement may consist of something which he may have committed to paper, but, whatever it is, it is a thing which has a real and true existence. It may be in the shape of something committed to a piece of paper or a formula in his notebook or something in his head, but it is to be the exclusive property of the company. That is what I mean by saying that cl. 5 is dealing with a very different subject-matter, because it is providing for the transfer to the company of something which started by being the property of the servant, or, at any rate, in his possession and under his control.

A great deal of argument has turned on the nature of the obligations imposed by cl. 5 of the service agreement. It is said by counsel for the plaintiff company that cl. 5 is a contract under which the employee agrees to assume the duties of a trustee in respect of the inventions or improvements. I should think myself that the phrase "trustee" is not a perfectly accurate one, for the reason that "inventions and improvements" may not be property of such a character as that to which one usually finds a trust attaching, but the phrase is a convenient one because the obligations of the defendant, when he undertakes that his inventions shall be the sole exclusive property of the company, are, as it seems to me, analogous to the obligations of a person who declares himself a trustee of a more tangible piece of property. He must do everything necessary, I should have thought, to place the invention, the sole exclusive property of which the company is to have, fully and freely at the disposal of the company, with everything that that entails. It imports a negative obligation. He may not, any more than any other trustee may make use of trust property, make use of the invention for his own benefit. He must make the subject-matter of the trust (if I may use that word) available to the fullest extent to the beneficiary for whom he holds it and no one else. If cl. 5 had stopped there, the effect of it would, I think, have been that any invention and improvement made by the defendant during the currency of the service agreement would automatically have become, as between him and the company, the exclusive property of the company, provided that the company desired to have it, and, in the present case, the company did admittedly desire, and express their desire, to have the inventions and improvements with which

we are concerned. The contract, however, does not stop there. It goes on to express the obligations under which the employed is to be in connection with his obligation to hold inventions and improvements as the sole exclusive property of the company. The particular obligation which it is now sought to enforce is the obligation to facilitate the obtaining of patents. Speaking for myself, I should have thought that, even without the express reference to those matters in this clause, the undertaking that the inventions should be the sole exclusive property of the company would have imported the obligation to facilitate the applications for those patents, but, in this agreement, the parties have set it out expressly.

Counsel for the defendant is perfectly right in saying that here are express undertakings, detailed and specifically enumerated, of the obligations under which the employed is put in respect of the obtaining of patents for inventions that he has made. Now, says counsel for the defendant (and this is the point of his argument), the leaving agreement puts an end in terms to the duties of the defendant, among the duties of the defendant is the duty to facilitate the grant of patents, and, therefore, he is relieved of any duty to sign patent applications as he was requested to do and has been ordered to do in this case. It will be seen that the real solution of this case depends on a very few words contained in the leaving agreement, and the words on which counsel for the defendant particularly relies are the words "terminated" in cl. 1 of the leaving agreement and the word "duties" in cl. 3. Clause 1 provides that the service agreement "be and it is hereby terminated as from June 30, 1945." That, says counsel for the defendant, means that none of the obligations expressed in the service agreement is to be operative thereafter, save in so far as it is an obligation which had arisen previously to June 30, but had not been fulfilled. He agrees, as I understand him, that the word "terminated" has a limited meaning, in the sense that it does not destroy an obligation under the service agreement which had arisen, but had not been fulfilled. He says that the obligation to sign these documents had not arisen before June 30, because that obligation only arises when the defendant is required by the company to execute such documents. They did not require him to execute these documents until after June 30, 1945, and, therefore, says counsel for the defendant, that was a future obligation which had not arisen by June 30, and the effect of the termination of the service agreement is to prevent that obligation from ever arising. Clause 3 of the leaving agreement not merely repeats the word "termination," but it also contains a release by the company of the defendant from his duties under the service agreement. Counsel for the defendant contends that the obligation to facilitate the granting of patents is a duty expressed in contractual terms, all duties have been released, and, therefore, there is no longer any duty capable of arising in the future, after June 30, 1945. The argument has the merit of simplicity, but, in my opinion, it does not prevail. In dealing with a contract of this kind, it is most important, to my mind, to adhere to the rule that words must be read in relation to the subject-matter to which they are directed. The leaving agreement was directed to a rather complicated subject-matter, part of which was merely contractual, part of which related to confidential information belonging to the company and part of which provided for the formation of what I call (possibly by analogy, but I think sufficiently for this purpose) the obligation of trusteeship imposed by the provision that the inventions and improvements should become the sole exclusive property of the company. Counsel for the defendant does, I believe, admit that certain obligations under cl. 5 continue after the termination of the service agreement by the leaving agreement. He admits that these inventions and improvements are not things that the defendant is entitled to use for himself. He admits (although he declines to use the word "trusteeship") a continuing obligation for all time to hold these inventions and improvements as the sole exclusive property of the company. He admits that the defendant is not entitled to communicate the inventions to anybody else (the obligation not to disclose any such invention being an obligation expressly mentioned in cl. 4 of the service agreement). Counsel for the defendant, therefore, cannot construe the word "terminated" as meaning that all legal relationships between the parties are to come to an end. He quite clearly admits that certain legal relationships



continue. The obligation to hold the inventions as the sole exclusive property of the company is a continuing obligation; the obligation not to make use of the inventions for his own purpose is a continuing obligation; the obligation not to disclose to anybody else is a continuing obligation. On his own admission, therefore, counsel for the defendant is bound to put a very important limitation on what might otherwise have been the meaning of the word "terminated."

His argument does not, however, rest there, because there is the word "duties" and the more attractive part of his argument is, I think, based on his interpretation of that word. In the context and in relation to the subject-matter, the word is not, in my opinion, one which must have one meaning attributed to it and one meaning only. Quite clearly, from what I have said, on the admission of counsel for the defendant, certain duties are continuing, because, whatever he may say of the obligation of non-disclosure, the obligation not to use the inventions for the defendant's own purposes and the obligation to hold them as the sole exclusive property of the company are duties and they are continuing. Counsel for the defendant, therefore, is bound to admit, as I see it, that the word "duties" cannot apply to every legal obligation arising under the service agreement. Therefore, he is admitting that it has to have a more circumscribed application. Turning back for a moment to cl. 5, I have already explained part of what, I think, is the effect of it, namely, that it is dealing with the vesting in the company of a beneficial interest in something which has had its origin in the brain of the inventor. The clause provides means and machinery for getting the full fruit and benefit of that invention into the ownership of the company. The provisions for facilitating the obtaining of patents are really nothing more than machinery for giving full effect to the exclusive property in the invention which the company is to have. It is quite clear, to my mind, that the defendant could not be fulfilling his obligation to give the company the sole exclusive property unless he was prepared to give them one of the benefits which flows from having made an invention, namely, the benefit of obtaining a patent, provided, of course, that the subject-matter is a patentable one. But the parties have not left those obligations to be read out of the words "sole exclusive property." They have set them out in terms. One finds in ordinary trust documents that the obligations of trustees are very often set out in numbered paragraphs, for the sake of convenience or for safety. Even if implied by law, they are, nevertheless, often set out in express terms. These provisions about facilitating the obtaining of patents have no meaning and no possible application save in connection with and for the purpose of the grant of the sole exclusive property. By themselves they have no existence because the subject-matter which gives them a content would be missing. The whole clause, in effect, is dealing with the method of getting the invention from its origin in the mind of the inventor into a patent in the name of the company.

The result of the argument of counsel for the defendant would be—as he frankly admits—that these inventions, being the exclusive property of the company and being inventions of which the defendant may never make use for his own purposes, cannot be effectively vested in the company by the obtaining of the patent rights because the defendant is entitled, so to speak, to stop the process which I have mentioned by which the invention starts in the inventor's brain and ends up in a patent in the name of the company. He is (says counsel) entitled to say: "That process I can stop *in transitu*, so to speak. Up to a point you, the company, are to retain the benefits of cl. 5, but when it comes to signing a document for the purpose of making effective the right of exclusive property, which I, the defendant, recognise, the operation of cl. 5 has been broken off." Of course, the parties may have so intended. The result would be, as I ventured to put it, to leave the defendant as a dog in the manger because he could, according to his argument, effectively prevent the company from obtaining the foreign patents, but might not obtain the foreign patents himself and could not make use of the invention. As I have said, the parties may have so intended—people intend curious things sometimes—but the question that we have to consider is whether they have said it. I am far from suggesting that the absurd nature of the result is by itself a sufficient reason for interpreting a written agreement in such a way as to avoid it—the language must entitle one so to do—but it is a factor which can be taken into

consideration when you are dealing with the interpretation of words which are susceptible of a variety of meanings, as it appears to me that the words "terminated" and "duties" are susceptible in this leaving agreement. I regard these provisions about facilitating the obtaining of patents as mere machinery and nothing else, to give effect to the substantive matter, namely, the grant of the sole exclusive property which makes the company the beneficial owner of the invention. The argument that, though the reality exists, namely, the sole exclusive property, the machinery for giving effect to it has been sterilised and made incapable of working is not one that appeals to me, and I do not feel myself forced to adopt such an unreasonable construction of the words "terminated" and "duties." In my opinion, the object of the use of those words was in effect to put the parties in the same position as that in which they would have been if the service agreement had come to an end by effluxion of time, with the modification that paras. (a) and (b) of cl. 3 were inserted for the special reasons which I have mentioned. Counsel for the defendant agrees that, if the service agreement had come to an end by effluxion of time, the company's demand in this case would have been perfectly right and that the defendant would have remained under the obligation to sign these applications for the foreign patents. He says, however, that that is not the position, because the service agreement has not come to an end by effluxion of time, but has been prematurely killed by the leaving agreement. There, again, we get back to precisely the same question: Has the leaving agreement had such an effect, or has it, at any rate for this purpose, no greater effect than advancing contractually the time of the natural termination of the service agreement? In my opinion, it does no more than that, so far as the subject with which we are concerned is affected. In my opinion, the judgment of the learned judge was right and the appeal must be dismissed.

SOMERVELL, L.J.: I agree.

VAISEY, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Robbins, Olivey & Lake*, agents for *Longbothams, Horsfield & Fielding*, Halifax (for the defendant); *Linklaters & Paines* (for the plaintiff).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

plied. KASLEFSKY v. KASLEFSKY.
50] 2 All E.R. 398.

SQUIRE v. SQUIRE.

[COURT OF APPEAL (Tucker and Evershed, L.JJ., and Hodson, J.) April 19, 20, 21, May 14, 1948.]

Divorce—Cruelty—Need of deliberation, malignity and intent—Conduct arising from illness.

The proposition that a person is presumed to intend the natural and probable consequences of his acts applies to acts amounting to cruelty in matrimonial causes. If a spouse commits acts amounting to cruelty, they constitute cruelty notwithstanding that the conduct was the consequence of the spouse's illness (not amounting to insanity) and not of any spiteful or malignant intention.

Per TUCKER, L.J.: I must not, however, be understood to suggest that, in considering whether or not a case of cruelty has been established, the state of health of the parties is not a relevant matter to be taken into consideration, together with all the other surrounding circumstances of the case, or that the same weight is to be attached to every act whether committed in sickness or in health, or that it is not the duty of each spouse to care for and tend and show forbearance towards the other in case of illness.

Per EVERSLED, L.J.: I do not say that proof of such an intention (*i.e.*, a spiteful or malignant intention) may not be an important, or, in some cases, even an essential consideration.

Decision of FINNEMORE, J. ([1947] 2 All E.R. 529), reversed.

Dicta of SIR WILLIAM SCOTT in Holden v. Holden (1 Hag. Con. 453, 458) and Kirkman v. Kirkman (1 Hag. Con. 409, 410), of WILDE, J., in Hall v. Hall (3 Sw. & Tr. 347, 349), and of SHEARMAN, J., in Hadden v. Hadden (The Times, Dec. 5, 1919), approved.

Dictum of HENN COLLINS, J., in Astle v. Astle ([1939] 3 All E.R. 967, 971), not approved.

[AS TO LEGAL CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Vol. 27, pp. 281-293, Nos. 2513-2694.]

Cases referred to:

- (1) *Astle v. Astle*, [1939] 3 All E.R. 967; [1939] P. 415; 109 L.J.P. 6; Digest Supp.
- (2) *Horton v. Horton*, [1940] 3 All E.R. 380; [1940] P. 187; 109 L.J.P. 108; 163 L.T. 314; 2nd Digest Supp.
- (3) *Atkins v. Atkins*, [1942] 2 All E.R. 637; 2nd Digest Supp.
- (4) *Russell v. Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest 291, 2661.
- (5) *Holden v. Holden*, (1810), 1 Hag. Con. 453; 27 Digest 285, 2563.
- (6) *Kirkman v. Kirkman*, (1807), 1 Hag. Con. 409; 27 Digest 286, 2579.
- (7) *Hall v. Hall*, (1864), 3 Sw. & Tr. 347; 33 L.J.P.M. & A. 65; 9 L.T. 810; 27 Digest 323, 3022.
- (8) *Hadden v. Hadden*, (1919), *The Times*, Dec. 5.
- (9) *Edwards v. Edwards*, [1948] 1 All E.R. 157; [1948] L.J.R. 670.
- (10) *Evans v. Evans*, (1790), 1 Hag. Con. 35; 27 Digest 281, 2522.
- (11) *Westmeath v. Westmeath*, (1827), 2 Hag. Ecc. Supp. 1; on appeal 2 Hag. Ecc. Supp. 61; 27 Digest 339, 3196.
- (12) *Curtis v. Curtis*, (1858), 1 Sw. & Tr. 192; 27 L.J.P. & M. 73; 31 L.T.O.S. 272; *affd.*, (1859), 4 Sw. & Tr. 234; 27 Digest 450, 4650.
- (13) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; [1948] L.J.R. 515; 176 L.T. 498.
- (14) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341.

APPEAL by the husband from a decision of FINNEMORE, J., dated July 9, 1947, and reported [1947] 2 All E.R. 529, dismissing his petition for divorce on the ground of his wife's cruelty.

The conduct complained of was the consequence of the wife's illness, and did not consist of deliberate malignant acts done with the intention of injuring the husband. *Inter alia* it was that from 1940 to 1944, at whatever place the husband and the wife might be residing together, the wife systematically for nights on end prevented the husband from sleeping, demanding that he read to or conversed with her. If he showed signs of going to sleep, she unreasonably demanded that he should perform various menial services for her and/or stripped the clothes from his bed, and/or moved furniture about the room, and/or switched electric lights on in the room, whereby the husband was deprived of sleep and suffered in health. The Court of Appeal allowed the appeal, holding unanimously that malignant intention was not an essential element of cruelty, and that (HODSON, J., dissenting) the judge in the court below had found cruelty in fact, or, if he had not so found, that the evidence clearly established cruelty.

Salmon, K.C., Roland Adams and Harold Cassel for the husband.

Theodore Turner, K.C., and R. J. A. Temple for the wife.

Cur. adv. vult.

May 14. The following judgments were read:

TUCKER, L.J.: In this case FINNEMORE, J., has dismissed the husband's petition for divorce for his wife's cruelty on the ground that the conduct complained of was the consequence of the wife's illness and did not consist of deliberate malignant acts done with the intention of injuring the husband. In his judgment the learned judge states the argument for the husband on this part of the case in these words:

If I understand the argument of counsel for the husband it is this, that it does not matter if, in fact, the wife was making these demands on her husband; she must be taken to have appreciated the effect they had upon him, and intended the natural consequence, which is that he would suffer in health. She knew that night by night she was requiring him to read to her, and she knew, or ought to have known, that he could not sleep; and she knew or ought to have known therefore that sooner or later his health would break down under her conduct; and she was responsible and,

therefore, she was cruel. The only defence to that—I am still taking the argument, as I understand it, for the husband—would be insanity, and short of that if she knew what she was doing, she must be presumed to have understood and intended the natural consequences.

Having dealt with the evidence, he says :

I, therefore, come to these conclusions on the facts. I think that the husband was required to do this reading. I think the wife did make a good many complaints. I am quite sure she was extremely difficult to live with and finally impossible, situated as they were, and I think further that the cause of all that was not a desire to hurt her husband, to whom she was devoted, as he was to her. I think she was an invalid, a very serious invalid, suffering pain, weakness and psychological or mental troubles, requiring many things to be done for her and unable to settle down to have things done for her except by her husband.

Later on he says :

I do not think that she ever deliberately set out, out of spite to her husband, to say : “ I am going to hurt him,” or as I mentioned before : “ As I can't sleep, he shan't.” I am quite satisfied about that.

The learned judge then referred to *Astle v. Astle* (1), *Horton v. Horton* (2) and *Atkins v. Atkins* (3), and expressed his view of the law as follows :

All these cases emphasise, as I think the cases before 1937 laid down, the fact that cruelty must be deliberate, malignant and intended—whatever precise words you like to use.

On this single ground he dismissed the petition.

In my opinion, the learned judge formed an erroneous view as to the effect of the authorities. One starts with the undisputed proposition that, generally speaking, a man is presumed to intend the natural and probable consequences of his acts. Is there any authority which decides that this is inapplicable to acts amounting to cruelty in matrimonial causes? No such case was cited to us. On the contrary, there is a considerable body of authority to the opposite effect. It is to be observed that in the well known and much quoted case of *Russell v. Russell* (4) it is nowhere suggested that motive is a necessary element in cruelty. More than 80 years earlier in *Holden v. Holden* (5) LORD STOWELL (as he later became) had used this language (1 Hag. Con. 453, 458) :

It is not necessary . . . to inquire from what motive such treatment proceeds. It may be from turbulent passion, or sometimes from causes which are not inconsistent with affection . . . If bitter waters are flowing, it is not necessary to inquire from what source they spring.

In *Kirkman v. Kirkman* (6) the same judge had previously observed (1 Hag. Con. 409, 410) :

If that safety is endangered by violent and disorderly affections of the mind, it is the same, in its effects, as if it proceeded from mere malignity alone ; it cannot be necessary, that, in order to obtain the protection of the court, it should be made to appear to proceed from malignity.

In *Hall v. Hall* (7) the JUDGE ORDINARY says (3 Sw. & Tr. 347, 349) :

With danger to the wife in view, the court does not hold its hand to inquire into motives and causes. The sources of the husband's conduct are, for the most part, immaterial. Thus, I have no doubt that cruelty does not cease to be a cause of suit if it proceeded from “ violent and disorderly affections,” as said in one case, or from “ violence of disposition, want of moral control, or eccentricity ” as said in another, or “ from a liability to become excited in controversy,” in the language of a third ; but madness, dementia, positive disease of the mind, this is quite another matter.

In more modern times there is a case of *Hadden v. Hadden* (8), in which SHEARMAN, J., said :

I do not question he had no intention of being cruel but his intentional acts amounted to cruelty.

Quite recently, in dealing with a case of constructive desertion by a husband founded on his conduct which resulted in his wife leaving the matrimonial home, LORD MERRIMAN, P., in *Edwards v. Edwards* (9) said ([1948] 1 All E.R. 157, 159) :

I have mentioned that this court, and, indeed, many judges in the Division individually, have referred over and over again to the principle that a man must be taken to intend the natural consequences of his acts. If it is a natural consequence of a man's

direct treatment of his wife that she leaves him, it is a commonplace that, whatever he says in words, he must be taken to intend that she will do so.

There is nothing in the cases referred to by FINNEMORE, J., which conflicts with this line of authority. I need only refer to *Astle v. Astle* (1), which might at first sight appear to lend support to the learned judge's view, but on closer examination it will be seen that HENN COLLINS, J., was dealing with a case of insanity, where it was pleaded and found by the judge that during a certain period the respondent did not know the nature and quality of the acts committed by him and relied on as cruelty. It was in dealing with the question whether these acts were intentional acts for which the respondent was responsible that HENN COLLINS, J., used the language which is summarised in the headnote. He said ([1939] P. 415, 419; [1939] 3 All E.R. 967, 971):

I have said that my conclusion of fact is that the respondent did not know the nature and quality of the acts which he committed in the year 1927, and, if those acts stood alone the petitioner could not get relief, since in my judgment intention or malignity is an essential ingredient in cruelty.

Even in its restricted context I do not, however, agree with the use of the word "malignity." In my view, the law on this point cannot be more clearly expressed than in the brief statement of SHEARMAN, J., quoted above. It follows, therefore, that this case cannot be disposed of on the short ground that the wife's conduct was not actuated by spite, but was due solely to her state of health. I must not, however, be understood to suggest that, in considering whether or not a case of cruelty has been established, the state of health of the parties is not a relevant matter to be taken into consideration, together with all the other surrounding circumstances of the case, or that the same weight is to be attached to every act, whether committed in sickness or in health, or that it is not the duty of each spouse to care for and tend and show forbearance towards the other in case of illness. As, in my view, the learned judge's decision cannot be supported on the ground on which he based his judgment, it becomes necessary to examine the evidence and his findings of fact, if any, in relation thereto in order to decide whether or not a case of cruelty has been established by the husband. A number of incidents were relied on in the petition, and were referred to in the evidence, and are dealt with in the judgment, with regard to which the learned judge came to the conclusion that they did not in the circumstances of this case amount to cruelty. He expressed the view, with which I agree, that the case stands or falls on the question of sleep and nagging, *viz.*, whether the wife by her exacting demands and nagging deprived her husband of sleep to such a degree that his health was impaired.

[HIS LORDSHIP stated the facts, reviewed the evidence in this connection and continued:] After a careful study of the whole of the evidence I have come to the conclusion that the evidence given by and on behalf of the husband was substantially unchallenged. There was a suggestion in general terms that the husband's story had "improved in the telling" and that he had not been kept up all night on as many occasions as he said, but the real defence throughout was, not that the incidents never took place nor that the husband willingly acquiesced in the demands of his sick wife, but that the behaviour described by the husband was solely attributable to his wife's state of health and was not actuated by spite.

I have read and re-read the learned judge's judgment to see if I could obtain any assistance from his findings of fact on this vital issue, *viz.*, whether the husband was, in effect, compelled by violence to submit to his wife's demands or whether he was throughout willingly ministering to her, or, at any rate, of his own free will yielding to her demands. There are passages in the judgment in which the judge describes him as a man of honour with a high sense of duty doing all he could to get his wife better, which, taken by themselves, might indicate a finding of acquiescence on his part, but, on the other hand, there is nothing to suggest that the judge rejected any part of his evidence, or considered it exaggerated, or regarded him as anything but a truthful and reliable witness. He accepted his evidence on the controversial issue as to the terms on which he finally parted from his wife in 1944. The only matter with regard to which the judge expressed any doubt was as to his present recollection concerning his motives in writing letters in affectionate terms to his wife at a

time when she was behaving in the way complained of. FINNEMORE, J.'s judgment must be read as a whole, and, so read, it is, I think, plain that he was not directing his mind to this issue at all, and, consequently, it is unhelpful and misleading to quote isolated passages therefrom out of their context.

In this court, therefore, I find myself without the benefit of the trial judge's findings directed to what I regard as the material issue in the case. In such circumstances it is necessary carefully to consider whether we have sufficient material to enable us to deal with the case ourselves or whether we are compelled to direct a new trial. Were it not for the fact that a study of the whole of the evidence leads me to the conclusion that the husband's evidence, corroborated as it was, was not seriously challenged, I should have felt compelled to the view that there must be a new trial, but, as I think, having regard to the way the case was conducted below, there was really only one conclusion at which the learned judge could have arrived on this aspect of the case, I feel that we are in a position to enable us to grant the relief to which I think the husband, who was regarded by the judge as a truthful and reliable witness, is entitled on his unchallenged evidence, coupled with the undisputed effect on his health of his wife's conduct. I would add that I have not lost sight of the letters of affection written by the husband to the wife during the material period, nor to his delay in seeking a divorce on the grounds now relied on. As to these matters I would, first, observe that, though they would, no doubt, afford material for cross-examination—and were, in fact, so used on the issue of the husband's belief in the motives of his wife—they are of no value unless, so used, they result in discrediting the testimony of the husband. As that evidence was not in fact challenged, I feel difficulty in seeing how this material can now avail the wife. In any event, it does not seem to me that the existence and persistence of a deep affection for his wife is in any way inconsistent with the husband's evidence as to his wife's behaviour, which was admittedly due to her neurotic condition.

For these reasons I think this appeal succeeds and that the husband is entitled to a decree *nisi* on the ground of the wife's cruelty.

EVERSHED, L.J.: In my judgment, this appeal should succeed. As I read his judgment, the learned judge was of opinion that the absence of any spiteful or malignant intention on the part of the wife (as he found to have been the fact) was fatal to the husband's claim. I am unable to agree with this view of the law. I do not say that proof of such an intention may not be an important, or, in some cases, even an essential, consideration, but in the circumstances of the present case, for reasons which have been stated by TUCKER, L.J., and which I need not repeat, I do not think proof of such an intention was a requisite for the husband's success. It is conceded that the wife, though her mind and judgment were distracted by the illnesses from which she had suffered, was not insane. She remained at all material times responsible for her actions. If, therefore, her conduct to her husband was, in fact, cruel, she cannot, as it seems to me, escape its natural consequences.

Shorn, then, of what I hold to be the learned judge's misdirection in law, the case presents itself thus: On a fair reading of his judgment has the judge found cruelty in fact? Has he, on the other hand, found voluntary submission or acquiescence on the husband's part? And, if no certain answer can be given to these questions, can this court, on a perusal of the transcript of the evidence in the case, though without the advantage of seeing the witnesses in the witness box, itself reach a conclusion on the facts? Although the case has presented many difficulties, and although on the view taken of the facts of the case by TUCKER, L.J. (with which I agree) it is not necessary for our decision, my own view is, on the judgment as I read it, that the judge has found cruelty in fact and that he would, but for the view of the law which he took, on his findings, have pronounced—and, in my judgment, properly pronounced—in the husband's favour. Further, if I am wrong in this conclusion, at least there is, in my judgment, no finding by the learned judge sufficient to defeat the husband's claim, and on my reading of the evidence as a whole I think, as I have already indicated, that the husband has made good his case for dissolution of his marriage. I do not attempt any definition of the words "cruel" or "cruelty" save to say that the conduct complained of must at least satisfy the ordinary acceptance of those English words, and that, on well settled

authority, it must be such as to have injured, in fact, the complainant's mental or physical health or be such as to cause real apprehension of such injury. On the second qualification no difficulty arises. It has not been disputed before us that, as a result of the wife's conduct, the health of the husband was most seriously affected. As to the first qualification, I do not forget the obligation of a spouse to take his or her partner in sickness and in health, for better or for worse, nor must I be thought to suggest that the substance of that obligation has lost any of its validity, but some limit must necessarily be set to it. If it be conceded, as, in my view, it must, that, in such a case as the present, proof of malevolent design is unnecessary, all, or almost all, acts of cruelty, not, in fact, malevolent, must proceed from some sickness or disorder of the mind, though in many cases falling short of insanity. A husband or wife who, by repeated acts of uncontrolled violence, inflicts serious bodily injury on his or her spouse, or who, by consciously depriving her or him of food, reduces her or him to a state of semi-starvation, cannot, as it seems to me, escape the consequences of those acts by praying in aid the obligation of the marriage vow. In the present case the conduct complained of by the husband deprived him, time and again, of the sleep which is no less necessary than food for bodily refreshment. That the wife's conduct proceeded from her sickness may properly absolve her from the stigma which malignancy would have imposed, but the result, in my judgment, on the facts of the case (and, as I think, on the judge's findings) was beyond what the husband could be properly called on to endure.

I turn, first, to the question which formed the subject of the main contest before us: Has the judge held the husband to have voluntarily assented to the demands made on him by his wife and on that ground deprived himself of his right to relief? The point is wholly distinct from that of condonation on which the judge expressed no conclusion. What is said by counsel for the wife is, in effect, that, though the demands made by the wife on the husband, because of her illness, were at times exacting in the extreme, nevertheless the husband, as a dutiful and loving husband, was held by the judge to have voluntarily and willingly submitted to those demands, and that, if a husband, so voluntarily submitting himself, ruins his own health in the process, then (though he may be greatly deserving of sympathy) he cannot claim relief in these courts. The passage in the judgment most strongly relied on in support of this argument reads as follows:

The picture I see, and I think it is much more creditable to both of them, is of a wife, undoubtedly seriously ill, and a husband, undoubtedly a man of honour with a high sense of duty, doing all that he could, even at the expense of his own comfort and health, to get his wife better. I do not doubt that ultimately he broke under the strain, and the task proved for him too much, and I think for that reason he has probably thought back to rather far-off days.

Bereft of the context these sentences, no doubt, lend colour to the argument, but, in my judgment, it is clear that, when read in their context, the words I have quoted were not intended as a finding that the husband had willingly acquiesced in the course of conduct imposed on him by his wife. The words represent the learned judge's conclusion, or part of his conclusion, on the question which he regarded as the main question, *i.e.*, whether the wife was acting spitefully or maliciously towards her husband, and, more particularly in that regard, whether the judge could accept the husband's evidence given at the trial that, notwithstanding his contemporary letters, he had thought so at the time. When the whole of this part of the judgment is read, it is, to my mind, clear that the material sentences cannot be construed as a finding of such acquiescence on the husband's part as defeats his claim. In my judgment, these sentences amount to no more than a rejection (in this one instance) of the husband's evidence that at the time he wrote the letters he thought his wife was actuated by malice, and a finding that, in writing the letters, the husband was prompted by duty and affection, hoping and believing that his wife might recover from the sickness which was responsible for her actions. I am confirmed in this opinion by other considerations, and, first, by the whole tenor of the judgment. As I have already stated, the judge plainly regarded the main question for his decision: Aye or no, was the wife acting malevolently? At the beginning of his judgment the learned judge posed for himself the dilemma—either he must refuse relief to the husband or he must “fix fairly and squarely on the

shoulders of the wife" the matrimonial offence of cruelty, notwithstanding that her conduct emanated from her illness. If "acquiescence" in the sense for which counsel for the wife has contended was the answer to the husband's claim and he so intended to find, then malevolence was not the main issue, or, indeed, a necessary issue at all, and he put to himself a choice and difficulty which did not really arise. Nor was it necessary for him to examine, as he did, the various incidents relied on and to reject some of them as (apart from malignity) not amounting to cruelty. As I read the whole judgment, I think it follows that (apart from the possibility of condonation with which he did not deal) had he either found malice in fact on the part of the wife or held malice to be unnecessary as a matter of law he would have pronounced for the husband. A second matter which supports the view I have formed is that acquiescence, as distinct from condonation, was not pleaded as a defence, nor, in my judgment, was it ever really put to the husband in cross-examination.

There is a third consideration going to the root of the suggested defence which, if not, perhaps, directly bearing on the terms of the judgment, may here be mentioned. In putting the point before us counsel for the wife suggested the analogy of a claim for cruelty based on acts of sexual perversion and a defence of acquiescence in the sense of voluntary participation in those acts, but I am not satisfied of the truth of the analogy. In such a case refusal to submit does not present the difficulties with which a husband in circumstances like those in the present case is faced. What were the choices before the husband, situated as he was with his wife in India in war time? He might have retaliated with violence, or done so to a greater extent than he did, for it was proved that on some occasions he did strike her. The choice is not one likely to commend itself to a husband with a sense of duty and propriety or to a husband who loved his wife. He might have deserted her in India. Was such a course, however, reasonably practicable for him, particularly when regard is had to the demands she made on him and the kind of offensive telegrams she sent to him when away from him? The only remaining course open to the husband was to submit in one form or another until they could both leave India. In a case of cruelty such as the present (for I assume for this purpose that the wife's acts were cruel), a spouse may, in practice, have no choice but to submit until further submission becomes impossible. In my judgment, however, it would not be right to say that such submission amounted to acquiescence so as to defeat the claim for relief. I conclude, therefore, that there is in the judgment no finding of acquiescence as counsel for the wife contended.

There remains the question: Has the judge found cruelty in fact? As already indicated, once the suggested finding of acquiescence is out of the way, an answer to the question is not, on the view of the facts which I take, strictly necessary, but were it necessary I should be prepared to hold that he has. In my judgment, indeed, the answer really follows by necessary inference from what has been already said in reference to the general form of the judgment—the dilemma posed at the beginning, the formulation of the issue of malice as the main question to be determined, and the judge's examination of the various incidents complained of and the rejection of some of them (such as that of upsetting the wireless) as insufficient to amount in any case to cruelty. Counsel for the wife referred us to the well-known judgment of LORD STOWELL in *Evans v. Evans* (10) (to which I refer again later) and it was argued that the language of the learned judge fell short of a finding of acts imposed on the husband as distinct from mere requests made to him. However, as counsel for the husband pointed out, the material word used almost exclusively by the judge in reference to the calls made on her husband by the wife was "require"—a word at least more consistent with command than request. Moreover, in a context referring to certain incidents the word must have imported compulsion. In any case, as it seems to me, once the alleged finding of acquiescence is out of the way, the significance of the search for words importing compulsion is largely disposed of. I shall not travel through the whole judgment, but the conclusion is thus stated in the following passage:

Now, I think, considering them as well as I can, that those letters are consistent with the attitude of a man who has faced a desperately difficult and unhappy situation as a husband should, and realised that it was not really his wife's fault, but was the result of her desperate ill health and insomnia. I, therefore, come to these conclusions

on the facts. I think that the husband was required to do this reading. I think his wife did make a good many complaints. I am quite sure she was extremely difficult to live with, and finally impossible, situated as they were, and I think further that the cause of all that was not a desire to hurt her husband, to whom she was devoted as he was to her. I think she was an invalid, a very serious invalid, suffering pain, weakness, and psychological or mental troubles, requiring many things to be done for her and unable to settle down to have things done for her except by her husband.

In my view, the learned judge intended to find and did find conduct on the part of the wife amounting to cruelty in fact, and such that, had it not been for his finding and conclusion of law in regard to malice, and apart from condonation (with which he did not deal), he would have held the husband entitled to a decree.

If, however, there be no sufficient finding of cruelty in fact, then, at least, in my view, there is no finding of fact sufficient to negative cruelty. This conclusion follows and follows, in my view, *a fortiori* from what I have already said on the whole form and tenor of the judgment. If the judge intended to find nothing which, apart from malignity, would amount to cruelty in fact, it was not only unnecessary to deal with the question of malignity, but inconsistent and senseless to treat it as being the main issue in the case. It was also pointless to refer to certain of the incidents alleged as distinct from others, and to find as regards them that they did not in any case fall within the meaning of the word "cruel." Equally unnecessary and pointless, on this hypothesis, was the judge's formulation of the case in the following passage:

Life having become impossible between them in that sense, was that because the wife was treating her husband cruelly, or was it that her illness and ill-health became so bad and she needed so much care, because of her illness, and made so many demands on her husband, that he could no longer meet them without breaking down himself? If I understand Mr. *Salmon's* argument, it is this, that it does not matter. If, in fact, the wife was making these demands on her husband, she must be taken to have appreciated the effect they had on him and intended the natural consequence, which is that he would suffer in health. She knew that night by night she was requiring him to read to her, and she knew, or ought to have known, that he could not sleep, and she knew, or ought to have known, therefore, that sooner or later his health would break down under her conduct, and she was responsible, and, therefore, she was cruel.

The judge thereupon proceeded to a discussion of what he calls "the real difficulty" and "the main question" in the case, namely, the issue of malignity, and to a citation of the various authorities on that point. I have already referred to the statement of conclusion in one part of the judgment. I cite finally two further passages—first:

In the result, as I say, I have come to this conclusion, that this was a case of a woman very seriously ill and in great pain, unable to sleep, making very wide demands on her husband, the only member of her family she had, demands which became from a practical point of view impossible for him to comply with indefinitely. I do not think that she ever deliberately set out, out of spite to her husband, to say: "I am going to hurt him," or, as I mentioned before: "As I can't sleep, he shan't." I am quite satisfied about that. I am satisfied that because of the illness life became impossible for them. Now, is that cruelty?

Secondly:

I think in a case where on the facts the court is satisfied that there was no deliberately adopted intention (as I find in this case), but, owing to illness and in the course of illness and arising out of illness, there was conduct and there were demands made upon the other partner to the marriage which were heavy and became impossible, you do not establish cruelty.

For these reasons I find it impossible to interpret the judgment as containing such findings as negative cruelty in fact.

If, therefore, the true view is that there are in the judgment no findings of fact one way or the other, true it becomes the duty of the court, if it can, to reach its own conclusion of fact on all the evidence assisted by the findings of the learned judge so far as they go. On this aspect of the case I have had the advantage of reading the judgment of TUCKER, L.J., with which I find myself in entire agreement. In approaching the evidence, which TUCKER, L.J., has fully analysed, it is important to have in mind (as pointed out by my Lord) that the learned judge accepted the husband as a truthful and candid witness plainly preferring—and I am not surprised that he did prefer—the husband's

evidence to that of the wife. The judge's finding on the issue of what occurred when the husband left the wife in February, 1944, strikingly illustrates, in my view, the reliance which can be placed on the husband's testimony. It is, no doubt, a point of substance that, until the presentation of the petition, the husband does not appear to have regarded himself as a victim of cruelty, and had, indeed, suggested that his wife should herself bring proceedings for divorce based on his desertion since February, 1944, and, further, that the husband, having sought advice in India in 1942, was not then advised that he had any case for dissolution of his marriage on the ground of cruelty or otherwise, but, as it seems to me, the weight and importance of these matters goes rather to the credibility of the husband's testimony. It is clear that the learned judge accepted his evidence of his wife's conduct as true. Once it is established that the various acts alleged did occur, in fact, it cannot matter that it may not have occurred to the husband that they constituted cruelty, or that a lawyer in India in 1942 advised that they did not. The facts having been established, it was for FINNEMORE, J., to decide, and it is now for this court to decide, what are their legal consequences. I bear in mind the passage from LORD STOWELL'S judgment in *Evans v. Evans* (10) (1 Hag. Con. 35, 38) to which I have already referred. In my view, the conduct proved far exceeds

Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offences in the marriage-state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation.

It is not seldom emphasised that every case must depend on its own peculiar facts, and that observation is particularly applicable to a case of cruelty such as the present, depending on the conclusion to be derived from a consideration of conduct extending over a period of years, during which a number of specific instances of varying significance stand against and illustrate a general background. In my judgment, it is clearly proved that over that period the wife, who suffered from insomnia at night (though not even able to sleep by day) and serious nervous distractions, including a good deal of self-pity as a result of many illnesses, demanded of her husband an altogether extraordinary degree of ministration, and as part of her demands, time and again, refused to allow him to sleep at all until 3 or 4 in the morning, or, at times, at all throughout the night, and that when from natural weariness he went to sleep she roused him by such means as pulling off his clothes, moving furniture and turning on taps. There was corroborated evidence of incidents illustrating such conduct. I observe also that, as regards these acts, the wife in her evidence did not attempt to say, as I understand her, that the husband was voluntarily ministering to her, but denied the facts or any recollection of them. To this must be added "nagging" of an intemperate kind, illustrated by various incidents. The result was, beyond doubt, seriously to injure the husband's health and to render it, as a medical witness said and the learned judge found, "impossible" for the husband to live longer with his wife. I, therefore, think that, if there was no finding by the judge of cruelty in fact, such cruelty is established by the evidence. On the defence of condonation I agree with TUCKER, L.J., for the reasons which he has given that that defence is not established. I, therefore, would allow the appeal and grant a decree *nisi* on the petition.

HODSON, J. [having stated the facts]: Unfortunately, at the trial the case appears to have been so conducted that the attention of the learned judge was distracted from the true issue, *viz.*, whether or not cruelty had been established on the evidence, apart from the question whether or not the wife had the intention of being cruel. I agree that the judgment appealed from is to a great extent vitiated by this distraction, and that it is necessary to examine the evidence and the learned judge's findings of fact in relation thereto in order to decide whether a case of cruelty has been proved. I also agree that a vital issue in the case is whether the husband was compelled to submit to his wife's demands or whether he was willingly ministering to her, impelled by natural

sympathy and affection and the sense of duty to tend her in her sickness. It is true that, in so far as the judgment in favour of the wife depends on a finding that there was no intention on her part to injure her husband, it appears that the existence of compulsion does not arise for consideration, and it may fairly be argued that absence of motive does not arise except on the view that the evidence of the husband was accepted as establishing a case of cruelty. I have, however, considered the judgment to the best of my ability and have formed the opinion that, no intention to injure having been found, the case was also dealt with by the learned judge on the alternative basis that, apart from the question of intention, no cruelty had been proved. It is at this point that I respectfully dissent from my Lords. I recognise the danger of taking isolated parts of his judgment in order to support this view, but I am, nevertheless, of opinion that, whenever in his judgment findings of fact appear, they are really consistent only with a finding that there were no acts of cruelty and no compulsion at any time. I do not think that these findings are inextricably confused with the learned judge's misconception as to intention. There are, indeed, references in the judgment to "another aspect of the case," *viz.*, whether the wife was actuated by spite, which show that the learned judge was looking at the case from more than one point of view. [HIS LORDSHIP referred to extracts from the judgment and the correspondence and continued:] It is true that the repeated use of the word "require" approximates to a finding of compulsion, but the learned judge, in my opinion, rightly attached great importance to letters written by the husband to the wife during the relevant period, including, as they did, a request by him to her to join him because he realised she was unhappy as well as for financial reasons. These letters, if genuine, as they were found to be notwithstanding the husband's denial, throw a strong light on the view which the husband took of his wife's conduct at the time and go some way towards negating the husband's case that he was acting under compulsion. As to his attitude at the time, the observations of the judge of the Consistory Court in *Westmeath v. Westmeath* (11) (2 Hag. Ecc. Supp. 1, 52) (cited in *Curtis v. Curtis* (12) (1 Sw. & Tr. 192, 197)) are material. He says:

... if they are not resented as injuries at the time, a state of things intervenes which either detracts from the weight of particular evidence when brought forward at a subsequent period, or may introduce quite another view of the relative situation of the parties.

If he had then resented the exacting requirements of his invalid wife he could have, at least, refrained from encouraging her to join him. Moreover, his forbearance from making allegations of cruelty until many years after the events complained of and only when his efforts to induce his wife to divorce him on the footing that he had deserted her without any cause is hardly consistent with the resentment which he now alleges.

The passage from the judgment read by EVERSLED, L.J. (p. 56 *ante*) refers to the picture of the parties as of a wife seriously ill and a husband doing all that he could even at the expense of his own comfort and health to get his wife better. This passage appears to summarise the general view which the learned judge took of the whole case.

The findings of fact lead me to consider whether the evidence can support them, having regard to the views expressed in the House of Lords in *Watt v. Thomas* (13) as to the weight to be attached to the findings of a trial judge who has seen and heard the witnesses. LORD THANKERTON said ([1947] 1 All E.R. 582, 587):

It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves, and, further, within that class, cases of alleged cruelty will afford an even stronger example of such an advantage. Normally, the cruelty is alleged to have occurred within the family establishment, and the physique, temperament, standard of culture, habits of verbal expression and of action, and the interaction between the spouses in their daily life, cannot be adequately judged except by seeing and hearing them in the witness box. The law has no footrule by which to measure the personalities of the spouses.

Looking at the established acts of the wife against the background of the special facts of this case, including what is surely not an uncommon feature of married

life, *viz.*, one ailing spouse making exacting and unreasonable demands on the other partner—demands which deprived the other of sleep from time to time—I am unable for myself to form the view that the learned judge came to an erroneous decision on the facts. Acts between spouses must necessarily be examined in relation to the obligation of each to accept the other for better, for worse, in sickness and in health. In a recent case of *Buchler v. Buchler* (14) this court had to consider the nature of conduct short of cruelty which may justify one spouse in refusing to live with the other. Expressions used in that case, so far as they are of general application, seem to me to apply *a fortiori* to a case where cruelty itself is alleged. In dealing with conduct not amounting to cruelty, ASQUITH, L.J., said ([1947] 1 All E.R. 319, 326) :

... it must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other "for better or worse." The ordinary wear and tear of conjugal life does not in itself suffice.

For my part, I have come to the conclusion that the finding in favour of the wife ought not to be disturbed and that this appeal should be dismissed.

Appeal allowed with costs to the husband. Decree nisi granted.

Solicitors : *Lewis & Lewis and Gisborne & Co.* (for the husband) ; *Preston, Lane-Claypon & O'Kelly*, agents for *Fardells*, Ryde, Isle of Wight (for the wife).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Followed. HUNTINGFORD v. HUNTINGFORD. [1950] 1 All E.R. 785.

OLDS v. OLDS. BRITTAN v. BRITTAN.

[COURT OF APPEAL (Tucker and Evershed, L.JJ., and Hodson, J.), April 30, May 14, 1948.]

Divorce—Costs—Poor person—Discretion to order poor person to pay opponent's costs—Basis of payment—R.S.C., Ord. 16, r. 28 (1).

Under R.S.C., Ord. 16, r. 28 (1), a judge has an unfettered discretion in any proper case to order a poor person to make such contribution as he thinks proper to the costs of the opposing party. If the opposing party is himself a poor person, such contribution will be limited to a poor person's costs, but if the opposing party is an ordinary litigant there is no such limitation. This general discretion is not limited by the special power under r. 31BB which only enables an order as to costs to be made against a poor person who has obtained his certificate by fraud or misrepresentation.

If a poor person is ordered to pay the costs of an ordinary litigant, he is thereby made liable to pay that litigant's costs taxed on the ordinary basis, *i.e.*, there is no foundation for the suggestion that a poor person ordered to pay the costs of an ordinary litigant pays costs taxed on some special or reduced basis, so, for example, as to exclude profit costs and charges. The latter result will only be achieved (in the absence of special direction) when the party whose costs are ordered to be paid by a poor person is himself a poor person. On the other hand, in a proper case a judge may order a poor person to pay or contribute some fixed sum towards the other party's costs. At the same time, although there may be cases in which it is proper, after careful investigation of evidence as to increase of means or other matters, to make an order for a poor person to make some contribution towards the costs of the opposing party, the circumstances would have to be wholly exceptional to justify an order against a poor person to pay the full taxed profit costs.

[AS TO ORDERS FOR COSTS IN POOR PERSONS' CASES, see HALSBURY, Hailsham Edn., Vol. 10, p. 704, para. 1053, and pp. 758, 759, para. 1198 ; and FOR CASES, see DIGEST, Vol. 27, p. 477, Nos. 5050-5052.]

OLDS v. OLDS.

APPEAL by an unsuccessful husband petitioner by leave of His Honour JUDGE KIRKHOUSE JENKINS, sitting as a Commissioner in Divorce at Bristol, against that part of an order made by him whereby he ordered the husband, suing as a poor person, to pay the full taxed costs of the wife respondent who was defending as an ordinary litigant. The Court of Appeal took the view that there were no circumstances which would warrant making an order for payment of these costs by the husband, and allowed the appeal.

BRITTAN v. BRITTAN.

APPLICATION by an unsuccessful husband respondent, defending as a poor person, for leave to appeal against a similar order made against him by the same commissioner on Oct. 6, 1947, in favour of the wife petitioner suing as an ordinary litigant, the commissioner having refused leave to appeal. The Court of Appeal refused the application, since they had no jurisdiction to entertain an appeal from the commissioner's refusal to give leave. If the order had been one which the commissioner had no jurisdiction to make, an appeal could have been brought without leave. The facts of both cases appear in the judgment of the court, delivered by TUCKER, L.J.

Bryant Irvine for the husband in both cases.

C. M. Hughes for the wife in *Brittan v. Brittan*.

The wife in *Olds v. Olds* did not appear and was not represented.

Cur. adv. vult.

May 14. TUCKER, L.J., read the following judgment of the court. In *Olds v. Olds*, the learned commissioner dismissed the husband's petition for divorce after a contest, and, in dealing with costs, said: "I order that the respondent shall have the costs of these proceedings. I make it a special order." To this counsel for the husband replied: "I am entitled to ask that the costs will be poor person's costs," and the learned commissioner rejoined: "The taxing master will settle that." The order drawn condemned the husband in the costs incurred on behalf of the wife as if the husband were not a poor person. Application was made to the learned commissioner, who, we are informed, felt himself unable to correct the order under the "slip rule," but gave leave to appeal, and made a note for the information of the court stating that the order was made without full argument and could not, in his judgment, be supported. We read his note as indicating that he had not fully appreciated either the possible implication of the words "special order" or the circumstances which might justify his making such an order, and that in this case he was now satisfied that there were no circumstances which would warrant his making any order for payment of costs by the husband. We took the same view and for these reasons allowed the appeal, with the result that the order must be varied by striking out the words:

... and condemned the petitioner in the costs incurred on behalf of the said respondent as if he, the said petitioner, were not a poor person.

In *Brittan v. Brittan*, before making the order as to costs, the commissioner was informed, and the accuracy of the information is now admitted, that the husband at the date of the trial was earning £6 or £7 a week as an employee of the Bristol Aeroplane Co., whereas, when the poor person's certificate was granted to him, he was serving as a member of His Majesty's Forces. There had, accordingly, been an appreciable improvement in his financial position. On this material the learned commissioner, exercising the discretion which he considered was conferred on him by R.S.C., Ord. 16, r. 28 (1), made the order indicated above and refused leave to appeal.

Under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*h*), no appeal lies:

... without the leave of the court or judge making the order, from an order of the High Court or any judge thereof made ... as to costs only which by law are left to the discretion of the court.

If, therefore, this order was one which the commissioner had a discretion to make, no appeal lies to this court without his leave, provided he has, in fact, exercised that discretion. It was contended by counsel for the husband that the discretion of the commissioner under R.S.C., Ord. 16, r. 28 (1) with regard to awarding costs against a poor person was limited to making an order that he should pay such costs as would have been recoverable by him as a poor person had he succeeded and obtained an order for costs in his favour, and that the learned commissioner had no jurisdiction to make the order complained of. It was argued that R.S.C., Ord. 16, must be read as a whole, and that, so read, and, more especially, having regard to r. 31BB, the true view was that no poor person could ever be ordered to pay the profit costs of the opposing party,

or any part thereof, unless the same came within r. 31BB. In the alternative, it was argued that, where the court orders a poor person to pay the costs of an ordinary litigant, the order should be drawn up and the costs taxed as if the successful litigant was a poor person.

The material provisions of R.S.C., Ord. 16, are as follows. Rule 28 (1) provides :

No court fee shall be payable in respect of the filing of the certificate nor in respect of the memorandum to be issued under r. 27 of this Order and after such filing the poor person named in the certificate shall not be liable for any court fees and unless the court or a judge shall otherwise order no poor person shall be liable to pay costs to any other party or be entitled to receive from any other party any profit costs or charges.

Rule 29 (1) provides :

The court or a judge may at any time (and whether or not any application be made by any Law Society or by any person for that purpose) discharge the certificate and direct it to be taken off the file and thereupon the poor person shall not be entitled to the benefit of this Order in any proceedings to which the certificate relates unless otherwise ordered.

Rule 23B (4) provides :

Where a certificate has been granted to a poor person under r. 23A of this Order or under this rule, it shall not be discharged under r. 29 hereof on the grounds only (a) that the conditions specified in paras. (1) and (2) of the said r. 23A are no longer applicable in the case of the poor person ; or (b) that the means of the poor person or, as the case may be, of the poor person and her husband, exceed the amounts specified in paras. (1), (2) and (3) of r. 23 of this Order : Provided that the committee may discharge any certificate so issued in any case in which they are satisfied that the means of the poor person or of the poor person and her husband jointly, as the case may be, so greatly exceed the amounts specified in paras. (1) (2) and (3) of the said r. 23 as to render it unreasonable that the poor person should be entitled to the benefit of this Order.

Rule 31BB is as follows :

Where it appears to the court or a judge that the certificate was obtained by fraud or misrepresentation the court or judge may order the poor person to pay the costs of the other party, and where such an order is made, the costs shall be taxed as if the party ordered to pay them were not a poor person.

In our view, there is nothing in R.S.C., Ord. 16, to limit the discretion clearly conferred on the court by the words "unless the court or a judge shall otherwise order," in r. 28 (1). We think that it was intended to leave the matter to the unfettered discretion of the judge so as to enable him in any proper case to order a poor person whose financial position has improved, or where the circumstances otherwise justify, to make such contribution as he thinks proper towards the costs of the opposing party. In our judgment, this general discretion is not limited by the special power under r. 31BB to make an order as to costs against a poor person who has obtained his certificate by fraud or misrepresentation, whatever his financial position might be at the date of the order. If a poor person is ordered to pay the costs of an ordinary litigant, he is thereby made liable to pay that litigant's costs taxed on the ordinary basis, *i.e.*, there is no foundation for the suggestion that a poor person ordered to pay the costs of an ordinary litigant pays costs taxed on some special or reduced basis, so, for example, as to exclude profit costs and charges. This result will be only achieved (in the absence of special direction) when the party whose costs are ordered to be paid by a poor person is himself a poor person. On the other hand, in a proper case a judge may order a poor person to pay or contribute some fixed sum, £x, towards the other party's costs.

We are, therefore, of opinion that the learned commissioner had jurisdiction to make this order, which was within his discretion, and, in the absence of leave by him to appeal, this court cannot entertain this application. We should, perhaps, observe that in form the husband was asking this court to give him leave to appeal. If he was right in his contention that the commissioner was acting without jurisdiction, he could have appealed without leave. On the other hand, if the matter, as we hold, was within the discretion of the commissioner, we have no jurisdiction to entertain an appeal from his refusal to give leave. In coming to our decision, we are not to be understood as approving the exercise of the commissioner's discretion in this particular case. Although

there may be cases in which it is proper, after careful investigation of evidence as to increase of means or other matters, to make an order for a poor person to make some contribution towards the costs of the opposing party, the circumstances would have to be wholly exceptional to justify an order against a poor person to pay the full taxed profit costs, but for the reasons stated we have no jurisdiction to interfere. The result is that the appeal in *Olds v. Olds* is allowed, and the application in *Brittan v. Brittan* is refused.

No order as to costs. A

Solicitors: *J. C. Hodgson*, agent for *C. A. Potter*, Bristol, Law Society's Divorce Dept. (for the husbands); *Darley, Cumberland & Co.*, agents for *Wansbroughs, Robinson, Tayler and Taylor*, Bristol (for the wife in *Brittan v. Brittan*).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

GILBERT v. GILBERT AND BROOKS.

[COURT OF APPEAL (Lord Merriman, P., Bucknill, L.J. and Wynn-Parry, J.), May 7, 12, 1948.]

Divorce—Costs—Co-respondent—No appearance—Proof of signature on acknowledgment of service—Matrimonial Causes Rules, 1947 (S.R. & O., 1947, No. 523), r. 8 (2). C

To charge a co-respondent who does not appear or take any part in divorce proceedings with the costs of a successful petition, it is not necessary to prove his signature on the acknowledgment of service of the petition sent to him by registered post under r. 8 of the Matrimonial Causes Rules, 1947.

[FOR THE MATRIMONIAL CAUSES RULES, 1947, r. 8 (2), see RAYDEN ON DIVORCE, 4th Edn., Special Supplement, p. 10.] D

Case referred to:

(1) *Re Struve's Trusts*, [1912] W.N. 149; 56 Sol. Jo. 551; 22 Digest 369, 3778.

APPEAL by the husband petitioner from a refusal of His Honour JUDGE STEWART, sitting as a Commissioner in Divorce, to make an order for costs against the co-respondent on the ground that there was no proof of the signature of the co-respondent on the acknowledgment of service of the petition. The Court of Appeal allowed the appeal. The facts appear in the judgment of the PRESIDENT. E

Karminski, K.C., and *A. G. Sharp* for the husband.

The co-respondent did not appear and was not represented.

LORD MERRIMAN, P.: The husband's petition, which was dated July 30, 1947, was undefended. It charged the wife with adultery with a named co-respondent. Neither the wife nor the co-respondent entered an appearance and neither of them has taken any part in the proceedings. Nevertheless, it is right to mention that as a matter of precaution the co-respondent has been given notice of this appeal and of the probable date of hearing, but has taken no steps to be present or to be represented. When the petition came on for hearing on Sept. 29, 1947, the adultery was clearly proved, and no question turns on that. The wife had signed an acknowledgment of service, and her signature was identified by the husband, and, therefore, proof of service was complete in her case. The transcript of the evidence shows, however, that there was no proof of the identity of the signature of the co-respondent from whom an acknowledgment of the service had been received. In those circumstances the learned commissioner, making it clear that he had experienced doubts about the matter—and others, I happen to know, have experienced like doubts—adhered to his already expressed opinion that in the circumstances he was not entitled to make an order for costs against the co-respondent. F

Until very recently a petition for divorce required personal service both on the respondent spouse and on any co-respondent. Among the procedural reforms which have resulted from recent enquiry into the practice and procedure of the Divorce Division there has been added as an alternative to personal service, both in the case of a respondent spouse and of a co-respondent, service G H

by registered post. That change was embodied in the Matrimonial Causes Rules, 1947, r. 8, which provides :

(1) Unless otherwise directed—(a) a copy of every petition shall be served personally or by registered post upon every respondent and co-respondent named therein . . . (2) For the purposes of the foregoing paragraph of this rule a document shall be deemed to have been duly served by registered post if the document is sent by pre-paid registered post to the party to be served, and an acknowledgment of service in accordance with Form 4 of his identity and of his receipt of the document is signed by him and returned to the solicitor for the petitioner, or to the petitioner if he is acting in person, at the address for service : Provided that where the party to be served is a respondent, his signature on the acknowledgment of service shall be proved at the trial or hearing. On the face of sub-r. (2) several things appear to require strict proof. The registered letter has to be sent by prepaid registered post to the party to be served. That implies not merely that his name is on it, but that it is sent to some address the sending to which can be properly described as sending it to him. Moreover, the document, called Form 4, which is to be enclosed with the petition with the intention that it shall be sent back by the party to be served contains two statements of fact—(i) an acknowledgment that the person to whom the letter is addressed is the person named as (in this case) the co-respondent, and (ii) that that person has received a copy of the petition. Thus, when the rule goes on to say “an acknowledgment of service in accordance with Form 4 of his identity and of his receipt of the document” is to be signed by him and returned to the solicitor for the petitioner, one would suppose, even if there were no qualifying clause, that it would certainly be necessary to prove strictly that he had received it and signed it. The proviso to r. 8 (2), however, reads : “Provided that where the party to be served is a respondent, his signature on the acknowledgment of service shall be proved at the trial or hearing.”

The first question is whether the word “respondent” in the proviso to r. 8 includes a co-respondent. Our attention has been very carefully called by counsel for the husband, as he has no opponent, to everything in the rules and elsewhere which could assist us, and to the contrasts in the rules or distinctions drawn in the rules between a respondent in the sense of a respondent spouse, on the one hand, and a respondent other than a spouse and co-respondent, on the other. It is important to look at the statute which is the foundation of the obligation to make a male adulterer a party to the proceedings. That is the Supreme Court of Judicature (Consolidation) Act, 1925, s. 177, which provides :

(1) On a petition for divorce presented by the husband or in the answer of a husband praying for divorce the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from doing. (2) On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

In other words, the male adulterer must be made a co-respondent unless that is excused, whereas a woman named need not be made a respondent unless the court so directs. It is from that section that the nomenclature is derived. A male adulterer is, so far as I know, without any exception whatever in connection with divorce procedure, at any rate, in an original petition, described as a “co-respondent.”

Having looked at the provisions with regard to service, it is well to look at some of the provisions dealing with subsequent procedure, to see whether the same line of thought is carried on through the rules. Rule 10 provides :

Unless otherwise directed, and save where the provisions of r. 8 (4) have been complied with, a petition shall not proceed to trial or hearing unless the respondent and every co-respondent thereto and every person named therein—(a) has entered an appearance ; or (b) is shown by affidavit . . . to have been served with the petition personally or in accordance with an order for substituted service ; or (c) has returned to the solicitor for the petitioner, or to the petitioner if he is acting in person, an acknowledgment of service in accordance with Form 4, which shall be lodged with the registrar.

It is to be observed that even there the same difficulty about establishing the identity of the person who returns the form occurs, but I think it is reasonably clear that at that stage, which is that at which the registrar gives his certificate

that the case is fit to be entered for trial, all that is required is that he should see that the respondent or co-respondent, as the case may be, has returned this form signed. For, it will be remembered, it is not until the trial or hearing that actual proof of the signature of the respondent, whatever that word may mean, on the acknowledgment of service is required. I am deliberately omitting other rules from which the same implication can be drawn, but sub-r. (6) of r. 14, which relates to "Supplemental and amended petitions," provides:

Unless otherwise directed, a copy of the supplemental petition or of the amended petition together with a copy of the order (if any) made under this rule, shall be served upon the respondent, co-respondent or person named therein and, in the case of a respondent, co-respondent or person not named in the original petition, the supplemental petition or amended petition shall be accompanied by a notice to appear . . .

There again the distinction is plainly drawn between the description "respondent, co-respondent or person named." The same thing applies to the answer. When one of these persons by appearing has qualified to deliver an answer, his rights are described in these words in r. 16:

A respondent, co-respondent or person named who has entered an appearance to a petition may, within fourteen days after the expiration of the time limited for the entry of such appearance, file an answer to the petition . . .

Finally, for I do not want to multiply instances, r. 33 is directly in point on the rights of the co-respondent in this case:

After entering an appearance, a respondent or co-respondent may, without filing an answer, be heard in respect of any question as to costs or damages and a respondent spouse may, without filing an answer, be heard as to any question of custody of or access to any children of the marriage.

At first sight that rather suggests that it may be intended to draw a distinction for the purposes of this rule between a respondent and a respondent spouse, and that a "respondent," therefore, may include respondents other than respondent spouses, but the explanation of that distinction in this rule is, I think, due to the fact that two distinct classes of relief are being dealt with, costs and damages on the one hand, and the question of custody or access to children, on the other. Plainly, questions of custody and access affect only respondent spouses, and it is necessary, therefore, to distinguish in connection with custody and access a respondent spouse from any more inclusive use of the word "respondent." That the word "respondent" in this rule does include a party other than the respondent spouse is shown by looking at r. 5, whereby:

Unless otherwise directed, where in a husband's petition there is a charge against a male adulterer, the alleged adulterer shall, if living at the date of the filing of the petition, be made a co-respondent in the cause and where a wife's petition contains a claim for costs against a woman named she shall be made a respondent in the cause.

It will be remembered that under s. 177 of the Act of 1925 there was power for the court to direct that the person with whom the husband is alleged to have committed adultery be made a respondent. This rule makes it obligatory in a case where there is a positive claim for costs against her. Going back, therefore, to the wording of r. 8, it is plain that the word "respondent," where first used, does not only include the respondent spouse, because it might also include a woman named against whom a claim for costs has been made, and who is, therefore, entitled to be heard on it, and who, by virtue of r. 5 and s. 177 of the Act has become a respondent, but there is contrasted with the two alternative meanings in that connection of the word "respondent," the word "co-respondent." That introduces, not only the question of costs, but also that of damages, for the co-respondent alone is the object of a claim for damages. That seems to me to show in the plainest way that there is throughout the rules a distinction drawn between "respondent" and "co-respondent," and, therefore, I read the word "respondent" in the proviso to r. 8 (2) as exclusive of a co-respondent.

What then is the result? It still remains that the acknowledgment of service on the prescribed form has to be proved. The question is, how is it proved? In the case of the respondent spouse there is the express requirement that the identity of the signature must be established at the trial. It seems to me that the only inference to be drawn from that is that in the case of the co-respondent that proof is not necessary. After all, this matter does not depend merely

on the presumption that a registered letter shown to have been posted is *prima facie* evidence of its delivery to the person to whom it is addressed, a presumption which was, after consideration of the authorities, re-affirmed by PARKER, J., in the case of *Re Struve's Trusts* (1). There is more than that. The registered envelope contains two documents at least, the petition and the unsigned Form 4, the form acknowledging the identity of the recipient and the receipt of the petition. The latter document has been returned, which shows that the envelope has been opened by somebody and that the document has been signed by somebody. I agree that, unless the wording of the rule leads to a contrary conclusion, that would not ordinarily be sufficient to prove that the document had been signed by the person whose name it bears. In my opinion, this rule does provide for a contrary conclusion. The condition of the proviso that it is only, as I think, in the case of a respondent that proof of his signature is required at the trial or hearing tends irresistibly to the conclusion that that proof is not necessary in the case of a co-respondent. There is no doubt, as BUCKNILL, L.J., pointed out in the course of the argument and as the learned commissioner pointed out at the trial, that this may mean that a heavy claim for damages may be decided on this evidence of service. At the moment, of course, we are only concerned with costs, and with regard to costs it is provided by r. 33 (ii) and (iii) that no bill of costs which is not directly referable to the decree *nisi* or the decree absolute shall be taxed against a co-respondent at all, if he has appeared, without giving him notice, or, if he has not appeared, without giving him his right to apply to discharge the order. We are not, however, concerned with questions of policy, but solely with the interpretation of this rule. For these reasons I think that the learned commissioner's decision that he had no jurisdiction to make an order for costs against the co-respondent was wrong and must be reversed.

BUCKNILL, L.J.: I agree. I entirely agree with what my Lord has said as to the meaning of the word "respondent" in the proviso to r. 8 (2). It is quite clear it does not include a co-respondent. What troubled the learned commissioner was that there was no proof of service on the co-respondent except, as he said, "that some person has signed the name of Brooks." That is true, and, as WYNN-PARRY, J., pointed out during the argument, one must read r. 8 (2) in this way: "For the purposes of the foregoing paragraph of this rule a document shall be deemed to have been duly served by registered post if the document is sent by pre-paid registered post to the party to be served, and an acknowledgment of service in accordance with Form 4 of his identity and of his receipt of the document purporting to be signed by him has been returned to the solicitor for the petitioner, or to the petitioner if he is acting in person, at the address for service." The learned commissioner was in error in reading that rule as if it was necessary that there should be proof of the co-respondent's signature before he could make an order against him for costs. In this case, in April, 1947, the co-respondent was a corporal in the army living at Otley, Yorkshire. We were told by counsel that the petition was sent to him at his private address, which is given by Mrs. Gilbert as 49, Council Bungalows, New Horton, near Mansfield. I have no doubt that he received the petition and signed Form 4. One can well understand, however, that the registered packet might have been received by someone else at his home address. The postman does not require to be satisfied that the addressee signs the receipt for a registered packet. It might have been opened, and, in a desire to avoid troubling him while he was abroad, Form 4 might have been signed by someone else. I point that out to show the danger of a rule of this kind. The same thing applies in the case of r. 10. That rule must be read in this way: "A petition shall not proceed to trial or hearing unless someone purporting to be the co-respondent has returned to the petitioner or his solicitor an acknowledgment of service in accordance with Form 4." I think the learned commissioner put too strict an interpretation on r. 8 (2), and that the appeal must be allowed.

WYNN-PARRY, J.: I agree.

Appeal allowed with poor person's costs.

Solicitor: W. O. Nicholls, agent for F. H. G. Craze, Leeds, Law Society's Divorce Department (for the husband).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Re COGHLAN (deceased), BRISCOE v. BROUGHTON.

[COURT OF APPEAL (Tucker and Evershed, L.J.J., and Hodson J.), April 6, 7, 8, 9, 26 and May 14, 1948.]

Administration—Revocation of grant—Effect of laches.

In November, 1892, the deceased, Henry Thomas Coghlan, died, and, no will being found, in December, 1892, letters of administration were granted to Sir H.D.B., one of his next of kin. In 1899 Sir H.D.B. died, and in 1908 letters of administration *de bonis non* to the estate of the deceased were granted to H.D.L.B. In 1914 H.D.L.B. died, and no further letters of administration were taken out. At the time of the present proceedings the estate of the deceased (with the exception of one asset mentioned below) had been fully administered and distributed under the supervision and by order of the court, and part of the assets or property representing them had passed by virtue of wills and a settlement into the hands of the defendants as the present trustees of a fund settled by the will of H.D.L.B. and by a resettlement made in 1940. In 1943 the plaintiff, in proceedings issued for the purpose, claimed the revocation of the letters of administration granted in 1892 and 1908 and sought to establish an alleged will of the deceased, dated Dec. 23, 1891, by which the deceased had devised and bequeathed all his estate to his cousin, S.W., and appointed him sole executor. In 1909 S.W. had died intestate, and in 1912 a Mrs. C. obtained a grant of letters of administration to his estate. Mrs. C. died in 1922, and in 1936 the plaintiff took out letters of administration *de bonis non* to the estate of S.W. The plaintiff had been aware of the alleged will since 1912. The proceedings were originally instituted against one only of the present defendants, Lady B., in her capacity of executrix of the will of H.J.D.B., the son of H.D.L.B., but by arrangement made before the registrar of the court those proceedings were terminated and the present proceedings taken against all the defendants in their capacity of trustees. The defendants failed to deliver a statement of defence, but they took out a summons to have the action dismissed as frivolous and vexatious, contending that, even if the plaintiff succeeded in establishing the authenticity of the will, it would avail him nothing as any subsequent proceedings in the Chancery Division would inevitably be defeated by reason of the laches of the plaintiff or that of persons in whose shoes he stood. The defendants admitted, for the purpose of the present proceedings only, that there were assets of the estate of the deceased in their hands which it might be possible to follow in appropriate proceedings in the Chancery Division if the will were established. It appeared for the first time in the proceedings before the Court of Appeal that there still remained, out of the deceased's estate of over £600,000 in value, a piece of ground containing a family tomb of the value of £157 10s. 0d. vested in H.D.L.B. at the date of his death as administrator of the deceased's estate.

HELD: the action should not be dismissed as frivolous and vexatious (i) (*per* TUCKER, L.J.) because the defendants had failed to discharge the heavy burden lying on them to show that the action should be dismissed as an abuse of the process of the court; (ii) (*per* EVERSLED, L.J., and HODSON, J.) because the fact that the piece of ground containing the family tomb still remained outstanding as part of the deceased's estate compelled the court to conclude that the action was not frivolous and vexatious, the value of the ground not being so wholly negligible as to invoke any application of the principle *de minimis*; and (iii) (*per* HODSON, J.) because, in view of the arrangement to terminate the original proceedings and to start the present proceedings with the object, to the knowledge of the defendants and their advisors, of establishing the alleged will, the defendants ought not to succeed *in limine* in preventing the plaintiff from seeking to prove the validity of the will.

Decision of WILLMER, J. ([1948] 1 All E.R. 367), reversed.

Mohan v. Broughton ([1900] P. 56) and *Willis v. Beauchamp* (Earl) ([1886] 11 P.D. 59), considered.

[AS TO JURISDICTION OF PROBATE DIVISION TO STAY FRIVOLOUS PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 226, 289, paras. 386, 515; and FOR CASES, see DIGEST, Vol. 23, pp. 248, 281, Nos. 3034-3036, 3479-3484.]

Cases referred to :

- (1) *Mohan v. Broughton*, [1900] P. 56 ; 69 L.J.P. 20 ; 82 L.T. 29, C.A., *affg.*, [1899] P. 211 ; 23 Digest 248, 3035.
- (2) *Willis v. Beauchamp (Earl)*, [1886] 11 P.D. 59 ; 55 L.J.P. 17 ; 54 L.T. 185 ; 23 Digest 281, 3479.
- (3) *Hewson v. Shelley*, [1914] 2 Ch. 13 ; 83 L.J.Ch. 607 ; 110 L.T. 785 ; 23 Digest 60, 402.

APPEAL by the plaintiff from an order of WILLMER, J., dated Feb. 3, 1948, and reported ([1948] 1 All E.R. 367), allowing an appeal from an order of the registrar dismissing the defendants' application for an order that the action brought by the plaintiff for revocation of a grant of administration be dismissed as frivolous and vexatious. The appeal was allowed and the registrar's order restored. The facts appear in the judgment of TUCKER, L.J.

Shelley, K.C., and *C. Burke* for the plaintiff.

H. C. Leon for the defendants.

Cur. adv. vult.

May 14. The following judgments were read.

TUCKER, L.J. : In this action the plaintiff is claiming revocation of letters of administration to the estate of Henry Thomas Coghlan deceased granted in December, 1892, to Sir Henry Delves Broughton as one of the next of kin of the deceased and letters of administration *de bonis non* to the same estate granted on July 28, 1908, to Henry Delves Louis Broughton, the son of Sir Henry Delves Broughton who had died in February, 1899, and praying that the court will pronounce for a will of the deceased dated Dec. 23, 1891, and that letters of administration with the will annexed be granted to him. The statement of claim alleges that the deceased died on Nov. 24, 1892, and that letters of administration to his estate were granted in December, 1892, to Sir Henry Delves Broughton as one of the next of kin who received one-fourth share more or less of the estate ; that the said Sir Henry Delves Broughton died on Feb. 26, 1899, and, subject to certain annuities, devised the whole of his estate to his son Henry Delves Louis Broughton ; that on July 28, 1908, letters of administration *de bonis non* to the estate of the deceased were granted to the said Henry Delves Louis Broughton ; that Henry Delves Louis Broughton died on Apr. 15, 1914, and by his will settled his real and personal estate on his son, Sir Henry John Delves Broughton, since deceased, with remainder to his eldest son (now Sir Evelyn Broughton), one of the defendants, who are the trustees of the Delves Louis Broughton will trust fund and also of a resettlement thereof made in 1940. The statement of claim goes on to allege that, by a will dated Dec. 23, 1891, Henry Thomas Coghlan had devised and bequeathed all his estate, both real and personal, to his cousin, Samuel Williams, the sole beneficiary under the will, and therein appointed the said Samuel Williams sole executor ; that Samuel Williams died intestate on Feb. 13, 1909 ; and that on Jan. 16, 1936, letters of administration *de bonis non* of his estate were granted to the plaintiff. On those allegations the plaintiff claimed the relief set out above.

On Aug. 17, 1943, an action was started by the plaintiff against the first-named defendant, Lady Broughton, the executrix of the will of Sir Henry John Delves Broughton, to establish the alleged will of Dec. 23, 1891. On Oct. 16, 1944, a statement of claim was delivered. During the course of the preliminary proceedings in that action Messrs. Travers Smith, Braithwaite & Co., objected to the capacity in which their client, the defendant, had been sued, and on Sept. 11, 1945, they wrote a letter in these terms to the plaintiff's solicitors :

Dear Sirs, Referring to the summons taken out by Lady Broughton objecting to her joinder as executrix of Sir Henry John Delves Broughton's will, we have arranged that she and her son, Sir Evelyn Delves Broughton (the present baronet) shall defend the action in the following circumstances. Sir Henry Delves Broughton, who died in 1899 and who shared in the estate of Coghlan deceased, bequeathed by his will various annuities and subject thereto half his estate to his son Sir Delves Louis Broughton. Some part of the annuity fund is still in the hands of the Public Trustee who is administering this fund as trustee of Sir Henry Delves Broughton's will. The reversion to the fund is, however, in the estate of Sir Delves Louis Broughton who by his will settled his real and personal estate on his son Sir Henry John Delves Broughton with remainder to his eldest son (now Sir Evelyn Broughton). Lady Broughton

and Sir Evelyn Delves Broughton are the trustees of the Delves Louis Broughton will trust fund and also of a resettlement thereof made in 1940. To the original suggestion that the Public Trustee intervened in the proceedings as trustee of Sir Henry Delves Broughton's will has been raised the objection that the fund is ear-marked for annuities only, that the Public Trustee is not otherwise interested, and that the persons interested are the trustees of Sir Delves Louis Broughton's will to whom the fund passes on the cesser of the annuities. We suggest when you are ready to make the necessary amendment (and we should like to have ample notice thereof) that our summons be restored, the position explained to the registrar, and the necessary order obtained joining Sir Evelyn Delves Broughton and changing the capacity in which Lady Broughton is sued. We should not like the matter to come before the registrar while counsel who was instructed by us is on vacation. Messrs. Witham & Co. will act for those parties as trustees. No admission is hereby made that your client has any rights to any funds held by these trustees or by the Public Trustee should the will propounded by your client be admitted to probate. Yours faithfully, (Sgd.) Travers Smith & Co.

Their proposals were not immediately agreed to, but eventually, on the hearing of a summons before the registrar on July 2, 1946, it was arranged that those proceedings should terminate and that the plaintiff should start fresh proceedings against the present defendants, for whom Messrs. Witham & Co. would act in accordance with the suggestions made in the letter of Sept. 11, 1945. Accordingly, that action was dismissed and the present proceedings begun by writ dated Nov. 28, 1946. The statement of claim was delivered on Jan. 6, 1947, and thereafter several requests were made by and granted to the defendants for extension of time for the delivery of their defence, but such defence was not delivered, and on Mar. 18, 1947, the defendants took out a summons to dismiss the action under the inherent jurisdiction of the court as frivolous and vexatious. This summons was dismissed by the registrar, but on appeal WILLMER, J., made the order asked for.

The defendants, by their counsel, have admitted throughout, but for the purposes of this summons only, that there are assets of the estate of the deceased in their hands which it might be possible to follow in appropriate proceedings in the Chancery Division if the will were established. Several affidavits were read on the hearings below and further affidavits were, by our leave, used on this appeal. I do not intend to refer to them in detail, but those filed on behalf of the defendants were relied on to support their contention that, assuming the plaintiff succeeded in establishing the authenticity of the will of 1891, it would avail him nothing, as any subsequent proceedings in the Chancery Division would inevitably be defeated by reason of the laches of the plaintiff or other persons in whose shoes he now stands. From these affidavits and those sworn in answer thereto it appears that the alleged will was first discovered in 1912, in which year a Mrs. Casey obtained a grant of letters of administration to Samuel Williams' estate. This lady continued to be the administratrix until her death in 1922, during which time she had taken no steps to establish her claim, although the discovery of the will and its terms had been communicated to the solicitors acting for Sir Henry Delves Louis Broughton, such solicitors being the predecessors of the defendants' present solicitors, and also to a solicitor in London, Mr. Brabant, who, through the intervention of a friend—a Lady Coote Stewart—was acting for Mrs. Casey. According to the plaintiff, Mrs. Casey's inactivity was due to her domicile in Ireland, to the outbreak of the first world war, to the death of Mr. Brabant in 1914, to her age—which was 86 at her death—and to lack of means. The plaintiff himself has been aware of the existence of the alleged will since 1912, but he left matters to the administratrix, Mrs. Casey, until her death. Thereafter he explains the subsequent delay on the score that in 1923 he was advised by a solicitor in Dublin that any claim to establish the will was barred by the Statute of Limitations, that he was not in a position to incur the necessary expense, that it was not until 1927 that he got possession of the will, and that in 1933 he was advised, for the first time, that the Statute of Limitations was no bar to the proving of the will. Thereafter, he says, he set out to discover the necessary evidence to establish the will, one of the attesting witnesses was discovered, and as soon as he was advised that he was in a position to prove the will he took proceedings. It further appears from the affidavits and the orders made by the court in the administration of the estate of the

deceased to which we have referred that all the assets have been fully administered and distributed under the supervision and by order of the court, with the possible exception of the family vault in Highgate Cemetery.

A It is obvious from this bare recital that a number of questions will arise for determination if this action is allowed to proceed. Some of the more obvious are as follows: (1) Is laches on the part of the plaintiff or his predecessors in itself a bar to proceedings in the Probate Court apart from its effect on any subsequent and consequential proceedings in Chancery or elsewhere? (2) If not, to what extent will the Probate Court investigate the existence of laches with a view to deciding whether the subsequent and consequential proceedings can succeed? (3) Of what, in fact, do the assets ultimately sought to be recovered consist, and what are the possible appropriate forms of action? (4) Has the plaintiff, in fact, been guilty of such laches as to preclude him from succeeding (a) in the Probate Court, (b) in the Chancery Division? (5) If he himself has not been guilty of laches, is he affected by the laches, if any, of Mrs. Casey?

B Counsel for the defendants agreed that, although he would, if necessary, eventually contend under No. (1) above that laches would be a defence to the probate proceedings themselves, he had not sufficient authority for this proposition to justify him in asking us on this ground to support the learned judge's order dismissing the action as vexatious. He based his whole case C on the ground that on a summons to dismiss a probate action as frivolous and vexatious under its inherent jurisdiction the court will investigate the facts, and, if satisfied that laches would bar any subsequent proceedings in Chancery for which purpose the action had been brought, will dismiss the action *in limine* as frivolous and vexatious. His authority for this proposition was *Mohan v. Broughton* (1) which WILLMER, J., accepted in the following words ([1948] 1 All E.R. 367, 368):

D The proceedings in this action are reported under the name of *Mohan v. Broughton* (1) and resulted in an order of the Court of Appeal dismissing the action under the inherent jurisdiction of the court as an abuse of the process of the court. In that action, the report of which was cited to me and very much relied on by the defendants as an authority in the present proceedings, a plea of *res judicata* failed, but it was held by E GORELL BARNES, J., that the action failed by reason of the laches of the plaintiff, who had stood by and practically acquiesced in the previous administration proceedings, and by the Court of Appeal on the additional ground that the action was quite pointless, seeing that the plaintiff could assert any right which she might have by commencing proceedings right away in the Chancery Division without the necessity for any order of this court.

F Examination of the reports of this case, however, reveal that, although a summons to dismiss the action on the ground of *res judicata* and that the action was vexatious had been taken out, the actual order was made on certain questions which by consent had been dealt with by the court on the hearing of the summons. The report in [1899] P. 211, begins as follows:

Hearing, upon certain questions left for the decision of the court under an order made by consent, upon an adjourned summons to stay proceedings and dismiss the action, on the grounds of *res judicata* and laches.

G The course taken is set out at p. 215 in the judgment of GORELL BARNES, J., where he says:

H On June 7, 1898, the writ in the present action was issued. On June 30, 1898, a summons was taken out by the late baronet to show cause why the action should not be dismissed on the ground—first, that the issue had already been adjudicated upon in the Chancery Division; and, secondly, that the action was vexatious. That summons came on for hearing before me, and was adjourned into court, and at the hearing in court it was ordered, by consent, that all questions in the action between the parties, other than the question of the relationship of the plaintiff and the late baronet to Henry Thomas Coghlan, the deceased, should be tried at the next sittings before me, upon the materials already supplied to the court and any further evidence. The case subsequently came on for hearing on these questions other than the relationship of the plaintiff and the late baronet to the deceased, on Feb. 24 last, when two questions were raised for the defence as a bar to the plaintiff's claim in this action. They were—first, that the plaintiff's claim was *res judicata*; and, secondly, that the plaintiff had been guilty of such laches as debarred her from prosecuting her claim.

The decision was, therefore, one which was arrived at after trial by consent of certain issues and the case is no authority for the circumstances in which

an action should be dismissed *in limine* as frivolous and vexatious and an abuse of the process of the court. This accounts for the observation of LINDLEY, M.R., in the Court of Appeal ([1900] P. 56, 58), where he says :

I think that he was perfectly justified in dismissing the action. I do not say it was frivolous or vexatious. Still less do I think that technically there is anything like *res judicata*.

The other authority principally relied on by the learned judge was *Willis v. Earl Beauchamp* (2). In this case the facts were beyond dispute and the circumstances peculiar. They are set out in the judgment of COTTON, L.J., in the following language (11 P.D. 59, 61) :

This action is of a somewhat curious nature. A person named Jennens died in 1798, and in that year administration was taken out to his estate by Lord Beauchamp and Lady Andover. They both died, and administration *de bonis non* was taken out in 1817 by Lady Beauchamp. That administratrix died, and administration *de bonis non* was granted to Isaac Martin in 1882. What the object of that was we are not told, but the personal estate not administered was then sworn to be under £20, so that administration was taken out for some other purpose, and not with the view of getting in any assets. Then the present plaintiff and others brought an action to get from Lord Beauchamp's representatives a large sum of money (the estate of Jennens) on the ground of some fraud on the part of Lord Beauchamp and Lady Andover. That action failed, and he has now taken proceedings against Isaac Martin to recall the letters of administration granted to him ; and he has also commenced this action to have revoked the letters of administration which were granted in 1798, and also those which were granted in 1817.

The learned Lord Justice proceeds as follows :

What is his object ? It was said on his behalf that this was necessary in order to enable him to establish his right to obtain administration to the deceased, he now coming forward and saying that he represents a nearer relative to the deceased than those who had obtained letters of administration in 1798. But so far as we can learn that is an erroneous view. If the letters of administration to Isaac Martin, which are still subsisting, are in the way of his obtaining the grant of letters of administration, undoubtedly he must get those letters of administration recalled or cancelled. But the power granted by letters of administration entirely ceases on the death of the persons to whom the court has granted the administration. It is transmissible in no way to their representatives, and so far as one can see it cannot be in any way necessary to recall those letters of administration when the persons to whom they were granted have long since died, and all the power and authority granted to them has long since come to an end. The executors of administrators do not have any power under the letters of administration, and in no way do they represent the administrators, except as having the personal estate, which of course, the administrators had. So far as we can learn, although there was a difference here between counsel on each side as to what was the ordinary practice, the ordinary practice of the Court of Probate does not require in such a case that any such action as this should be instituted.

BOWEN, L.J., said (*ibid.*, 63) :

We have had no satisfactory explanation offered to us why these defendants are made defendants in the suit. Grant of administration is a personal grant. On the death of the administrator there is no succession, and no authority derived from the original grant is transmitted to the personal representatives of the deceased administrator. It seems to me to follow from this, in the first place, that it is wholly unnecessary to apply to revoke the grant of letters of administration to a deceased person, because the grant is already extinct with his death. We have been unable to discover any precedent for such a suit, and though it is not necessary to say that it cannot be maintained, it appears to me clear that even in a suit to revoke administration granted to a deceased person, joining his personal representatives, is a misapprehension of legal principle. I cannot see how they have anything to do with such an action, and in fact I think they have been joined in this particular suit by a confusion of thought.

The court went on to deal with the case on the assumption that the proceedings were amended by asking for a grant to the plaintiff and bringing in Isaac Martin and asking to recall his letters and found that the plaintiff was mistaken in thinking that a large sum remained unadministered and expressed the view that the action was one which could produce no good result. The passages from the judgments quoted above are, however, sufficient to show that the action on its face was unnecessary and that the defendants who were sued as the present representatives of the administrators of 1798 and the administratrix of 1817 were wrongly joined as defendants. This case does not, in my

opinion, afford much assistance in deciding whether a probate action should be dismissed *in limine* as vexatious if it appears that subsequent proceedings in Chancery would be defeated by a plea of laches.

Having regard to the facts that the jurisdiction to dismiss *in limine* is one which is sparingly exercised and then only in exceptional and clear cases, I have come to the conclusion, having regard to the terms of the letter of Sept. 11, 1945, the state of the authorities with regard to laches as applied to probate actions, and the fact that some of the material facts with regard to laches are in dispute, that the defendants have not been able to discharge the heavy burden that lies on them to show that this action should be dismissed as frivolous and vexatious and an abuse of the process of the court. It is inevitable that in the very full discussion of the various issues that has taken place in this court I should have reached certain conclusions on some of the points that have arisen, but, having arrived at the decision that the action must proceed, I think it undesirable in an endeavour to save costs to express any view thereon at this stage. In my opinion, this appeal succeeds and the order of the registrar should be restored.

EVERSHED, L.J. : This is, indeed, a remarkable case, and not the less so because, since it first came before this court, a mass of evidence has, by our leave, been added to the considerable material which was before WILLMER, J. Out of the mass one fact has emerged which, as matters stand, is, in my judgment, fatal to the defendants' application. To that fact I refer more particularly hereafter, but it has compelled me to conclude, whatever be the answer to the many other points which have been debated before us, that the present action cannot be stayed *in limine* as frivolous and vexatious and, accordingly, that this appeal must succeed.

I confess that I have reached this conclusion with considerable reluctance. Stated in its briefest terms, the plaintiff's claim in the action is startling in the extreme. It is a claim to establish an alleged will 54 years after the death of the testator, the whole of whose estate has, with the exception presently mentioned, long since been distributed (for the most part pursuant to orders of the court) on the footing that he died intestate. Moreover, the plaintiff—whose claim must rest on his title as personal representative of the universal legatee and devisee named in the alleged will—has by his own admissions been fully aware of the existence and terms of the will since the year 1912. Not only that, but another individual, an aunt of his, by name Mrs. Casey, obtained a grant of letters of administration to the estate of the universal legatee and devisee named in the alleged will in 1912, but herself took no step before her death in 1922 to establish the will which the plaintiff, clothed since 1936 with the representative capacity formerly attached to Mrs. Casey, now seeks to propound. In these circumstances, it is not surprising that the defendants (who derive title under the will of a testator found by order of the court to be one of Mr. Coghlan's next of kin) have alleged that in the circumstances and after so long a lapse of time a grant of letters of administration *cum testamento annexo* to the plaintiff must be futile, since any attempt on the plaintiff's part after a grant to get in or recover any property formerly belonging to Mr. Coghlan's estate must necessarily be defeated by the plaintiff's laches and the laches of his predecessor in title, Mrs. Casey. WILLMER, J., so held, and on that ground, in the exercise of his discretion, made an order staying the proceedings in the action under the inherent jurisdiction of the court.

It is unnecessary for me to repeat the facts of the case which have already been stated by TUCKER, L.J. Beyond doubt there has been great delay on the plaintiff's part and on the part of the plaintiff's predecessor in title as personal representative of Samuel Williams. For the purposes of the present appeal counsel for the defendants has not thought it right, in the absence of any authority directly in point, to contend that this delay—even though amounting to such laches as would in a court of equity be a bar to any proceeding to follow and recover property—is a bar in the Probate Court to a claim to establish a will assumed to be valid, or that the statutes of limitation apply to defeat such a claim. It follows, therefore, that the case of the defendants in this court for summary dismissal of the action must rest on the proposition that (as WILLMER, J. held) the plaintiff, even though he obtained his grant,

could not possibly succeed either in his capacity of personal representative of the testator or as beneficiary under the testator's will in deriving any practical advantage—*i.e.*, in recovering any property from the defendants or from any other persons. The hearing of the appeal has taken many days, and apart from the main question, aye or no, of the validity of the above proposition itself, has involved several other and subsidiary questions—for example, whether or not the plaintiff is bound or affected by the inactivity of Mrs. Casey; whether or not, having regard to the explanations put forward, the delay on the part of the plaintiff or on the part of Mrs. Casey amounts to such laches as would defeat any proprietary claim which the plaintiff might otherwise put forward; whether or not—particularly having regard to the decision of this court in *Hewson v. Shelley* (3)—the plaintiff, as personal representative of Mr. Coghlan, could successfully lay claim to any assets identifiable as having formerly been part of Mr. Coghlan's estate. On all these and other matters, the court has had the advantage of hearing exhaustive arguments by the learned counsel for the plaintiff and for the defendants, and I confess that I have felt, having heard those arguments, that this court is as well able to express its conclusion as any court before whom these same matters may be argued again, at no little cost to the parties, when the present action comes on for hearing. Nor, for my part, do I think that the difficulties and complexities of the points involved of themselves necessarily form any ground for a refusal on the part of the court to decide them on such an application as the present. If, with all relevant facts before it, the court is able on such an application to reach a clear conclusion on the questions of law to which those facts give rise, then, as it seems to me, the court is entitled to express that conclusion and the result will, at least, be a great saving of time and money to the parties concerned. And on the main proposition advanced by the defendants (*viz.*, that the court may, in the exercise of its inherent jurisdiction, dismiss an action *in limine* where it is shown that though the action itself may succeed no useful or fruitful result can thereby be achieved by the plaintiff) I find myself, for my part, in agreement with WILLMER, J. For, in approaching the question whether the action is frivolous or vexatious, the court is entitled to ask of the plaintiff, what is his object? If it is apparent that the plaintiff can achieve no real or material advantage for himself or for anyone else from his success, then I think that the court may fairly hold his proceeding to be, in truth, vexatious. I think further that the court is properly entitled to take account of the fact that to any proprietary claim which the plaintiff may make either the relevant statutes of limitation or laches would be a conclusive defence, if, in all the circumstances, it is plain that such pleas will be raised though the time for raising them has not yet, strictly, arrived. In my judgment, *Willis v. Beauchamp* (2) provides authority, if authority be needed, for both propositions. It is true that the action there before the court was one in which the plaintiff only sought revocation of the grant of letters of administration to persons already dead so that it was a sufficient answer to the claim that the administrations had died with the administrators and nothing was left to revoke, but all three members of the court (as I follow the judgments) dealt also with the case on the footing that the plaintiff had amended his proceedings by adding as a defendant the administrator who was still living and by including a claim for the revocation of the grant to the living administrator. On that basis COTTON, L.J., observed (11 P.D. 59, 62):

What evidence is there, or what ground is there, for supposing that there will be any good result as regards money if letters of administration are granted to the plaintiff? Looking at this action as an action which might be amended by making it one for a grant to Mr. Willis and bringing in Isaac Martin, and asking to recall his letters, Mr. Inderwick hardly suggested that there was any probability that if letters of administration were granted to the plaintiff, he would get any money by that means.

BOWEN, L.J., said (*ibid.*, 64):

But if we proceed further and consider what possible advantage can be obtained by the plaintiff, there is no ground for supposing that he can get a single farthing of benefit or a single right declared which is of any value to him whatever. As regards all acts done by the administrator, the grant, even if it was set aside, would be voidable only, and not void, and the revocation of it would not displace all acts which have been done

under the revoked grant. And as regards property outstanding, the ordinary Statutes of Limitation would apply.

Finally, FRY, L.J., added (*ibid.*, 65) :

I think that this action ought to be stayed under the general jurisdiction of the court to prevent the prosecution of frivolous and vexatious actions, and I think it is hardly going too far to say that an action begun nearly ninety years after the death of the person to whose estate it relates is almost *prima facie* vexatious. I say that because one knows the presumption which the law lends in favour of the possessors of property and the existence of Statutes of Limitations, one or other of which is almost always found to stand in the way of proceedings after such a lapse of time.

As, however, I have indicated at the beginning of this judgment, one fact has emerged from the evidence filed since the hearing before this court began which seems to me fatal to the defendants' application. For it appears that there is a piece of ground containing a family tomb which at the date of the death of Sir Henry Delves Louis Broughton still remained vested in him as administrator of Mr. Coghlan. It is remarkable that no mention appears to have been made of the property in the administration proceedings started in the year 1893, and it may be that some explanation will hereafter be forthcoming, but, as the evidence stands, it is, in my judgment, impossible to deny that that piece of property still remains outstanding as part of Mr. Coghlan's estate, to which none save Mr. Coghlan's personal representative can make title. Nor does it seem to me that the comparative smallness of the value of the property—it is said in the evidence to be worth £157 10s. 0d., compared with a total estate of over £600,000—can affect the result. It cannot be said that the value is so wholly negligible as to invoke any application of the principle of "*de minimis.*" I, therefore, have felt compelled to conclude that, whatever be the answers to the several questions indicated above, the evidence in regard to the family tomb is of itself decisive of the appeal. Having reached that conclusion and having regard to the view taken by both my brethren, not only on this matter but on the wider issues involved, I feel that it would not be right for me further to express conclusions on those other issues. So to do could serve no useful purpose on the present appeal and might embarrass the judge before whom the action will, in due course, come on for hearing. I do not, indeed, forget that the jurisdiction here invoked is one that, as has been said many times, should be exercised sparingly and only in clear cases, nor do I forget that, whatever be the merits of the case, the present action was brought by the plaintiff, in effect, on the invitation of the defendants contained in the letter of Sept. 11, 1945. In the circumstances, therefore, though I cannot conceal my regret that the considerable and careful arguments which have been addressed to us have led to so inconclusive a result, I feel I can do no other than concur in the order which my brethren propose.

HODSON, J. : I have had the advantage of reading the judgments prepared by TUCKER, L.J., and EVERSHEDE, L.J., and it is unnecessary for me to set out the facts relevant to the application.

The first head of the plaintiff's claim, namely, the claim for the revocation of the existing grants of administration is, in my opinion, clearly demurrable since, the administrators being stated on the face of the claim to be dead, the administration died with them. The remaining claim, namely, the claim to establish the alleged will dated Dec. 23, 1891, is not demurrable and in order that the defendants may succeed they rely on the inherent jurisdiction of the court to dismiss frivolous and vexatious actions. On such an application the court is not confined to the pleadings, but is entitled to look at the facts. These have been presented in this case on affidavits which have multiplied in the course of the investigation. The defendants base their application to dismiss the action on the ground, taken in this court, before the learned judge and before the registrar, that it is plain that, even if the claim may succeed, no fruitful consequence can be achieved by the plaintiff.

So far as the defendants themselves are concerned, there is one matter which, in my judgment, is detrimental, if not fatal, to their application. The plaintiff first instituted proceedings against the first-named defendant, who objected to the capacity in which she had been sued. By the letter of Sept. 11, 1945, which has already been read, her solicitors made proposals which eventually led to the issue of a summons heard on July 2, 1946, by the

registrar when it was arranged that the existing proceedings should terminate and the plaintiff should start fresh proceedings against the present defendants. The writ in this action was, accordingly, issued on Nov. 28, 1946. The object of these proceedings was, to the knowledge of the defendants and their advisers, to establish the alleged will of 1891. In these circumstances, the defendants ought not, in my judgment, to succeed *in limine* in preventing the plaintiff from seeking to prove the validity of the will.

Apart from the objection outlined above, it is, in my view, not established by authority that the mere existence of laches such as would bar a claim in subsequent proceedings would justify the court in taking the drastic step of dismissing the action *in limine*. A close examination of the authorities principally relied on by the defendants, *viz.*, *Mohan v. Broughton* (1) and *Willis v. Earl Beauchamp* (2), leads me to the same conclusion as TUCKER, L.J., on this aspect of the matter. Laches, like the Statute of Limitations, must normally be pleaded in order to defeat a claim, and there are grave difficulties in determining on affidavit evidence whether the facts proved against the plaintiff establish laches against him. In spite of the lapse of time and the admitted inactivity of the plaintiff and his predecessor, I express no opinion as to the prospects of a defence of laches succeeding in this or subsequent proceedings by the plaintiff.

Again, the defendants have undertaken to establish on this application that the plaintiff could recover nothing, not only from themselves but also from any other person as identifiable with, or otherwise referable to, assets originally forming part of H. T. Coghlan's estate. On this part of the case a curious fact emerged in the evidence, namely, that a somewhat valuable family tomb exists which forms to this day part of the unadministered estate of H. T. Coghlan. There was no evidence of any other unadministered assets except possibly some pedigree books, but for my part I see great difficulty in applying the *de minimis* principle, even to the tomb alone, so as to justify the dismissal of the action *in limine*. In my judgment, the appeal succeeds and the order of the registrar should be restored.

TUCKER, L.J. : The order with regard to costs is that the costs of the hearing before the registrar will be costs in the cause, and the costs before WILLMER, J., and in this court will be the plaintiff's in any event. Twenty-eight days for defence.

Appeal allowed. Costs of hearing before the registrar to be costs in the cause, costs in the court below and in the Court of Appeal to be the plaintiff's in any event.

Solicitors : Piper, Smith & Piper (for the plaintiff) ; Witham & Co. (for the defendants).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

BANKS v. COPE-BROWN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Sellers, JJ.), May 27, 1948.]

Rent Restriction—Extortionate rent—Rent including right to use kitchen, bath-room and garden in common with other tenant—Application of Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 10 (as amended by the Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1), sched. I).

A landlord who let a furnished room to a tenant with the right to use, in common with the tenant of another room, the kitchen, bathroom and garden, was convicted under s. 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1), sched. I) of letting part of a house to which the Rent Acts applied at a rent including payment in respect of the use of furniture which was extortionate.

HELD : as the letting of the room included the use of the kitchen in common with the tenant of another part of the house, the room was not

"let as a separate dwelling" within the meaning of the Acts, and, therefore, the Rent Acts did not apply and there was no offence under s. 10 of the Act of 1920.

Neale v. Del Soto ([1945] 1 All E.R. 191), and *Cole v. Harris* ([1945] 2 All E.R. 146), *applied*.

[AS TO "SEPARATE DWELLING" AND RENT INCLUDING PAYMENTS FOR USE OF FURNITURE, see HALSBURY, Vol. 20, pp. 313, 314, paras. 369, 370; and FOR CASES, see DIGEST, Vol. 31, pp. 557, 560, 561, Nos. 7044-7046, 7073-7084.]

Cases referred to :

- (1) *Neale v. Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 2nd Digest Supp.
- (2) *Cole v. Harris*, [1945] 2 All E.R. 146; [1945] K.B. 474; 114 L.J.K.B. 481; 173 L.T. 50; 2nd Digest Supp.

CASE STATED by Middlesex justices.

At a court of summary jurisdiction sitting at Ealing an information was preferred by the respondent, the town clerk of Ealing, charging the appellant, Eileen Greengrass Banks, with having let to Albert William Holyman, a furnished back room on the ground floor of No. 22, The Park, Ealing, together with the use of the kitchen, bathroom and garden and the provision of electric light on the stairs and in the bathroom, at an extortionate rent, contrary to s. 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended. At the hearing on Jan. 19, 1948, the appellant contended *inter alia* that s. 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, had no application to the letting, because there was a sharing of the kitchen, which was an essential living room, by Mr. Holyman with the tenant of the front room on the ground floor of the premises, and Mr. Holyman was, accordingly, not the tenant of a separate dwelling-house within the meaning of the Rent Restrictions Acts. The justices held that the offence charged had been committed and fined the appellant £15 with £10 10s. costs. The appellant appealed and the Divisional Court now allowed the appeal.

Russell Vick, K.C., and *I. H. Jacob* for the appellant.

W. G. Wingate for the respondent.

LORD GODDARD, C.J.: The appellant let rooms in her house to more than one person, but to each of those persons she gave the right to use, in common with the other tenant, the kitchen, bathroom and garden. The question is whether or not, in those circumstances, the Rent Restrictions Acts apply. If they do not, s. 10 of the Act of 1920, which imposes a penalty on a person who lets a place at an extortionate rent, has no application. Section 10 (as amended by the Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (2), and the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1), sched. I) provides :

Where any person after the commencement of [the Rent and Mortgage Interest Restrictions Act, 1939] lets any dwelling-house to which this Act applies or any part thereof at a rent which includes payment in respect of the use of furniture, and the rent charged yields to the landlord a profit which, having regard to all the circumstances of the case is extortionate, then, without prejudice to any other remedy under this Act, the landlord shall be liable on summary conviction to a fine not exceeding £100 . . .

That section provides in the clearest possible terms that the penalty shall be recoverable if the person lets a house or part of a house to which the Acts apply. If the Acts do not apply, it follows that the section does not apply. As they originally stood the Acts had no application to furnished lettings at all and landlords avoided the provisions of the Act by putting into the house some inconsiderable piece of furniture and then saying that the rent included, not only the house, but also the use of the furniture, and, therefore, the house was outside the scope of the Rent Restriction legislation. To remedy that state of affairs s. 9 of the Act of 1920 provided :

(1) Where any person lets, or has, before the passing of this Act, let any dwelling-house to which this Act applies, or any part thereof, at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the lessee that the rent charged is yielding or will yield

to the lessor a profit more than 25 per cent. in excess of the normal profit as hereinafter defined, the court may order that the rent, so far as it exceeds such sum as would yield such normal profit and 25 per cent. shall be irrecoverable, and that the amount of any payment of rent in excess of such sum which may have been made in respect of any period after the passing of this Act, shall be repaid to the lessee.

That provision was varied by s. 3 (1) and sched. I of the Act of 1939, and it now reads :

(1) Where any person lets, or has, since the beginning of the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1939, let any dwelling-house to which this Act applies, or any part thereof, at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the tenant that the rent charged is yielding or will yield to the landlord a profit in excess of the normal profit as hereinafter defined, the court may order that the rent, so far as it exceeds such sum as would yield such normal profit shall be irrecoverable, and that the amount of any payment of rent in excess of such sum which may have been made in respect of any period after the commencement of the Rent and Mortgage Interest Restrictions, Act 1939, shall be repaid to the tenant. (2) For the purpose of this section "normal profit" means the profit which might reasonably have been expected from a similar letting in the year ending on Sept. 1, 1939.

The Act of 1939 also amended s. 10 by omitting the direction to the court to pay particular attention to the margin of profit allowed under s. 9. Section 16 of the Act of 1933 provides that :

"Dwelling house" has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let.

It follows that before there can be a conviction under s. 10 of the Act of 1920 there must be a letting of a dwelling-house as a whole or a letting of a part of a house as a separate dwelling. The objection which is taken in this case is that the part of the house that was let to the tenant was not let as a separate dwelling, and, for that, reliance is placed on *Neale v. Del Soto* (1), a case which is binding on this court. It was decided there that where there was a letting of certain rooms in a house together with the right to use the kitchen in common with the landlord, there was no letting as a separate dwelling-house. *Cole v. Harris* (2) followed the principle which *Neale v. Del Soto* (1) laid down, although it was distinguished on the facts. In *Cole v. Harris* (2) certain rooms were used in common by a landlord and two tenants, but these rooms did not include the kitchen. All the members of the court applied the principle of *Neale v. Del Soto* (1). The only difference there was that one member of the court, LAWRENCE, L.J., thought the principle of *Neale v. Del Soto* (1) would apply where the rooms occupied in common were a bathroom and a water closet while the other two members of the court thought that that was not enough and that only if the use of a kitchen had been let there would be enough to apply the principle of *Neale v. Del Soto* (1) and to say that no longer was there a separate letting of a part of the house.

In the present case the right to use the kitchen is conferred on both the tenants of the house, and it seems to me, and, indeed, counsel for the respondent (the prosecutor) has conceded, that he cannot draw any distinction in principle between the case where part of a house is let to a tenant who has the right to use the kitchen in common with the landlord and the case where the tenant is entitled to use the kitchen in common with another tenant. He is right to make that admission, because in *Cole v. Harris* (2) MORTON, L.J., in delivering the leading judgment of the court, said this ([1945] 2 All E.R. 146, 152) :

I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows : there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as "living rooms" or "dwelling rooms." To my mind a kitchen is fairly described as a "living room," and thus nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling.

That obviously applies here, although the common use is a use common to two tenants and not common to a tenant and a landlord. For these reasons, in my opinion, this letting was never within the Rent Restrictions Act, 1920,

as amended by the Act of 1939, and it follows that the penal section cannot apply to it. This appeal must be allowed.

BIRKETT, J.: I am of the same opinion and for the same reasons.

SELLERS, J.: I agree.

Appeal allowed with costs.

Solicitors: *Osmond, Bard & Westbrook* (for the appellant); *E. J. Cope-Brown*, Town Clerk, Ealing (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

GORDON v. BARNSLEY POLICE AUTHORITY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Sellers, JJ.), May 28, 1948.]

Police—Pension—Widow's special pension—"Non-accidental injury"—"Special risks"—Heart disease aggravated by duty—Police Pensions Act, 1921 (c. 31), ss. 3 (b), 33 (3).

By the Police Pensions Act, 1921, s. 3 (b): "Where . . . a member of a police force dies whilst serving in the force from the effects of an injury received in the execution of his duty . . . his widow shall be entitled, where the injury was accidental to a widow's ordinary pension, and where the injury was non-accidental to a widow's special pension." By s. 33 (3): "Any injury intentionally inflicted, or incurred in the performance of a duty involving special risks, shall be deemed to be a non-accidental injury." By previous decisions of the Divisional Court, a disease can be an injury within the meaning of the Act.

A police officer died from the effects of heart disease which was aggravated by his duty, and his widow claimed a special pension under s. 3 (b), on the ground that his death was caused by a "non-accidental injury":—

HELD: although the definition in s. 33 (3) of the Act was not comprehensive, a "non-accidental injury" must be, or must be *sui generis* with, an injury intentionally inflicted, or incurred in the performance of a duty involving special risks, and the special risks must be risks special to the duty which the police officer was called on to perform and not risks special to the officer, and, therefore, the widow was not entitled to a special pension.

[AS TO WIDOWS' PENSIONS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 351, 352, para. 583.]

Cases referred to:

(1) *Garvin v. City of London Police Authority*, [1944] 1 All E.R. 378; [1944] K.B. 358; 113 L.J.K.B. 305; 170 L.T. 336; 108 J.P. 107; 2nd Digest Supp.

(2) *Huddersfield Police Authority v. Watson*, [1947] 2 All E.R. 193; [1947] K.B. 842; [1948] L.J.R. 182; 177 L.T. 114.

APPEAL by the widow of a police officer, under the Police Pensions Act, 1921, s. 17 (2), from a decision of the West Riding, Yorkshire, Quarter Sessions, dated Jan. 19, 1948. Quarter sessions held that the widow was not entitled to a special pension under s. 3 (b) of the Act, because the police officer's death was not the result of a "non-accidental injury," and the Divisional Court now affirmed their decision. The facts appear in the judgment of LORD GODDARD, C.J.

R. Lyons for the widow.

G. W. Wrangham for the police authority.

LORD GODDARD, C.J.: This is an appeal brought under the Police Pensions Act, 1921, s. 17 (2), which enables a decision of quarter sessions to be reviewed by this court on a point of law. I think it is a transparently clear case in which quarter sessions decided rightly. The Police Pensions Act, 1921, s. 3 (b), provides:

. . . where in any case a member of a police force dies whilst serving in the force from the effects of an injury received in the execution of his duty without his own default, or, having been granted a pension in respect of any such injury, dies from the

effects of such injury, his widow shall be entitled, where the injury was accidental to a widow's ordinary pension, and where the injury was non-accidental to a widow's special pension.

Section 33 (3) provides :

Any injury intentionally inflicted, or incurred in the performance of a duty involving special risks, shall be deemed to be a non-accidental injury.

That definition is not comprehensive, since it does not say that no other injury can be a non-accidental injury, but it indicates a class of injury which the legislature had in mind as a non-accidental injury. A

The police constable in question died from the effects of heart disease. He suffered from that disease for probably a long time, but it was not known. During the war he was on a heavy beat, which he worked by means of a bicycle, and, as everyone knows, a bicycle is a very bad thing, especially in hilly country, for a man with heart disease. By reason of the decisions of this court [in *Garvin v. City of London Police Authority* (1) and *Huddersfield Police Authority v. Watson* (2), that a disease can be an "injury" within the meaning of s. 2 (1) (c) of the Act], where a police officer dies from what would ordinarily be called "natural causes," his death is held to be the result of an injury received in the execution of his duty, and, consequently, the widow is entitled to a pension under s. 3 (b) of the Act if those causes have been aggravated by his duty or if his duty has caused the "natural cause" which existed to be fatal. In this case the question is whether or not the injury which the police officer suffered is to be regarded as an accidental or non-accidental injury. Quarter sessions held that a non-accidental injury must be, or must be *sui generis* with, an injury intentionally inflicted or incurred in the performance of a duty involving a special risk. That is a perfectly right decision, and I do not think we can improve on it. It is obvious, from the facts found by quarter sessions, that this was not an injury intentionally inflicted nor one incurred in the performance of a duty involving a special risk, but that it was simply incurred in performing the ordinary duties of a police officer. Counsel for the widow put forward an alternative submission that, if the risk was one which was special to the officer himself, it would be a non-accidental risk. I cannot agree with that. I think the risk must be special to the duty and not to the particular officer. No one knew at the time that this officer was suffering from this disease. He did not know it himself. I think that the "special risk" must be a risk special to the duty which he is called on to perform, and not a risk which is special to the officer because it so happens that, unknown to everyone, he is in a particular state of health. For these reasons I think that the decision of quarter sessions was right and that this appeal should be dismissed. B
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BIRKETT, J.: I am of the same opinion, and for the same reasons. I should be content to accept and adopt as my own the very careful judgment of the learned chairman of quarter sessions. I agree with the reasons of my Lord. F

SELLERS, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Collyer-Bristow & Co.*, agents for *Alf. Masser & Co.*, Leeds (for the widow); *Torr & Co.*, agents for *A. E. Gilfillan*, Town Clerk, Barnsley (for the police authority). G

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BETTELEY, ADDYMAN & JALLAND, LTD. v. SINGTON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Streetfeild, JJ.),
May 26, 1948.]

Price Control—Exceeding maximum price—Penalty—Minimum penalty—Offender to derive “no benefit from the offence”—Deduction of tax paid on excessive profit—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 55AB (4) (a).

A During the 12 months ending Dec. 19, 1946, a manufacturing company received by the sale of its goods £33,353, which exceeded its permitted maximum charge by £3,789. The company was liable to pay £3,293 in income tax and excess profits tax on the excess. In assessing the minimum amount of the fine to be imposed under the Defence (General) Regulations, 1939, reg. 55AB, which provides by para. 4 (a) that “the minimum amount [of the fine] shall be such amount as will, in the opinion of the court, secure that the offender derives no benefit from the offence,”

B HELD: on the construction of the regulation, the company should be fined the amount by which it had, in fact, profited, and, in arriving at that amount, it was proper to deduct the amount of the tax from the total amount of illegal profit.

C [FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 55AB, see HALSBURY'S STATUTES, Vol. 39, pp. 992-994.]

Cases referred to:

- (1) *Inland Revenue Comrs. v. Von Glehn*, [1920] 2 K.B. 553; 89 L.J.K.B. 590; 123 L.T. 338; 28 Digest 46, 236.
- (2) *Mann v. Nash*, [1932] 1 K.B. 752; 101 L.J.K.B. 270; 147 L.T. 154; 76 Sol. Jo. 201; 16 Tax Cas. 523; Digest Supp.

D CASE STATED by Nottingham justices.

At a court of summary jurisdiction sitting at Nottingham an information was preferred by the respondent on behalf of the Board of Trade under the Apparel and Textiles Order, 1942, art. 1, the Utility Apparel (Infants and Girls Wear) (Consolidation) Directions, 1945, para. 3 (2), and the Defence (General) Regulations, 1939, reg. 55AB, charging the appellants with having charged, in the course of their business, in respect of all relevant goods supplied by sale during the twelve months ending on Dec. 19, 1946, £33,353, an aggregate of gross prices exceeding by £3,789 the manufacturers' costs of production and other costs and 5 per cent. thereon. The appellants pleaded Guilty, but contended that the facts warranted the imposition of the minimum penalty only and that such minimum penalty was the sum of £3,789 less £3,293 income tax and excess profits tax payable by the appellants on this sum, *i.e.*, £496. In imposing a fine of £3,789, the justices held that the proper penalty was the minimum penalty, but that, in assessing it, there was no power to deduct the amount of income tax and excess profits tax payable by the appellants. The Divisional Court now held that the liability for tax should be taken into account and allowed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Vaughan, K.C., and *Geoffrey Lane* for the appellants.

G *H. L. Parker* for the respondent.

LORD GODDARD, C.J.: This case raises a short but very important point in regard to penalties which may be imposed for exceeding maximum prices under the Defence (General) Regulations, 1939, reg. 55AB, made in December, 1945, in pursuance of the Supplies and Services (Transitional Powers) Act, 1945, s. 2.

H The appellants, who were manufacturers of clothing, during the period of twelve months ending Dec. 18, 1946, sold £33,353 worth of goods. On aggregate of gross prices, that exceeded by £3,789 the sum they were entitled to charge under the Apparel and Textiles Order, 1942. It was proved before the justices and accepted by the prosecution that the amount of tax which they would have to pay, either in income tax or excess profits tax, on that sum was £3,293, and it was contended by the appellants that on the true construction of the regulation they were entitled to deduct that £3,293 from the £3,789 for the purpose of assessing the minimum penalty to which they

were liable, which would mean that the balance, £496, would be the amount of the minimum penalty. The justices held that they had no power to take into account the amount of tax, and, therefore, they fined the appellants £3,789. Regulation 55AB provides :

(3) Any person guilty of an offence against this regulation shall be liable—(a) on summary conviction, to a fine not exceeding the maximum amount provided in the next following paragraph . . . and shall in every case be ordered to pay such a fine as aforesaid, of an amount not less than the minimum amount provided in the next following paragraph, unless, having regard to any special circumstances, the court thinks there is good reason for not imposing a fine or for imposing a fine of less amount.

(4) The minimum and maximum amounts of the fine referred to in the last foregoing paragraph shall be as follows, that is to say—(a) whether on summary conviction or on conviction on indictment, the minimum amount shall be such amount as will, in the opinion of the court, secure that the offender derives no benefit from the offence ; (b) On summary conviction the maximum amount shall be an amount which exceeds the minimum amount by £500 or by the treble penalty, whichever is the greater . . . and for the purposes of this paragraph the expression “treble penalty” means—(i) in a case where the offence was a sale of, or an offer or agreement to buy or sell, or an invitation of an offer to buy or sell, controlled goods at too high a price, an amount equal to three times that price.

Therefore, with regard to the maximum penalty, which is meant to be highly punitive, being imposed in what I may call a bad case of deliberate over-charging, there is no question. It is simply the price multiplied by three. Observe the difference between that and the provision with regard to the minimum penalty, which is to be “such amount as will, in the opinion of the court, secure that the offender derives no benefit from the offence.” It seems to me that what Parliament means is that the offender, in the absence of special circumstances (and none was found here), is to pay a sum of money which will leave him no better off than if he had not got the illegal profit into his pocket and no worse off than he would have been if he had not offended against the regulation. That may be, in many cases, difficult of assessment, and the words “in the opinion of the court” show that Parliament is leaving the court to use the best means that it can in deciding the proper amount. It is not to be measured by some particular yardstick. There may, however, be cases (and it is said that this is one, because the prosecution was brought after the assessment for taxes had been ascertained) in which the court will not have any difficulty in applying a measurement because it has already been done for them. If I am right in my view that the intention of the section is that the offender is to be fined such an amount as will leave him in the same position as he would have been in if he had not made the over-charge, the present matter becomes clear, because, while, in making the over-charge, the appellants put into their pockets £3,700 odd, they will have to pay thereout to the State some £3,200 in taxation. The justices, therefore, can see at once what sum has to be brought into account to find out whether or not the appellants are getting a benefit. Manifestly they are required to measure the benefit which the appellants have received by their illegal profit and to take that sum from them by way of a minimum fine. Therefore, the justices were in error in thinking that they could not take into account the tax which the appellants have to pay. If Parliament had meant that the offender was, in every case, to pay the full amount of the illegal profit, it would have been easy to say so. Comparing the provision for the minimum penalty with the words used in regard to the maximum penalty, it seems clear that the legislature intended that a man who, in the opinion of the justices, should be fined a minimum penalty, should only pay that amount by which he was, in fact, better off.

There was ample evidence before the justices to show that the true amount by which the appellants were better off was £496 and that that was the only benefit which they received. Therefore, this case will go back to the justices with an intimation that they had power to take the tax into account and that, therefore, the proper penalty for them to impose was £496, and the conviction must be amended accordingly.

BIRKETT, J.: I am of the same opinion and for the same reasons. I would base my own judgment on the concluding sentence of my Lord's judgment with regard to the true duty which lay on the justices. No doubt,

as counsel for the respondent has forcibly pointed out, these are important cases, and he has shown some of the difficulties which may arise in dealing with them. In the present case, however, I think the facts are quite clear. The justices found as a fact that £3,789 was the illegal excess contrary to the provisions of the Apparel and Textiles Order, 1942. They also found that the appellants must pay taxes amounting to £3,293, leaving the sum of £496. The justices were wrong in saying that they had no power to consider the taxation. That ignores entirely the meaning of the words "in the opinion of the court." The words of the regulation are: "the minimum amount shall be such amount as will, in the opinion of the court, secure that the offender derives no benefit from the offence." The justices had before them the clearest evidence that the amount which the appellants must pay by way of income tax and excess profits tax was £3,293, and the clearest evidence that the net cash benefit was £496. They say in the Case Stated: "We are of opinion that we had no power to deduct that sum [the amount of the tax]." I think they had, and that, on the true construction of the words of the regulation, they ought to have considered it.

STREATFEILD, J.: I also am of the same opinion. Whatever the result of a fine in this case, the amount of the income tax and excess profits tax which the appellants are liable to pay cannot be recovered by them from the Revenue. The two cases which have been cited to the court: *Inland Revenue Comrs. v. Von Glehn* (1) and *Mann v. Nash* (2) make that quite clear, but, in my opinion, in assessing the minimum amount under the regulation the justices have wrongly fettered themselves by saying that they had no power to take into consideration the amount of tax for which the appellants are liable. I agree with my Lord that, in assessing the amount which, "in the opinion of the court, shall secure that the offender derives no benefit from the offence," it is impossible to shut out the tax which has been suffered by the appellants in this case. In assessing the minimum punishment the justices had to form an opinion as to what amount would secure that there was no benefit to the appellants. I do not see how that could be done unless they took into consideration what the appellants were liable to pay in income tax and excess profits tax. I agree that this case should be sent back with the directions the Lord Chief Justice has indicated.

Appeal allowed, with costs.

Solicitors: *Kenneth Brown, Baker, Baker*, agents for *Browne, Jacobson & Hallam*, Nottingham (for the appellants); the *Solicitor for the Board of Trade* (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

SAYCELL v. BOOL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Sellers, JJ.), May 28, 1948.]

Motor Vehicle—"Driving"—*Steering lorry down incline without engine running*—*Road Traffic Act, 1930 (c. 43), s. 7 (4).*

On Dec. 10, 1947, the respondent, who was then disqualified for holding a licence to drive a motor vehicle, released the brake of a lorry which he owned and which was standing at the head of an incline and steered it down the road into his garage, a distance of about 100 yards. The engine was not started, and there was no petrol in the tank.

HELD: the respondent was guilty of driving a motor vehicle while disqualified for holding a licence, contrary to the Road Traffic Act, 1930, s. 7 (4).

[FOR THE ROAD TRAFFIC ACT, 1930, s. 7 (4), see HALSBURY'S STATUTES, Vol. 23, p. 616.]

Case referred to:

(1) *Wallace v. Major*, [1946] 2 All E.R. 87; [1946] K.B. 473; 115 L.J.K.B. 402; 175 L.T. 84; 110 J.P. 231; 2nd Digest Supp.

CASE STATED by Sheffield justices.

Informations were preferred by the appellant, a police inspector, against the respondent, charging him with driving, on Dec. 10, 1947, a motor lorry while being a person disqualified for holding or obtaining a licence to drive motor vehicles, contrary to the Road Traffic Act, 1930, s. 7 (4), and with driving the lorry when there was no third-party insurance policy in force in relation thereto, contrary to s. 35 (1) of the said Act. The justices, being of the opinion that in the circumstances the van was not mechanically propelled and was not a motor vehicle within the meaning of the Road Traffic Act, 1930, dismissed the said informations. The present appeal to the Divisional Court was allowed. The facts appear in the judgment of LORD GODDARD, C.J.

Wrangham for the appellant.

Harry Morris for the respondent.

LORD GODDARD, C.J. : This is a Special Case stated by justices for the city of Sheffield who dismissed a charge preferred against the respondent of having driven a motor vehicle on the road when he was disqualified. As a concomitant of that charge, he was also charged with driving an uninsured vehicle, because the policy of which he was possessed only covered a person holding a licence. The alleged offence was committed on Dec. 10, 1947, and the justices heard the case on Feb. 17, 1948. Meanwhile, on Feb. 6, 1948, the Recorder of Sheffield had allowed the respondent's appeal against his disqualification for holding a driving licence.

The question raised in this case is whether the respondent was driving the lorry at the time in question. The lorry, which he owned, was standing at the head of an incline. There was no petrol in the tank, and the respondent, having released the brake, set the lorry in motion by pushing it, got into the driving seat, and let the lorry go down the hill so as to get it into his garage. I dare say he thought he was not committing an offence, but it seems impossible to say that in those circumstances he was not "driving" the vehicle. He controlled it by operating the brakes and the steering wheel, and one cannot say that he was not the "driver" for the purposes of the Road Traffic Act.

This case has been brought here after the respondent's disqualification was removed. It appears very unfortunate that the respondent should have been convicted after his disqualification had been removed—when the appellate court had expressed the opinion that he ought not to have been disqualified. We shall send the case back to the justices with an intimation that a technical offence was committed. We shall not give any costs of this appeal. If the police want to get a decision on a point of principle they must get it at their own expense. We shall also indicate to the justices that we think that in the circumstances of the case, having regard to the removal of the disqualification which had taken place before the case was heard, the case can properly be met by a nominal fine, and that special reasons do exist for not disqualifying the respondent for holding a licence by reason of his conviction.

BIRKETT, J. : I agree.

SELLERS, J. : I agree.

Appeal allowed ; no order as to costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *John Heys*, town clerk, Sheffield (for the appellant) ; *Paisner & Co.*, agents for *R. Howard Boyers*, Sheffield (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

WALFORD v. NARIN.

[KING'S BENCH DIVISION (Morris, J.), April 23, 26, 1948.]

Sale of Goods—Note or memorandum in writing—Sufficiency—Omission of vendor's name—Deficiency supplied by purchaser's admission—Omission of term as to delivery—Sale of Goods Act, 1893 (c. 71), s. 4 (1).

On Jan. 20, 1948, the defendant agreed to buy certain furniture from the plaintiff and signed the following memorandum: "11 Nether Close, Finchley, N.3 [the defendant's address]. I agree to purchase the following second-hand furniture and will forward a cheque for £150 in payment for same within three days." The articles were set out underneath. It was orally agreed that the plaintiff should send the furniture to a factory where one article was to be sprayed, and that after the spraying he would send all the furniture to the defendant. On Jan. 21, 1948, the defendant told the plaintiff that he no longer desired to take delivery of the furniture. On that day the plaintiff's solicitors wrote to the defendant calling for payment, and, on Jan. 22, 1948, in reply, the defendant's solicitors wrote: "Your letter of yesterday's date addressed to Mr. S. N. has been handed to us with instructions to deal with same on his behalf. He informs us that he has no copy of the memorandum signed by him, and we shall, therefore, be obliged if you will favour us with a copy of same and give us an opportunity of inspecting the original." In an action by the plaintiff for payment of the money alleged to be due under the contract, it was submitted on behalf of the defendant that there was no sufficient memorandum for the purposes of the Sale of Goods Act, 1893, s. 4.

HELD: (i) the letter of Jan. 22, 1948, was an admission by the defendant through his agent that he signed the memorandum of Jan. 20, 1948, and was sufficient to supply the deficiency in that memorandum caused by the omission therefrom of the plaintiff's name.

(ii) the oral agreement as to delivery was a term of the contract which should have appeared in the memorandum, and its omission rendered the memorandum insufficient for the purposes of s. 4.

Dicta of SCRUTTON, L.J., and BANKES, L.J., in Thirkell v. Cambi ([1919] 2 K.B. 590, 598, 593), *applied*.

Wilkinson v. Evans (1866) (L.R. 1 C.P. 407), *distinguished*.

[AS TO NOTE OR MEMORANDUM OF CONTRACTS FOR £10 OR UPWARDS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 33-37, paras. 34-38; and FOR CASES, see DIGEST, Vol. 39, pp. 383-393, Nos. 212-295.]

Cases referred to:

- (1) *Studds v. Watson*, (1884), 28 Ch.D. 305; 54 L.J.Ch. 626; 52 L.T. 129; 12 Digest 141, 958.
- (2) *Wilkinson v. Evans*, (1866), L.R. 1 C.P. 407; Har. & Ruth. 552; 35 L.J.C.P. 224; 12 Digest 135, 911.
- (3) *Thirkell v. Cambi*, [1919] 2 K.B. 590; 89 L.J.K.B. 1; 121 L.T. 532; 12 Digest 135, 908.

ACTION for moneys due and payable under a contract for the sale of goods, with interest. The defendant set up the absence of a sufficient memorandum in writing as required by the Sale of Goods Act, 1893, s. 4 (1), on the ground that neither the name of the plaintiff nor a term of the contract as to the delivery of the goods appeared in the note of the contract signed by the defendant. The facts appear in the judgment.

G. E. Duveen for the plaintiff (the seller).

Pearl and Wellwood for the defendant (the buyer).

MORRIS, J.: The plaintiff, Mr. Herbert Abraham Walford, claims the sum of £150 from the defendant, Mr. Samuel Narin, as moneys due and payable by the defendant to the plaintiff under a contract for the sale of goods. On Feb. 23, 1948, the defendant swore an affidavit in which he denied that he was indebted to the plaintiff in the sum alleged, or at all, and in which he said:

The money the subject-matter of the plaintiff's claim herein is the price alleged to be due to him in respect of the sale to me by the plaintiff of certain articles of furniture. I am advised and verily believe that the said alleged contract of sale is unenforceable in that there is no sufficient note or memorandum in writing of the

said contract as required by law and I have not accepted or received the goods, neither have I given anything in earnest to bind the contract.

When the matter came to court the defendant took, not only the point that there was no memorandum of the contract because the name of the plaintiff did not appear in the document signed by the defendant on Jan. 20, 1948, but also a further point that a term of the contract relating to delivery is not to be found in any document or documents signed by him (the defendant).

The plaintiff advertised in a newspaper certain furniture for sale. The defendant, who was setting up a home, went with his wife to see the furniture. Ultimately, it was orally agreed between the plaintiff and the defendant that the defendant would buy the furniture for £150. There is no dispute as to what constituted the items of furniture. They are set out in a document, dated Jan. 20, 1948, signed by the defendant. One of the articles of furniture, a dressing table, was not quite in the condition that the defendant would have liked it to be in or that the plaintiff was willing to have it put in. The plaintiff was agreeable to having that dressing table sprayed, and he was willing to undertake the spraying at a factory in Edgware with which he was connected. There was a discussion as to delivery, and I find that the parties agreed that the plaintiff would send the furniture to the factory so that the dressing table might be sprayed, and that, when that had been done, the plaintiff would send the furniture to the defendant at such place as the defendant specified, and, presumably, subject to considerations as to what was reasonable, at such time as the defendant specified. The importance of this part of the case is that the plaintiff agreed with the defendant that the plaintiff would deliver the furniture to the defendant.

After this agreement the plaintiff got a piece of his own notepaper, wrote on it, gave it to the defendant, and asked him to sign it. The defendant did so. The document so signed by the defendant is dated Jan. 20, 1948. The address of the plaintiff's house is printed at the head, but it is deleted and there is written, "11 Nether Close, Finchley, N.3," that being the defendant's address. The document is in this form :

I agree to purchase the following second-hand furniture and will forward a cheque for £150 in payment for same within three days.

The articles of furniture are enumerated. The plaintiff retained the document and a few days later he had it stamped. It will be seen that the name of the plaintiff is not contained in the document.

The next morning, Jan. 21, the defendant telephoned to the plaintiff saying that he no longer desired to take delivery of the furniture. The plaintiff consulted his solicitor, who wrote a letter on Jan. 21 in these terms :

We have been consulted by Mr. H. A. Walford of Lea Lodge, Norrice Lea, Finchley. We understand from our client that you purchased from him furniture for the sum of £150 last night and we have before us a memorandum of the bargain which you signed. Mr. Walford informs us that you telephoned him this morning to state that you no longer desired to take delivery of this furniture. Our client was most surprised and has instructed us to write to you accordingly. We must inform you, therefore, that the furniture stands at your risk, and that, unless we receive payment for the same by the 23rd instant, the date you promised in the memorandum, we shall issue a writ against you. Yours faithfully, Walford & Co.

The plaintiff's solicitor received the following reply, dated Jan. 22, from the defendant's solicitors :

Your letter of yesterday's date addressed to Mr. S. Narin has been handed to us with instructions to deal with same on his behalf. He informs us that he has no copy of the memorandum signed by him, and we shall, therefore, be obliged if you will favour us with a copy of same and give us an opportunity of inspecting the original. After we have seen them we will take our client's instructions and communicate with you again.

A number of authorities have been cited to me dealing with the authority that should be possessed by any agent who signs a memorandum for the purposes of the Sale of Goods Act, 1893, s. 4 (1). It does not seem to me that the citation of authority is necessary in regard to this part of the case. The words in the second paragraph of the letter are quite plain : "He informs us that he has no copy of the memorandum signed by him." There cannot be any doubt that the solicitors were there stating that they were informed by the defendant that he had

no copy of a memorandum signed by him, and those words, in my judgment, carry the plain meaning that the solicitors, having been asked by the defendant to deal with the letter that he had received from the plaintiff's solicitor, wrote on the direct instruction of the defendant to say that the defendant had no copy of the memorandum signed by him. That is a clear statement by somebody told to write on behalf of the defendant that he is saying: "I did sign the memorandum to which you are referring, but I have not a copy of it."

A That letter is sufficient by itself to supply one deficiency in the original document, namely, that it does not contain the name of the plaintiff.

One or two further letters passed. The plaintiff's solicitor sent a copy of the memorandum that had been signed by the defendant and that was acknowledged on Jan. 30, 1948, in a letter in which the defendant's solicitors say:

We thank you for your letter of the 27th instant, enclosing copy of the document signed by our client which we will inspect.

B In a letter, written on Jan. 28, by the defendant to the plaintiff personally, the defendant said:

The capital with which I intended to purchase the furniture was a loan which was promised me by a close relative. Now, for some reasons best known to himself, he has withdrawn his promise which leaves me in an awful position, I must admit. Under the circumstances, I feel sure you will agree with me it would seem rather

C futile and hopeless to bind myself, when I am incapable of discharging my obligations. My reason for telephoning you on the following morning was the hope that you would be able to dispose of the furniture in question.

He then goes on to make a suggestion as to how he would be able to pay if the plaintiff still insisted that he should purchase the goods. Using that letter and citing *Studds v. Watson* (1), counsel for the plaintiff says that, if it were necessary for him further to rely on any matter, he would submit that that letter of Jan. 28 sufficiently refers to the agreement that was made between the defendant and the plaintiff so as to introduce the name of the plaintiff, and that he could rely on that document, together with the memorandum of Jan. 20, and say that together they constitute a sufficient note or memorandum in writing. As I have held that the letter of Jan. 22 is sufficient so far as the supplying of the name of the plaintiff as the seller and as the person to whom the cheque was to be given was necessary to constitute a memorandum, it is unnecessary

D for me to deal with this alternative contention.

E If the matter had rested there, I would be of opinion that the documents constituted a sufficient note or memorandum in writing. The Sale of Goods Act, 1893, s. 4, provides:

(1) A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

F

There is no dispute between the parties that the contract is unenforceable unless there is a note or memorandum in writing of it, signed by the defendant.

Section 29 (1) of the Act, in dealing with the question of delivery, provides as follows:

G

Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

H

Counsel for the plaintiff submitted that on the evidence the proper conclusion is that nothing was arranged between the parties as to delivery, and that, therefore, the result is that, in accordance with s. 29 (1) delivery of these articles of furniture was to be at the residence of the plaintiff. I have already stated that the view of the evidence which I have accepted is that it was arranged between the plaintiff and the defendant as to how delivery was to take place, namely, that the plaintiff was to deliver to the defendant. That was a term of the contract that depended on the particular arrangement made between

the parties. Counsel further argued that, even if there was an agreement that the plaintiff should deliver to the defendant, nevertheless such an agreement need not be incorporated in the note or memorandum in writing. In support of that contention he referred to LEAKE ON CONTRACTS (8th ed.), p. 191, where it is said :

But directions respecting the route by which the goods are to be delivered relate to the mode of performance, and not to the substance of the contract, and therefore need not be in writing.

The authority given to support those words was *Wilkinson v. Evans* (2), but it seems to me that that case is different from the present on its facts and on the principle raised in it. In that case some cheeses and candles had been sold and an invoice was sent to the buyer. The buyer returned the goods and the invoice with a note on the back of the latter complaining of the condition in which the goods had arrived. It was held (L.R. 1 C.P. 407) :

... that the contents of the invoice were sufficiently referred to by the note on the back of it, and that the two together constituted a sufficient memorandum in writing of the bargain to satisfy the Statute of Frauds.

In a letter which was written by the defendant in that case it was said that, had the goods been sent by canal, as had been ordered, they would not have been damaged, and in argument to the court it was submitted that from the letter it would appear that it was a term of the contract that the goods should be sent by canal. In giving judgment, ERLE, L.J., said (*ibid.*, 410) :

I think the direction to send them by the canal was not a part of the contract, but only an order given subsequently as to the mode of carrying it out.

It seems to me that a question whether the plaintiff is to deliver the goods to the defendant or whether the defendant is to collect them from the plaintiff is on quite a different footing from the matter referred to in *Wilkinson v. Evans* (2).

In *Thirkell v. Cambi* (3), in the Court of Appeal, SCRUTTON, L.J., in the course of his judgment, after referring to certain letters, says ([1919] 2 K.B. 598) :

But when all these documents are examined, which, it is said, contain the terms of the contract and prove that there was no other contract, it is found that one term, the mode of delivery of the goods against payment, is not mentioned in the written statements of the contract.

BANKES, L.J., referred to the question of delivery, using these words (*ibid.*, 593, 594) :

Take for example the terms as to the mode of delivery and the conditions of payment ... for the purposes of this case I will assume that the letters do contain the terms of the bargain.

It seems to me that those passages indicate that a term as to delivery was regarded as a term that should have been set out in the note or memorandum in writing. Counsel for the plaintiff sought to distinguish the case on the ground that delivery and payment in that case were so closely related. In the present case, he says, the payment provided for by the contract is to be £150 payable by cheque within three days and that payment is irrespective of delivery. In my judgment, however, that is not a distinction which negatives the contention that a term as to delivery may be a term that ought to be in the note or memorandum in writing of the contract. I must decide this case only in reference to its own facts, but it seems to me that, as the parties came to an arrangement in regard to delivery which altered what would otherwise have been the legal position, that term should have been in the note or memorandum in writing. I, therefore, feel compelled to hold that there is no sufficient note or memorandum in writing of the contract, and that the claim of the plaintiff does not succeed.

Judgment for the defendant. No order as to costs.

Solicitors : *Walford & Co.* (for the plaintiff) ; *Gerald Samuels & Co.* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

BEAMAN v. A.R.T.S., LTD.

[KING'S BENCH DIVISION (Denning, J.), April 19, 20, 21, May 12, 1948.]

Limitation of Actions—Postponement of limitation period—Conversion—“Action based on fraud”—“Right of action concealed by fraud”—Bailment of goods—Owner abroad during war—Instructions unobtainable—Storage charges accumulating—Goods given away as worthless—Action brought more than 6 years after date of conversion—Limitation Act, 1939 (c. 21), ss. 3, 26 (a), (b).

In 1935, before going abroad, the owner of four packages deposited them with a company for storage. In August, 1940, the company gave up its own storage depot and, owing to difficulties connected with the war, wished to wind up outstanding matters so far as possible. Storage charges were already due on the packages and were accumulating, and, as communication with the owner was impossible at the time, the company examined the contents of the packages to see if their continued storage was justifiable. Deciding that they were worthless, the company gave them to the Salvation Army, paid certain warehouse charges, and cancelled its own charges. The company neither wrote to, nor heard from, the owner until 1946 when she returned to England and demanded delivery of the packages. In November, 1946, after making inquiries, necessitated by disorganisation due to the war, the company informed her of the position, whereupon, she started an action against the company for damages for conversion. The company pleaded the Limitation Act, 1939, s. 3, but it was contended by the owner under s. 26 of the Act that the period of limitation was postponed because the action was “based upon the fraud” of the company or “the right of action was concealed by [its] fraud,” within the meaning of s. 26 (a) and (b) respectively :—

HELD: the word “fraud” always imported some element of moral turpitude and an action for conversion was not “based upon the fraud of the defendant” within the meaning of s. 26 (a) of the Act of 1939 where the defendant honestly believed that the true owner was not available and that he was acting in the best interests of all concerned. Therefore, on the facts of the case, the action was not based on fraud and there had been no fraudulent concealment by the company of the owner's right of action, within the meaning of s. 26 (b), and, accordingly, the cause of action in respect of the conversion accrued on Aug. 16, 1940, and, under s. 3 of the Act of 1939, the action was barred on Aug. 16, 1946, when the owner's title to the goods became extinguished.

[FOR THE LIMITATION ACT, 1939, ss. 3 and 26, see HALSBURY'S STATUTES, Vol. 32, pp. 226 and 240.]

Cases referred to :

- (1) *Clayton v. Le Roy*, [1911] 2 K.B. 1031; 81 L.J.K.B. 49; 105 L.T. 430; 75 J.P. 521; 43 Digest 493, 314.
- (2) *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; [1941] A.C. 1; 109 L.J.K.B. 919; 164 L.T. 139; 2nd Digest Supp.
- (3) *Granger v. George*, (1826), 5 B. & C. 149; 7 Dow & Ry. K.B. 729; 32 Digest 344, 264.
- (4) *Beaumont v. Jeffery*, [1925] Ch. 1; 93 L.J.Ch. 532; 132 L.T. 246; Digest Supp.
- (5) *Betts v. Metropolitan Police District Receiver and Carter Paterson & Co., Ltd.*, [1932] 2 K.B. 595; 101 L.J.K.B. 588; 147 L.T. 336; 96 J.P. 327; Digest Supp.
- (6) *Wilkinson v. Verity*, (1871), L.R. 6 C.P. 206; 40 L.J.C.P. 141; *sub nom.*, *Williamson v. Verity*, 24 L.T. 32; 32 Digest 327, 136.
- (7) *Spackman v. Foster*, (1883), 11 Q.B.D. 99; 52 L.J.Q.B. 418; 48 L.T. 670; 47 J.P. 455; 32 Digest 344, 271.
- (8) *Miller v. Dell*, [1891] 1 Q.B. 468; 60 L.J.Q.B. 404; 63 L.T. 693; 32 Digest 344, 272.
- (9) *Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 All E.R. 583; [1946] K.B. 374; 115 L.J.K.B. 215; 174 L.T. 214; 2nd Digest Supp.
- (10) *Sachs v. Miklos*, [1948] 1 All E.R. 67.
- (11) *S.S. Celia v. S.S. Volturmo*, [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 17 Digest 159, 602.
- (12) *France v. Gaudet*, (1871), L.R. 6 Q.B. 199; 40 L.J.Q.B. 121; 17 Digest 78, 6.
- (13) *Bulli Coal Mining Co. v. Osborne*, [1899] A.C. 351; 68 L.J.P.C. 49; 80 L.T. 430; 32 Digest 524, 1798.

- (14) *Lynn v. Bamber*, [1930] 2 K.B. 72; 99 L.J.K.B. 504; 143 L.T. 231; Digest Supp.
 (15) *Ecclesiastical Comrs. for England v. North Eastern Ry. Co.*, (1877), 4 Ch.D. 845; 47 L.J.Ch. 20; 36 L.T. 174; 32 Digest 524, 1801.

ACTION for damages for conversion.

The action was brought more than 6 years after the date of the conversion and the defence was that the cause of action accrued at the date of conversion and, accordingly, the action was barred by the Limitation Act, 1939, s. 3. The plaintiff claimed that the action was "based upon the fraud" of the defendants, or the right of action was concealed by their fraud, within the meaning of s. 26 (a) and (b) of the Act, so that the period of limitation did not run until she had discovered the fraud. DENNING, J., held that there was no fraud within the meaning of s. 26, and that the action was barred under s. 3. The facts appear in the judgment.

Patrick O'Connor for the plaintiff.

Arthian Davies, K.C., and *Thesiger, K.C.*, for the defendants.

Cur. adv. vult.

May 12. DENNING, J., read the following judgment. In November, 1935, the plaintiff, Mrs. Beaman, deposited with the defendants five packages which she desired them at a later date to send over land to Istanbul, but meanwhile they were to hold them in store. She went on ahead herself to Istanbul. In May, 1936, at her request they sent one of the packages to her at Istanbul. They were anxious to receive instructions for despatch of the remaining four packages, but the Turkish authorities had made regulations which prevented the plaintiff from getting them into Turkey, so she asked the defendants to hold them in store pending further instructions. Three years passed, but she had not given any delivery instructions and on Oct. 27, 1938, the defendants wrote to her, saying:

We cannot trace having received any instructions from you to insure the baggage whilst in store, and as same is held at your own risk, we should be pleased to learn whether you would like insurance effected.

They added that, if she insured, it would be necessary for her to declare the value and state if there were any very valuable articles in the packages. She did not insure them, nor did she declare any valuables. She said that she was hoping to come back to England, but she never came. The outbreak of war found her still in Turkey. Early in 1940 she asked the defendants if it were possible to send the packages to Athens. They said it was and sent her the necessary forms, but shortly afterwards there was fighting between Greece and Italy, so she did not fill in the forms or give instructions for despatch to Athens. Then, in June, 1940, Italy came into the war, France fell, the Mediterranean was closed, and, for all practical purposes, communication between the plaintiff and the defendants became impossible. At the end of 1940 the plaintiff went to India and remained there until the end of the war. In 1940 and 1941 she wrote one or two letters to the defendants, but they never received them. She thought the packages were probably destroyed in the bombing of London and made no further inquiry about them until she returned to England in 1946. In August, 1946, she visited the defendants and asked what had become of the packages. They were not forthcoming and on Oct. 10, 1946, her solicitors formally demanded delivery. On Nov. 20, 1946, they issued the writ in this action claiming damages for conversion.

What had happened to the packages? From November, 1935, to February, 1940, they were stored at a depot which the defendants rented at Bishopsgate station from the London and North Eastern Railway. It was a depot where goods were held awaiting transit or collection. In February, 1940, owing to the war, the defendants gave up the depot and deposited these packages with Thos. Cook and Son, Ltd., at their warehouse in Coweross Street. The events of June, 1940, altered the position greatly. The defendants were a company controlled by Italian nationals and their business became vested in the Custodian of Enemy Property. Most of the staff had gone to the war. Business was practically at an end. The managing clerk, a Mr. Ingram, was about to be called up for service and was concerned to wind up outstanding matters as far as he could. In August, 1940, therefore, the question arose

A in his mind what was to be done about these four packages of the plaintiff. There were storage charges outstanding, due to the defendants, amounting to £6. The defendants had already rendered themselves liable to Thos. Cook and Son for another £1 13s. 10d. and the charges would run on. There was a real and imminent danger of invasion and bombing. There was no prospect of getting into touch with the plaintiff then or for a long time. The war looked as if it might go on for years, as, in fact, it did. Mr. Ingram consulted his superior, Mr. Sawyer, and decided to examine the packages to see if their contents were so valuable as to justify their continued storage. On his examination, he discovered that they were, to his way of thinking, worthless and only fit to be given away. Therefore, on Aug. 14, 1940, he gave instructions to Thos. Cook and Son, Ltd., to deliver the four packages to Colonel Wotton of the Salvation Army, 124, Queen Victoria Street. As an afterthought, however, he thought that, if they were to be given away, he could do with a trunk himself, so he took the contents out of one of the trunks and bundled them into the others, and took the empty trunk for himself. On Aug. 15, 1940, that empty trunk was delivered by Thos. Cook and Son to Forest Gate for him. On Aug. 16 the other two hampers and a trunk and their contents were delivered by Thos. Cook to the Salvation Army in Queen Victoria Street, whence they would be, in the ordinary course, distributed to the poor and needy in the east end of London. On the same day, entries were made in the books of the defendants whereby the £1 13s. 10d. owing to Thos. Cook was paid, the storage charges debited to the plaintiff were cancelled, and the transaction was closed with the entry "goods worthless—given away." About six years later, the plaintiff called on the defendants in London and asked what had become of the goods. Meanwhile, they had heard nothing from her. Their staff had been at the war and were just beginning to trickle back, but Mr. Ingram was not back. Their papers had been destroyed in the bombing of London. Inquiries were at once put in hand, first at Bishopsgate station and then at Thos. Cook and Son. About Aug. 22, 1946, Thos. Cook told the defendants that they had delivered the packages to the Salvation Army about Aug. 15, 1940. The defendants passed this information on to the plaintiff. The Salvation Army could not say exactly what had happened to the packages, because their papers had been destroyed in the bombing of London. None of the goods has been traced except the trunk that Mr. Ingram took for himself. That was produced at the trial and was obviously of little value.

E The plaintiff now brings this action and claims that the packages and contents are worth £3,544 15s. She says that they contained a necklace and earrings worth £1,000 and other articles of great value, including gold and silver articles, jewellery, a watch, clocks, trinkets, paintings, plated articles, glass, china, silks, furs and lace. If that is true, I cannot understand why she never insured them and never told the defendants that they contained valuables, especially after their letter to her of Oct. 27, 1938. A great number of the articles are such as would fall under the Carriers Act, 1830, s. 1, and for the loss of or injury to them even a common carrier would not be liable unless the value was declared and an increased charge paid. Yet it is quite certain that the plaintiff never insured them and never declared any valuables. G She has no document to support her description of the contents and relies on her recollection only. In these circumstances, it is not surprising that the defendants rely on the Limitation Act, 1939, and no one can blame them for so doing.

H If this case had fallen to be decided before 1939 it is probable that a claim in detinue would not have been held to be statute barred, but the Limitation Act, 1939, has altered the law very materially, and, as this is the first case to come before the courts on the relevant provisions of that Act, I have considered the position in some detail. At the outset I desire to point out that the action is not brought for breach of contract, but for conversion. If it had been founded on breach of contract, *i.e.*, a contract to store the goods and to re-deliver on demand, and then charged as the breach the failure in 1946 to deliver on demand, the period of limitation in respect of that breach would only begin to run from the date that the cause of action accrued, *i.e.*, from the earliest date on which the defendants failed to deliver on demand, which was August, 1946. The defendants would not be allowed to

set up their own conversion in 1940 as an answer to that cause of action and say that the time ran from the conversion, any more than they could set up a loss in 1940 due to their own negligence and say that the time ran from the loss. Even if the plaintiff had lost her title to the goods by reason of the lapse of six years since the original conversion, the cause of action in contract would still be good. The plaintiff has not, however, pursued that cause of action, no doubt for the very good reason that the conditions of the contract might make it difficult for her to maintain the claim. She has made her claim in conversion, alleging that the defendants themselves wrongfully disposed of her goods knowing them to belong to her. To a claim so put, the defendants, by their counsel, admitted that the conditions of the contract could not be a defence and did not invite me to consider them.

Once breach of contract is out of the way, it is necessary to consider s. 3 of the Limitation Act, 1939, which is an important new provision in regard to the effect of lapse of time. It introduces for the first time in our law a prescriptive title to chattels. The effect of s. 3 is that (subject to s. 26, with which I will deal hereafter) as soon as there has been a conversion or wrongful detention of the plaintiff's goods, time begins to run against him, and, if it continues for six years without his recovering possession, his cause of action is barred not only for that conversion or wrongful detention, but also for any subsequent conversions or wrongful detentions, and, moreover, his title to the goods is extinguished. I do not think that s. 3 affects a plaintiff's cause of action for breach of contract, if he has one, which is not statute-barred. It does, however, vitally, affect his causes of action in tort and also his title to the goods. In order to ascertain the scope of the section, it is necessary to see what is meant by "conversion" and "wrongful detention." The modern causes of action for wrongful detention or for conversion are very different from the old forms of action for detinue or for trover, and must not be confused therewith. Detinue in its original form was a real action founded on a bailment which was extended later to cases against a finder. It had, however, many procedural disadvantages, and, in particular, the defendant could wage his law. On this account, it was superseded in the course of time by trover, which for over 150 years was in practice the common remedy in all cases of taking away or detention of chattels or of their misuse or destruction. In 1833 the defendant in detinue lost his right to wage his law. In 1852 the old forms of action were abolished. In 1854 the plaintiff gained the right to an order for specific delivery of the chattel detained. Since that time there have developed the new causes of action of conversion and wrongful detention, the names of which are derived from the old forms of action, but the substance of which is quite different. I attempt no precise definition, but, broadly speaking, the cause of action in conversion is based on an unequivocal act of ownership by the defendant over goods of the plaintiff without any authority or right in that behalf. The act must be an unequivocal act of ownership, *i.e.*, an act such as acquiring, dealing with, or disposing of the goods, which is consistent only with the rights of an owner as distinct from the equivocal acts of one who is entrusted with the custody or handling or carriage of goods. A demand and refusal is not, therefore, itself a conversion, but it may be evidence of a prior conversion. The cause of action in wrongful detention is based on a wrongful withholding of the plaintiff's goods. It depends on the defendant being in possession of the plaintiff's goods. If such a defendant, without any right so to do, withholds the goods from the plaintiff after the plaintiff has demanded their return, he is, for such time as he so withholds them, guilty of wrongful detention: see *Clayton v. Le Roy* (1). This is the tort of which a bailee or finder is guilty who is in possession of the goods and fails to deliver them up within a reasonable time after demand, though it may also, in the case of a bailee, be a breach of contract. If the bailee or finder subsequently disposes of the goods, he is guilty of conversion, but the wrongful detention then comes to an end and is swallowed up in the conversion.

In all these cases, so far as the causes of action in tort and the title to the goods are concerned, time runs from the initial wrong and is not enlarged by subsequent wrongs. Nor can s. 3 of the Act of 1939 be evaded by a mere change in the form of remedy. An owner cannot escape the effect of the

statute by assuming to waive the tort of conversion and sue for money had and received: see *United Australia, Ltd. v. Barclays Bank, Ltd.* (2) per LORD ATKIN ([1940] 4 All E.R. 20, 35-37)—for otherwise the wrongdoer who waited till after the six years and then sold the goods would be better off than one who sold within the six years. There is, however, nothing to prevent a plaintiff from relying on another distinct cause of action, if he has one, e.g., a breach of contract which is not statute-barred. The effect of s. 3 is, in effect, to leave untouched *Granger v. George* (3) (which was a case of trover) *Beaumont v. Jeffery* (4), and *Betts v. Metropolitan Police District Receiver and Carter Paterson & Co., Ltd.* (5). Its effect is not, in my opinion, to reverse *Wilkinson v. Verity* (6) because there the cause of action was treated in the judgment as being for breach of contract to restore the goods in question when required. The section does, however, reverse *Spackman v. Foster* (7) and *Miller v. Dell* (8).

When, however, does the cause of action accrue in such cases as the present? In my opinion, it accrues at the date of the original conversion or the initial withholding of the goods. A recent decision of the Court of Appeal holds that the damages in such cases are to be assessed at the date of the judgment or verdict in the plaintiff's favour: see *Rosenthal v. Alderton & Son, Ltd.* (9); but that does not mean that the cause of action accrues at that time. The observations of LORD GODDARD, C.J., in *Sachs v. Miklos* (10) considerably limit the scope of *Rosenthal v. Alderton* (9), and, should prices hereafter fall, the courts will probably be faced with the task of reconciling *Rosenthal v. Alderton* (9) with the settled rule that damages, whether in contract or tort, are to be assessed as at the date of the accrual of the cause of action and that subsequent fluctuations upwards or downwards in rates of exchange or commodity prices, before or during legal proceedings, are irrelevant: see the decision of the House of Lords in *S.S. Celia v. S.S. Volturno* (11), particularly the speeches of LORD BUCKMASTER ([1921] 2 A.C. 544, 548), of LORD SUMNER (*ibid.*, 556), and of LORD WRENBURY (*ibid.*, 563), and the long line of cases of buyers who sue sellers for conversion of, or for failure to deliver, goods bargained and sold (such as *France v. Gaudet* (12)), where the damages are always assessed as at the date of the breach.

Turning now to s. 3, in the light of these observations it is plain that on Aug. 16, 1940, a cause of action accrued to the plaintiff in respect of the conversion of the packages by the defendants. Before she recovered possession of the packages, further conversions took place by the Salvation Army and by Mr. Ingram and by the other persons who received the goods. No wrongful detention took place, except possibly by Mr. Ingram after he knew that the plaintiff was requiring the trunk which he had. Howsoever that may be, it is clear that, unless the plaintiff can avail herself of the provisions of s. 26 of the Act, her causes of action on all grounds of tort became barred after Aug. 16, 1946, and her title to the goods then became extinguished. This was accepted by counsel for the plaintiff as well as by counsel for the defendants. The argument, therefore, turned to s. 26. The effect of s. 26, speaking broadly, is to prevent the period of limitation from running in the case of fraud, with the important exception, however, that it still runs in favour of an innocent purchaser for value, not merely from the time of his purchase, but from the date when the cause of action accrued for the initial conversion or wrongful detention. If there was fraud in this case, therefore, the plaintiff will be able to pursue her cause of action in conversion against the defendants in respect of all the goods, and her title to the trunk which Mr. Ingram took will not be extinguished, but, if the other articles at any time have come into the hands of an innocent purchaser for value, her title to them will have been extinguished. Section 26 has two sub-sections dealing with fraud, each of which is relied on here. Sub-section (a) affirms the view of the law expressed in *Bulli Coal Mining Co. v. Osborne* (13) and *Lynn v. Bamber* (14). It provides that, where the action is "based upon the fraud" of the defendant, the period of limitation shall not begin to run until the plaintiff has, or could have, discovered the fraud. Counsel for the plaintiff contended that the present action is based on the fraud of the defendants. He said that the word "fraud" is used in the section in a wide sense which does not necessarily involve moral turpitude. He went so far as to say that

nearly every case of conversion by a bailee would be a "fraud" in this wide sense, because otherwise, having regard to s. 3, the bailor might be deprived of his goods without any fault on his part before he knew of his cause of action. I do not accept this view. Whatever else the word "fraud" involves, it always imports some element of moral turpitude, such as some deliberate untruth, or some dishonesty. This is shown by the passage in the judgment of the Privy Council ([1899] A.C. 351, 364) in *Bulli Coal Mining Co. v. Osborne* (13) where they disapproved the decision of MALINS, V.-C., in *Ecclesiastical Comrs. for England v. North Eastern Ry. Co.* (15). The consequences feared by counsel for the plaintiff for an innocent bailor do not follow, because he always has his cause of action for breach of contract, as I have been at pains to show earlier in this judgment. The word "fraud" is not, however, used in the narrow sense of fraudulent misrepresentation. An action of conversion is, in one sense, never "based upon the fraud" of the defendant, because fraud is not an ingredient of the cause of action. If the defendant has wrongfully converted the plaintiff's goods, then, apart from the Limitation Act, 1939, he is liable, whether he was fraudulent or not. When, however, the Limitation Act, 1939, is pleaded, the question whether or not it was a fraudulent conversion may be vital.

In my opinion, an action of conversion is "based upon the fraud" of the defendant if the wrongful act which constitutes the conversion is done by him with the knowledge that the goods do not belong to him, that he has no authority or right to do the act, and that the true owner is available and would not authorise the act if he knew of it, but it is not "based upon the fraud" of the defendant if the defendant honestly believed himself to be the owner, or to be authorised, or to have the right, to do the act, or if he honestly believed that the true owner was not available but would authorise the act if he knew of it, or if he honestly believed that the true owner was not available and that the action was in the best interests of all concerned. A railway company which sells unclaimed lost property is guilty of conversion, but it is not a fraudulent conversion. A finder of goods, who cannot trace the owner and uses or consumes the goods, is guilty of conversion, but it is not a fraudulent conversion. A housewife, who is storing goods for an absent friend and gives them away to a jumble sale because they are moth-eaten or are of little value and are encumbering the house, is guilty of conversion, but it is not fraudulent conversion. So, in this case, although the defendants were guilty of a conversion, I do not think it was a fraudulent conversion. It is necessary to recapture the atmosphere of 1940. Goods and chattels were then of small concern compared to the lives of men. I think the defendants quite honestly said to themselves: "It is useless keeping these things lying in store any longer, with storage charges running up, doing no good to anyone, and in danger of being destroyed by the enemy. The goods do not seem to be of any real value. They have been left here for years. The owner, when we last heard from her was in Turkey, but goodness knows what she is doing now or where we can get hold of her. The war looks like going on for years. The best thing to do is to give them away to the Salvation Army where they may be of some good to somebody." Such conduct is not, to my mind, dishonest. It does not involve any moral turpitude. An action for conversion in those circumstances is not "based upon fraud." The subsequent action of Mr. Ingram in taking an empty trunk for himself was not in the course of his employment and it is not, therefore, to be imputed to the defendants, but, again, I do not think he was fraudulent. I thought he was an honest and reliable witness. He, no doubt, said to himself: "If this stuff is being given away, I see no harm to anyone in having a trunk for myself." It was a conversion, but not a fraudulent conversion.

Section 26 (b) of the Act prevents the period of limitation from running when "the right of action is concealed by the fraud" of the defendant. This does not create new law. Here again "fraud" is not confined to fraudulent misrepresentation, but it does involve some dishonesty, some element of moral turpitude. Applied to cases of conversion by a bailee which was in its inception innocent and not fraudulent, it comprises such conduct as to send in accounts for storage charges knowing that the goods have gone, deliberately putting off the true owner, or keeping the owner in uncertainty while knowing

all the time that the goods had gone, and, in some situations, the failure to notify the owner of the act of conversion might be a fraudulent concealment of the right of action. On the facts of this case, however, I find no fraud by the defendants or their agents. It is true that, although they had her address in Turkey, they did not notify her either before or after they gave the goods away. They ought, of course, to have done so, but I do not think there was anything fraudulent in their not doing so. The situation in August, 1940, which I have already described, amply accounts for the omission without imputing fraud or dishonesty. As to the later events, I find that they did not receive any letters from her and heard nothing more of her until the middle of August, 1946. Their failure to write to her in that period cannot be said to be fraud, especially as everyone who had any knowledge of the matter was away at the war. When she did make inquiries in August, 1946, I find that they acted with due diligence in their inquiries as to what happened to the goods, and told her as soon as they found out. So there was no fraud there. My conclusion, therefore, is that s. 26 does not apply in this case so as to prevent the period of limitation from running. The action is barred by the statute and must be dismissed.

Judgment for the defendants with costs.

Solicitors: *Murray Napier & Co.* (for the plaintiff); *Crawley & de Reya* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

LLEWELLYN v. HINSON.

[COURT OF APPEAL (Scott and Asquith, L.JJ. and Jenkins, J.), May 5, 6, June 3, 1948.]

Rent Restriction—"Separate dwelling"—*Exclusive letting of room with user, in common with other tenants, of other rooms, including kitchen—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 16 (1).*

Where the landlord grants to the tenant (a) exclusive possession of a room or rooms in a house with (b) the user, jointly with some one else—whether the landlord or another tenant—of another living room or rooms, the tenant is not the tenant of a "part of a house let as a separate dwelling" within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16 (1), and so is not protected by the Rent Restrictions Acts.

A tenant had been given, under his tenancy agreement, the exclusive possession of certain rooms plus the user, jointly with other tenants, of a bathroom, water closet, and kitchen.

HELD: the kitchen being a living room, the tenant had not been let "a part of a house let as a separate dwelling" within the meaning of s. 16 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

Neale v. Del Soto, ([1945] 1 All E.R. 191); *Sharpe v. Nicholls* ([1945] 2 All E.R. 55); *Cole v. Harris* ([1945] 2 All E.R. 146); *Kenyon v. Walker* ([1946] 2 All E.R. 595), *applied*.

EDITORIAL NOTE. The same reasoning as is applied in this case was applied by the Divisional Court of the King's Bench Division in *Banks v. Cope-Brown* (*ante* p. 76). In giving judgment in that case LORD GODDARD, C.J., said (p. 78): "It seems to me, and, indeed, counsel for the respondent (the prosecutor) has conceded, that he cannot draw any distinction in principle between the case where part of a house is let to a tenant who has the right to use the kitchen in common with the landlord and the case where the tenant is entitled to use the kitchen in common with another tenant."

AS TO "SEPARATE DWELLING," see HALSBURY, Hailsham Edn., Vol. 20, p. 312, para. 369; and FOR CASES, see DIGEST, Vol. 31, p. 557, Nos. 7044-7046.]

Cases referred to:

- (1) *Neale v. Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 2nd Digest Supp.
- (2) *Sharpe v. Nicholls*, [1945] 2 All E.R. 55; [1945] K.B. 382; 114 L.J.K.B. 409; 172 L.T. 363; 2nd Digest Supp.
- (3) *Cole v. Harris*, [1945] 2 All E.R. 146; [1945] K.B. 474; 114 L.J.K.B. 481; 173 L.T. 50; 2nd Digest Supp.
- (4) *Kenyon v. Walker*, *Stevenson v. Kenyon*, [1946] 2 All E.R. 595; 2nd Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE FORBES, made at Birmingham County Court, and dated Sept. 23, 1947, granting to the landlord possession of rooms let exclusively to the tenant together with the user in common with other tenants of other rooms, including a kitchen. The landlord did not himself reside in the house. The tenant, in the view of the learned judge, was not protected by the Rent Restrictions Acts. The appeal was dismissed.

Platts Mills and Claude Barry for the tenants.

Richard O'Sullivan, K.C., and Lionel Blundell for the landlord.

Cur. adv. vult.

June 3. ASQUITH, L.J., read the following judgment of the court. It may be convenient to state at the outset the point of law raised by this appeal. The question was whether the tenant was protected by the Rent Restrictions Acts, having regard to the following facts. Under his tenancy agreement, the tenant had been given the exclusive possession of certain rooms, plus the user, jointly with other tenants, of certain other accommodation, including the kitchen. In the line of cases initiated by *Neale v. Del Soto* (1), and followed up by *Sharpe v. Nicholls* (2) and *Cole v. Harris* (3), the Court of Appeal had to consider the legal implications of such a state of affairs. The protection of the Rent Restrictions Acts only attaches (once a valid notice to quit has been given, as it had been in the cases referred to and in the case under appeal now) to "dwelling-houses." A "dwelling-house" is defined, under the provisions applicable to the present cases, by s. 16 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, that definition not differing materially from that which applied in *Neale v. Del Soto* (1) and the authorities deriving from that case. Section 16 (1) defines a dwelling-house as follows :

"Dwelling-house" has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let.

When, therefore, a part of a house is let it must (to qualify as a "dwelling-house" and to attract the protective operation of the Rent Restrictions Acts) be "let as a separate dwelling."

In the present case, a "part of a house" was let to the tenant in the sense that, under his tenancy agreement, he was granted exclusive possession of certain rooms, but in addition he was granted the joint use of certain other rooms, namely, a bathroom, a water closet, and a kitchen. The issue is whether on these facts, the tenant had let to him "a part of a house let as a separate dwelling." The learned county court judge held that he had not, and he based his decision on the authority of *Neale v. Del Soto* (1) and the Court of Appeal cases following and interpreting that decision. The question is whether he was right in so holding. We think he was.

This court cannot consider whether *Neale v. Del Soto* (1) and its satellite cases were properly decided. It can only inquire what they, in fact, decided, and about this there can, in our view, be little doubt. The gist of those decisions is that where what the landlord under the agreement of tenancy parts with to the tenant consists of two things (a) exclusive possession of a room or rooms, plus (b) user, jointly with some one else, of another living room or rooms, then the tenant cannot say that he is the tenant of a "house or part of a house, let as a separate dwelling." The ratio is that the "dwelling" of the tenant on the facts assumed consists of the totality constituted by (a) plus (b), and that part of the totality is not "separately" let to him because the possession or user of it is to be shared by him with others, a state of affairs which is inconsistent with the word "separately," and, indeed, with the word "let," for both of these terms connote exclusive possession or enjoyment. If this ratio were inexorably applied, it would exclude from the ambit and protection of the Acts all tenants who, being entitled to exclusive possession of one or more rooms, enjoyed under the terms of their tenancy joint user of any other accommodation or facilities whatever, for example of a water closet, a bathroom, a box-room, or a coal cellar. The decisions referred to, by which this court is bound, reject this consequence, and limit the operation of the rule to cases in which the room shared is a "living room."

Those decisions equally bind us to say that a "kitchen" is a living room, and that even in cases in which the sharing of the kitchen is limited to access to the kitchen for purposes of cooking: *Kenyon v. Walker* (4).

In our opinion, in *Cole v. Harris* (3) the Court of Appeal affirmed a principle which is fatal to the tenant in this appeal. The material passage from the judgment of MORTON, L.J. (propounding a test accepted by MACKINNON, L.J., in that case)—is as follows ([1945] 2 All E.R. 146, 152):

A I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows: there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as "living rooms," or "dwelling rooms." To my mind a kitchen is fairly described as a "living room."

B Counsel for the tenant, faced by this pronouncement (which was re-affirmed by the whole court in *Kenyon v. Walker* (4)), had no alternative but to contend that it was *obiter*. In so far as *Cole v. Harris* (3) decides that the sharing of a "living room" negatives the letting of a separate dwelling and that the sharing of a non-living room does not, the statement is clearly not *obiter*. This was the very point in issue in that case, but it is suggested by the tenant that, though that case decided that a "sharing" of a living room between landlord and tenant excluded the Acts, yet neither it nor any other case decided that a sharing of such a room as between one tenant and another had similar legal consequences. It is true to say that in *Neale v. Del Soto* (1) the "sharing" was between landlord and tenant, and that in substance that was also the position in *Kenyon v. Walker* (4), and in certain other cases.

C Nevertheless, *Cole v. Harris* (3) would seem to be the key decision and to lay down a wider principle. In that case the shared accommodation was to be shared between the landlord, the defendant tenant, and another tenant or tenants. The language used by MORTON, L.J. (and acquiesced in by MACKINNON, L.J.) draws no distinction at all between the "sharing" of accommodation between the tenant with the landlord and a similar sharing between the tenant and other tenants. This appears plainly in the passage quoted above, and as clearly in passages which follow. Speaking of the tenant in that case MORTON, L.J., says ([1945] 2 All E.R. 146, 153): "He does not share any living room with other people, though there are certain valuable conveniences which he shares with other people . . ." and he speaks of a "licence to the plaintiff to use the combined bathroom and w.c., and also the garden (for the purposes already mentioned) in common with the other occupiers," and, again: "In either case, the plaintiff does not share any living room with other people." Neither MACKINNON, L.J. (who expressly accepts MORTON, L.J.'s formula), nor LAWRENCE, L.J. (who dissented only on the nature of the accommodation the sharing of which will oust the operation of the Acts) says a word to suggest that the tenant must share the material accommodation with the landlord for that result to ensue.

D Apart altogether from the language, in fact, employed in this connection by the Lords Justices, there would seem to be no logical distinction between the two types of "sharing," judged by the touchstone of s. 16 (1) of the Act of 1933. When is a part of a house "let as a separate dwelling"? It is not "separately let" if part of the "dwelling" is shared with the landlord: *Neale v. Del Soto* (1); not because it is with the landlord that that part is shared, but simply because it is shared by the tenant with some one, and, therefore, is not separately let. It cannot matter logically with whom it is shared. This seems to be not merely an irresistible deduction from the language employed by MORTON, L.J. and MACKINNON, L.J., but one implied in the logic of their decision in *Cole v. Harris* (3). It was urged that such a construction as that which we favour would open to unscrupulous landlords a new loophole of escape from the intended operation of the Acts. A landlord has only to stipulate (as against a poor tenant who is in an inferior bargaining position) that the kitchen is to be shared, to rid himself of the shackles of the Acts. He can, as the law now stands, as easily throw off those shackles, by stipulating that he, the landlord, shall himself have joint user of the kitchen. In any case these consequences, be they grave or trivial, do not affect what alone a court of law can properly consider, namely, the true construction of the Acts as

determined by their language and decisions binding on that court. The rest is for Parliament. The appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Stafford Clark & Co.*, agents for *Faber & Co.*, Birmingham (for the tenant); *T. D. Jones & Co.*, agents for *W. D. Clark Brookes & Co.*, Smethwick (for the landlord).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

A

Discussed. *HOPES v. HOPES*. [1948]
2 All E.R. 920.

THOMAS v. THOMAS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Sellers, JJ.), May 28, 1948.]

Husband and Wife—Maintenance—Cessation of order—Resumption of cohabitation—Order obtained while wife living apart from husband—Wife's return to husband's house to live in separate rooms as tenant—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (c. 51), s. 2 (2).

B

A wife, who had obtained a separation order from her husband while living apart from him, returned to the husband's house with her child and was allowed by him to live in part of the house. There was no resumption of cohabitation, the husband and wife occupying separate parts of the house and an arrangement being made that the wife should pay 10s. a week rent by allowing the husband to deduct that amount from the maintenance due to her under the order. On appeal by the husband against a committal order made by justices on his default in making payments under the separation order:—

C

HELD: under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2), where a wife had obtained a separation order while living apart from the husband, the order ceased to have effect only if the wife resumed cohabitation with the husband, and not if she merely resumed residence at the same address; on the facts of the case, the wife had not resumed cohabitation; and, accordingly, the order was enforceable.

D

Evans v. Evans ([1947] 2 All E.R. 656), distinguished.

[FOR THE SUMMARY JURISDICTION (SEPARATION AND MAINTENANCE) ACT, 1925, s. 2 (2), see HALSBURY'S STATUTES, Vol. 9, p. 415.]

E

Case referred to:

(1) *Evans v. Evans* [1947] 2 All E.R. 656; [1948] K.B. 175; [1948] L.J.R. 276; 112 J.P. 23.

CASE STATED by Glamorgan justices.

A complaint was preferred by the wife before a court of summary jurisdiction alleging that, by an order made on Feb. 20, 1946, under the Summary Jurisdiction (Married Women) Act, 1895, s. 5, the husband was adjudged guilty of having deserted her and was ordered to pay her the sum of £2 10s. a week for her maintenance and the maintenance of an infant child of the marriage while it was under 16 years of age, and that payment had not been made in accordance with the order. The husband claimed that, as the wife had returned to his house, the order had ceased to have effect, by reason of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2). The complaint was heard at Gowerton, Swansea, on Mar. 3, 1948, when the justices held that there was no resumption of cohabitation within the meaning of s. 2 (2) of the Act of 1925, and committed the husband to imprisonment for one month, suspending the committal so long as he paid the amount of the order (less 10s. per week rent while the wife lived in a part of his house) and 5s. a week of the arrears. The husband's appeal was now dismissed by the Divisional Court.

F

G

H

Wallis-Jones for the husband.

The wife did not appear and was not represented.

LORD GODDARD, C.J.: This is a Special Case stated by justices for the county of Glamorgan before whom there came one of these troublesome cases which now arise under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, due to the existing housing shortage. The justices have found that a separation order was made at a time when the parties were

living apart and that they continued to live apart after that order was made. Subsequently the parties came together again in the sense that the wife returned with her child to the husband's house, and was allowed by him to do so, but in no sense did she resume cohabitation with him because she did not resume her position as wife.

Cohabitation does not necessarily depend on whether there is sexual intercourse between husband and wife. "Cohabitation" means living together as husband and wife. As I endeavoured to point out in *Evans v. Evans* (1), cohabitation consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband cherishing and supporting his wife as a husband should. Sexual intercourse usually takes place between parties of moderate age if they are cohabiting, and, if there is sexual intercourse, it is very strong evidence—it may be conclusive evidence—that they are cohabiting, but it does not follow that because they do not have sexual intercourse they are not cohabiting. In the present case, the wife resumed residence in the husband's house under an arrangement with him by which she and her child occupied rooms in the house which were entirely separate from those occupied by him. Apparently, some alteration was made to the water supply of the house so that the two parties should be able to live entirely separate and get the necessary water without interfering with each other. Moreover, on Apr. 10, 1946, when the wife was endeavouring to enforce the order by proceedings before the court, the parties came to an agreement (which they communicated to the justices) under which it was arranged that, as the wife was living again in the husband's house, she should pay 10s. a week—or (what was the same thing) allow the husband to deduct 10s. a week from the maintenance—as representing the rent which she was to pay to the husband for the rooms she occupied, and the husband agreed to allow the wife to remain in the house so long as she paid the 10s. a week, or as long as he cared to let her. In fact, he has served her with a notice to quit. Therefore, whatever the parties might have done, technically, in law, it appears that they intended that the wife should be a tenant of part of the house.

When the proceedings, which are the subject-matter of this case, were taken by the wife to enforce the order, the husband sought to evade liability by saying that the same state of affairs existed here as existed in *Evans v. Evans* (1), a case under s. 1 (4) of the Act of 1925. The justices, who evidently gave great attention to this case, have decided (in my opinion, quite rightly) that the decision in *Evans v. Evans* (1) does not apply. They have stated why it does not apply, namely, because here the very state of affairs existed which we visualised might exist in *Evans v. Evans* (1), where we pointed out that different considerations would, or might, arise, if a case fell within s. 2 (2) of the Act of 1925. It is worth while remembering that, until the Act of 1925 was passed, a woman could not apply to justices for a separation order unless she had quitted her husband's house and lived away from him. As I pointed out in *Evans v. Evans* (1), that was thought to be a hardship on a wife, because it meant that, before she could obtain an order, she must leave her husband and live elsewhere and she might have no money with which to do so. Therefore, the legislature altered the law in 1925, to enable a wife to apply for and obtain an order from justices although she was still residing with her husband. Realising, however, that there might be all kinds of serious results if a woman who was living with her husband obtained a maintenance order against him, but continued to live in his house and insisted on receiving the maintenance while at the same time refusing to perform any wifely services for him, the legislature provided (by s. 1 (4) of the Act of 1925) that, if a wife obtained an order while living with her husband, it should have no effect while she resided with him and, if she continued to reside with him, it would become void after three months. Section 2 (2) contains a completely different provision :

Where a married woman with respect to whom an order has been made under the [Summary Jurisdiction (Married Women) Act, 1895] resumes cohabitation with her husband after living apart from him, or where she has before the date of the commencement of this Act so resumed cohabitation, and is at that date cohabiting with him, the order shall cease to have effect on the resumption of such cohabitation or at the commencement of this Act, as the case may be.

In this case an order was made under the Summary Jurisdiction (Married Women) Act, 1895, s. 5, when the parties were neither cohabiting nor residing with each other, but were living apart, and, therefore, the case falls exactly within the words of s. 2 (2), *i.e.*, the wife was living apart from her husband at the time when the order was made. Consequently, the order will remain good unless she "resumes cohabitation"—not "residence," but "cohabitation."

We need not consider whether in 1925 Parliament could have visualised the state of affairs in housing matters which exists at this time, when it may be extraordinarily difficult for two spouses, if they separate, each to find separate accommodation. We merely have to construe the words of the Act, and the words of the Act seem to me clearly to show that, if the parties are living apart when the order is made, it is not residence, but cohabitation, that will put an end to the order. There is the contrast between "resides with" in s. 1 (4) and "resumes cohabitation with" in s. 2 (2). I think that, when the judgments in *Evans v. Evans* (1) are read carefully, it will be seen that the court visualised that there might arise the very case which has arisen here, and we pointed out the difference between the residence which was sufficient to prevent the order taking effect under s. 1 (4) and the resumption of cohabitation which was required to put an end to an order which had taken effect because the parties were living apart. In the present case it is clear that the justices were right in holding that there had been no resumption of cohabitation, the wife being treated as a mere tenant of part of her husband's house, and, therefore, the order was enforceable, since it had been made while the parties were living apart. The justices came to a right decision in point of law and this appeal fails.

BIRKETT, J. : I am of the same opinion. I think that the justices most admirably fulfilled their duty. First, they ascertained what was the law, and it is clear from the opinion which they attached to the Case that they had considered with great care the decision of this court in *Evans v. Evans* (1) and, in particular, the observations of my Lord in that case, pointing out the essential distinction between s. 1 (4) and s. 2 (2) of the Act of 1925. Having digested those observations and been quite clear in their minds what the legal position was, they then dealt with the facts, and, equally clearly, they kept, as I think, two different matters in mind. One was that s. 1 of the Act, which obviously amended the existing law to meet a very difficult situation, dealt with the case of an order which was made while the husband and wife were residing together and went on to state that, although, after the passing of the Act, such an order could be made, it would only remain in force for three months if the parties continued to reside together. When they came to s. 2, the justices considered the special fact that the order with which they had to deal was made, not while the parties were residing together, but while they were living apart, and dealing with that state of affairs, s. 2 (2) of the Act provides :

Where a married woman with respect to whom an order has been made under the principal Act resumes cohabitation with her husband after living apart from him, or where she has before the date of the commencement of this Act so resumed cohabitation, and is at that date cohabiting with him, the order shall cease to have effect on the resumption of such cohabitation . . .

The justices found as a fact that there was no cohabitation, though it appeared that some attempt was made before them to establish its existence. In those circumstances, they refused to apply the provisions of s. 2 (2), and I think that they were right.

SELLERS, J. : I agree. The justices have found, and, in my view, rightly, that there was no resumption of cohabitation. It would seem, on the facts, that there was, indeed, no residence together, although the justices have not expressly said so. The case, I think, is different from *Evans v. Evans* (1), and, on all the grounds which have been stated, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors : *John B. Purchase & Clark*, agents for *D. W. P. Williams*, Swansea (for the husband).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re KENDRICK'S AGREEMENT, COLWILL v. BARRINGTON.

[CHANCERY DIVISION (Harman, J.), May 25, 26, 1948.]

Agricultural Holding—Notice to quit—Consent of Minister—Consent during currency of notice—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 62 (4A).

The Defence (General) Regulations, 1939, reg. 62 (4A), provides :
 "Where the whole or any part of an agricultural holding is subject to a contract of sale made since Sept. 3, 1939, or has been sold in pursuance of a contract of sale made since that date, any notice to quit that holding or any part thereof given to the tenant so as to expire at any time after the end of the year 1941 shall be null and void. Provided that this paragraph shall not apply to any notice if (whether before or after the giving thereof) the Minister of Agriculture and Fisheries consents in writing thereto."

By a written agreement dated Aug. 10, 1940, K. agreed to let certain agricultural land to the tenants' predecessor in title for a term of one year from Lady Day, 1940, and so on from year to year until the tenancy should be determined by either party giving one year's notice to quit in writing. In 1946 the reversion expectant on the tenants' term became vested in B. pursuant to a contract of sale made after Sep. 3, 1939. On Mar. 13, 1947, B. served on the tenants notice to quit on Lady Day, 1948, and by a document dated Oct. 25, 1947, the Minister, in exercise of his powers under para. 4A, consented thereto.

HELD : on the construction of para. 4A, the subsequent consent of the Minister to a notice to quit, thus validating the notice, could be given at any time before the expiration of the notice and need not be given during the interval (if there were one) between the date of the giving of the notice and that on which it began to run, and, therefore, the notice of Mar. 13, 1947, was good.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 62 (4A), see HALSBURY'S STATUTES, Vol. 39, p. 1034.]

Cases referred to :

- (1) *Phipps (P.) & Co. (Northampton & Towcester Breweries), Ltd. v. Rogers*, [1925] 1 K.B. 14; 93 L.J.K.B. 1009; 132 L.T. 240; 89 J.P. 1; 69 Sol. Jo. 50, C.A.; 31 Digest 448, 5947.
- (2) *Re Bebington's Tenancy, Bebington v. Wildman*, [1921] 1 Ch. 559; 90 L.J.Ch. 269; 124 L.T. 661; 65 Sol. Jo. 343; 31 Digest 451, 5979.

ADJOURNED SUMMONS for a declaration that a notice to quit an agricultural holding was void and of no effect as not being in compliance with the tenancy agreement, under which 12 months' notice was required, or as being in contravention of the Agricultural Holdings Act, 1923, s. 25. The tenants relied on the fact that, as the Minister of Agriculture and Fisheries did not consent to (and thereby validate) the notice under the Defence (General) Regulations 1939, reg. 62 (4A) until 5 months before the notice was due to expire, they did not in law receive 12 months' notice. HARMAN, J., held the notice to be good. The facts appear in the judgment.

G. L. Dawson for the plaintiffs (the tenants).

F. B. Alcock for the defendant (the landlord).

HARMAN, J. : At all relevant times the plaintiffs in this summons were the tenants of two holdings, being parts of lands called Warford Park and Deer Park, Great Witley, in the county of Worcester, on the terms of a written tenancy agreement made on Aug. 10, 1940, between the predecessor in title of the defendant and the predecessor in title of the plaintiffs. By that agreement the landlord agreed to let and the tenant to take the parcels of land in question for a term of one year from Lady Day, 1940, and so on from year to year until (cl. 3) the tenancy should be determined at the end of any subsequent year by either party giving to the other one year's notice to quit in writing, at a rent and subject to covenants with which I need not concern myself. In 1946 the reversion expectant on the term then current under that agreement became vested in the defendant pursuant to a contract which, for the purposes of this proceeding, was admitted by his counsel to have been made after 1939. On

Mar. 13, 1947, the defendant, having thus become the plaintiffs' landlord, served on the plaintiffs what purported to be a notice to quit their holding at Lady Day, 1948. There is nothing particular in the form of the notice and I think it is not disputed that but for certain statutory provisions, with which I will deal, it would have been a good notice. It is a notice for over a year, it expired on the correct day, that is to say Lady Day, the terminating day of the year of the tenancy, it is not equivocal, and it was properly served. The summons asks for a declaration that the notice was bad on the footing that it is void and of no effect as not being in compliance with cl. 3 of the agreement I have mentioned or as being in contravention of the Agricultural Holdings Act, 1923, s. 25. As I understand it, both these grounds come to this. It is said that in the upshot the tenants did not have 12 months' notice to quit, but that under both s. 25 of the Act of 1923 and the express terms of cl. 3 of the tenancy agreement they were entitled to such a notice. A

In 1941 there was promulgated under the powers of the Crown conferred by the Emergency Powers (Defence) Act, 1939, s. 1, an addition to the Defence (General) Regulations, 1939, numbered 4A in reg. 62. Regulation 62 is headed: "Control of cultivation, and termination of agricultural tenancies." After dealing in its first three paragraphs with the control of cultivation reg. 62 provides: B

4A. Where the whole or any part of an agricultural holding is subject to a contract of sale made since Sept. 3, 1939, or has been sold in pursuance of a contract of sale made since that date, any notice to quit that holding or any part thereof given to the tenant so as to expire at any time after the end of the year 1941 shall be null and void, unless, before the giving of the notice, or before the end of the said year, whichever is the later, the Minister of Agriculture and Fisheries consents in writing thereto. C

That Order was made on Nov. 11, 1941. It will be observed that notices to quit of the relevant kind—and this is one, the contract of sale here being admittedly after Sept. 3, 1939—were made null and void except in a certain event, namely, a consent of the Minister of Agriculture which might be given either before the notice to quit was served or before the end of the year 1941. If that had been allowed to continue as the law in 1942 and thereafter, there could have been no consent by the Minister subsequent to any notice, so that any notice to quit in order to be good would have required the previous consent of the Minister. Whether for that reason or not I do not know, but that state of affairs was never allowed to come to fruition, because on Dec. 18, 1941, the condition beginning with the word "unless" was struck out and the following proviso was substituted for it: D

Provided that this paragraph shall not apply to any notice if (whether before or after the giving thereof) the Minister of Agriculture and Fisheries consents in writing thereto. It is clear enough that the notice given on Mar. 13, 1947, by the landlord in this case was null and void when given and so remained and has been null and void ever since unless cured by a document dated Oct. 25, 1947, whereby the Minister, purporting to act in exercise of his powers under reg. 62 (4A), "hereby consents to the notice to quit given on Mar. 13, 1947" to the tenants in respect of the land. That is a notice under the seal of the Minister and has at the end of it a note in these terms: E

This consent does not make valid any notice to quit which may otherwise be defective for want of proper form or any other reason, neither shall this consent be taken as endorsing the grounds, if any, on which the notice to quit purports to be given. G

In my judgment, this note must be ignored for present purposes. It is said on behalf of the landlord that the consent cured the vice in the notice because, having regard to the terms of the proviso, para. 4A of reg. 62 must not be read in connection with this notice to quit and so the notice to quit is effective just as if no such regulation existed. On the other hand, it is said by the tenants with a great deal of force that, if this consent by the Minister makes good that which until it was given was null and void, the effect is that the tenant got, not 12 months', but 5 months' notice to quit, that that is a breach of the Agricultural Holdings Act, 1923, s. 25, and also of the express terms of the tenancy agreement, and, that, therefore, the notice to quit is bad. H

The difficulty with which the tenants have to contend is the words in the proviso, "whether before or after the giving" of a notice to quit. It is clear

that in some circumstances a consent after the date of the notice may make the notice good. Counsel for the tenants argued that "or after" may be given an adequate meaning if it is applied to an interval of time which may exist between the date of the giving of the notice and that when the period of 12 months begins to run. In the present case, for instance, the notice was given on Mar. 13 and the 12 months would not begin to run until the following Lady Day. There were, therefore, 12 days during which the consent of the Minister would have made the notice good, but, counsel argues, after the 12 months had begun to run no consent could validate it. On the other hand, the landlord says that there is nothing in the regulation so to cut down the words "or after," but that consent can be given up to the eleventh hour of the thirty-first day of the eleventh month of the currency of the notice. The tenants say that that would be monstrous and most inconvenient, and so it would—no less inconvenient to the one party than to the other—but I do not think that there is much room here for application of the maxim *ab inconvenienti*. Counsel for the tenants relied on the cases which show that a notice to quit must be unambiguous and must not involve the tenant in questions of law and difficulties which might need the aid of a lawyer to unravel for him. He cites in particular *Phipps v. Rogers* (1) for that proposition. With that I see no reason to quarrel, but it seems to me that the answer is that given by counsel for the landlord, namely, that the difficult questions of law which arise here do not arise out of the notice which is in itself plain and unambiguous. It arises out of the regulation for which neither party can be held responsible. This, in my view, is a question purely of construing the regulation. It is true, as the tenants say, that it is for the landlord to show that his notice is good. It is not for the tenant to have to find out what the notice means. It is true also that the effect of the landlord's construction is to make the notice uncertain because, as is pointed out, one never can tell during the 12 months whether the Minister by a stroke of the pen may not make good that which before was bad. I see all the force of that, but, in my judgment, it cannot prevail over the language of the regulation. The language is perfectly general. It says that where a consent by the Minister is given the regulation shall not apply. Consequently, this notice stands as a good 12 months' notice.

I must administer the law as it stands, and, in my view, it is mandatory on me to shut my eyes to the existence of para. 4 (A) altogether and treat it as not applying to this notice. If I do that, the answer is plain—the notice is good. I do not think that the common law rule that a notice must be a good notice from the moment it is given can prevail having regard to the form of this statutory regulation. In *Re Bebington's Tenancy* (2) ([1921] 1 Ch. 563) PETERSON, J., reviews the cases on the subject and shows clearly that at common law the tenant is entitled to have a notice on which he can act with certainty from the moment when it is given. That right, I am afraid, he has lost under this regulation. It is pointed out to me that under the new Agriculture Act, 1947, s. 31 (which has no bearing on the present case) the same system is continued and is made a permanent part of the law of the land. The statutes, therefore, have overridden the common law and tenants are now at the mercy of the Minister rather than under the rule of the law as they used to be. Whether that is better or worse for them it is not for me to say, but it is now the Minister who holds in his hand the key whether a tenant shall go or stay and it is to him that parties to an agricultural holding must look and not to the protection of the common law to ascertain their rights and their duties. Accordingly, I hold that the notice to quit was a valid and effectual notice, and I order the tenants to pay the landlord's costs as between party and party.

Order accordingly.

Solicitors: *Geare & Son*, agents for *Marcy, Hemmingway & Sons*, Bewdley (for the tenants); *Tuck & Mann*, agents for *Wallace Robinson & Morgan*, Birmingham (for the landlord).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

JERRED AND OTHERS *v.* T. RODDAM DENT & SON, LTD.
(GLEN LINE, LTD. Third Party).

[LEEDS ASSIZES (Atkinson, J.), April 22, 23, 24, 29, 1948.]

Negligence—Duty to invitees—Duty of shipowners to stevedores—Beam left insecure by shipowners—Effect of failure to examine beam by stevedores or their employers—Factories Act, 1937 (c. 67), s. 60—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), Duties, para. (d); reg. 42.

Under the heading "Duties" in the Docks Regulations, 1934, para. (d) provides: "It shall be the duty of every person who by himself, his agents, or workmen carries on the processes, and of all agents, workmen, and persons employed by him in the processes, to comply with Part IV of these regulations." In Part IV, reg. 42 states: "The beams of any hatch in use for the processes shall, if not removed, be adequately secured to prevent their displacement."

The plaintiffs were stevedores employed by the defendants to load cargo into the hold of a ship owned by the third parties. In accordance with the practice of the port, the crew of the ship had removed the necessary beams and hatch covers prior to the loading, but they failed to secure adequately, so as to prevent its displacement, one of the beams which had not been removed. Neither the plaintiffs nor the defendants' foreman examined this beam to see whether it had been secured, but relied on the assurance of the ship's officer in charge. While the cargo was being loaded the beam fell into the hold injuring the plaintiffs.

Held: (i) the regulations did not impose on every employee a duty to examine personally every beam if he was assured by the foreman that all was in order; even if the plaintiffs were technically in breach of the regulations, no duty under the regulations was imposed on them towards the defendants; and, therefore, there was no contributory negligence on the part of the plaintiffs.

(ii) even if there were a duty, as the employers had accepted the responsibility of directing the men when it was safe to begin work, the employers could not rely on a breach of the regulations by the plaintiffs.

(iii) the third parties had undertaken the duty of securing the beam and they owed a duty to the plaintiffs as invitees on board the ship to see that that duty was properly discharged; the regulations did not create a duty towards the third party by the plaintiffs or by the defendants to make sure that the beam was secure; and the third parties' responsibility for the accident and the negligence of the third parties was the effective cause of the plaintiffs' accident.

Heaven v. Pender (1883) (11 Q.B.D. 503), *applied*.

Hillen & Pettigrew v. I.C.I. (Alkali), Ltd. ([1934] 1 K.B. 455; [1936] A.C. 65), *M'Alister (or Donoghue) v. Stevenson* ([1932] A.C. 562) and *Haseldine v. Daw & Son, Ltd.* ([1941] 3 All E.R. 156), *distinguished*.

[As to DUTY TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858; and FOR CASES, see DIGEST, Vol. 36, pp. 35-45, Nos. 208-281.]

Cases referred to:

(1) *Compania Mexicana de Petroleo El Aguila v. Essex Transport and Trading Co., Ltd.*, (1929), 141 L.T. 106; Digest Supp.

(2) *Heaven v. Pender*, (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 36 Digest 8, 9.

(3) *Hillen & Pettigrew v. I.C.I. (Alkali), Ltd.*, [1936] A.C. 65; 104 L.J.K.B. 473; 153 L.T. 403; Digest Supp.

(4) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.

(5) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.

(6) *Lees v. Dunkerley Brothers*, [1911] A.C. 5; 80 L.J.K.B. 135; 103 L.T. 467; 4 B.W.C.C. 115; 34 Digest 496, 4096.

(7) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463; Digest Supp.

(8) *Hanton v. Port of Liverpool Stevedoring Co., Ltd.*, [1937] 4 All E.R. 39; Digest Supp.

- (9) *Grayson (H. & C.) v. Ellerman Line, Ltd.*, [1920] A.C. 466; 89 L.J.K.B. 924; 123 L.T. 65; 36 Digest 116, 780.
- (10) *Weaver v. Commercial Process Co., Ltd.*, [1947] 63 T.L.R. 466.
- (11) *Buckner v. Ashby & Horner, Ltd.*, [1941] 1 K.B. 321, 337; 110 L.J.K.B. 460; 105 J.P. 220; 85 Sol. Jo. 200; 2nd Digest Supp.
- (12) *Taylor v. Cairn Line*, 32 Ll.L.R. 118.
- (13) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.
- (14) *Whitby v. Burt Boulton & Hayward, Ltd.*, [1947] 2 All E.R. 324; [1947] K.B. 918; [1947] L.J.R. 1280; 177 L.T. 556.
- (15) *Peck v. Hull & East Coast Stevedoring Co., Ltd.*, (1938), 82 Sol. Jo. 153; 60 Ll.L.R. 39; Digest Supp.

ACTION tried by ATKINSON, J., without a jury.

The plaintiffs claimed damages against the defendants for breach of statutory duty or negligence and an unsafe system of working. The defendants claimed indemnity or contribution from the third party on the grounds that the injuries and loss were wholly or partly caused by the negligence and breach of statutory duty of the third party. Judgment was given for the plaintiffs against the defendants, and for the defendants against the third party for nine-tenths of the damages and costs. The facts appear in the judgment.

J. Charlesworth for the plaintiffs.

Hylton-Foster, K.C., and *Rawden Smith* for the defendants.

Nelson, K.C., and *Veale* for the third party.

Cur. adv. vult.

Apr. 29. ATKINSON, J., read the following judgment. This is an action brought by five stevedores against the defendants, their employers, for damages for personal injuries sustained by them while they were at work on July 11, 1946, loading bags of sulphate of ammonia into the steamship "Glenartney" at the defendants' wharf, Dent's Wharf, Middlesbrough. The defendants admitted their liability, but put the plaintiffs to proof of the injuries alleged. They then, by third party notice, brought in Glen Line, Ltd., the owners of the ship, alleging that they were wholly, or, at any rate, mainly, responsible for the accident which caused the injuries complained of, and they claimed indemnity or contribution. The third party denies responsibility, and, further, says that the defendants had a perfectly good defence to the claim in whole or in part.

It is common ground that the defendants had been engaged by the third party (whom for simplicity's sake I will call "the ship") to load into the ship a large number of bags of ammonium sulphate. The ship arrived in Middlesbrough on July 11, 1946, and Hill, the defendants' foreman, who was to conduct the loading, came on board the ship, saw Capt. Todd, the cargo superintendent, and inquired where the bags were to be stowed. He was told that they were to go into No. 2 hold, that the orlop deck hatch was to be used, and that the bags must all be stowed aft of the hatch and must not come out forward of a line one hatch length forward of the upper deck coamings, that is 3 ft. Between the upper or main deck and the bottom of the hold there were two decks, the second deck and the orlop deck. Then there was the bottom deck. Capt. Todd, or somebody in the employ of the ship, had drawn a line across the bottom of the hatch, which line was supposed to be 3 ft. forward of the upper deck coamings. In all probability that line was less than 3 ft. forward of the coamings. Before anything could be done it was necessary for sufficient beams and hatches to be removed on the upper deck, the second deck and the orlop deck, to provide a way for the bags. The bags were to be lowered into the hold by a crane operated by the defendants. It has been and is the practice in Middlesbrough for the ship to remove the necessary beams and hatch covers and to secure the working beams which are not removed. Before the ship got to Middlesbrough the second officer was told by the chief officer that the crew were to remove the necessary beams and hatches, and at about three o'clock he ordered the crew to strip the necessary beams and hatches from No. 2 hatch and also from Nos. 1 and 4. They did this. A little later Hill came along to the second officer and asked that some more should be taken out to give extra light and air, and the second officer then ordered the crew to take off three more beams in this hatchway, one on the upper deck, one on

the 'tween deck and one on the orlop deck. That left a 16-foot way. The second officer had instructions, which he said applied generally, to the effect that all working beams must be adequately secured, or, if not, removed. He, therefore, told the carpenter to go round and follow the crew and bolt up all working beams, meaning all beams next to the way down which cargo would go. In the orlop deck that meant two beams. After the second officer had given these instructions to the carpenter, Hill came along and asked the second officer to see that all beams were secure, and the second officer said that he would. He had, as I have said, according to his evidence, already given the order for that to be done. A little later the second officer, conceiving it to be his duty so to do, went round each hatch to see that all was right, and he says that everything appeared satisfactory, but he did not, in fact, check the all-important after beam in the orlop deck. That beam was set back some 3 ft. further aft than the deck above was, and, in fact, it had cargo stowed on the top of it, which cargo had been picked up at Rotterdam. That cargo was heavy machinery. He said that he was fairly new to the ship, and he thought it was the coaming. He then reported to the chief officer that all beams were bolted and everything was satisfactory. Hill says that he saw the second officer again and asked if the beams were "O.K.", and that the second officer said: "Yes." The second officer does not remember this. In fact he said: "If he had asked me that, I should probably have told him to mind his own business," adding that he was annoyed that Hill had ever asked him to see that the beams were safe, and that it was like telling him to do his job. I accept Hill's evidence as to this. Not that I think that the second officer was saying anything which he does not believe to be true, but Hill was very certain of it, and I think the second officer had merely forgotten. The second officer's evidence is of considerable consequence when one comes later to consider the case put forward as to its being the duty of the stevedores to accept responsibility for the safety of the hatch.

It is common ground, so far as the evidence is concerned, that in the port of Middlesbrough the ship has always handled and secured beams. The stevedore members of the branch of the men's union are not allowed to remove or replace beams or hatches without special arrangement. During the war for a time there was a special arrangement whereby stevedores could handle beams and hatches, but, of course, at the expense of the ship. After the war the old practice was resorted to. It saved the ship the expense of paying the stevedores to do the work. The ship's officers were familiar with the practice. The second officer certainly knew all about it, and he and the chief officer acted accordingly.

Unfortunately, the carpenter had not secured the most important beam in the hatchway, the aft working beam on the orlop deck. A beam is 20 ft. long, it is made of iron, and it is half an inch thick and 13 inches high. Each end rests in a socket deep enough to take the full height of the beam. Two or three inches from the top there runs for the full length a T-shaped flange—I think it would technically be called an angle-iron—making a shelf four inches wide, and on this shelf the hatches rest. Along and flush with the bottom of the beam there is another similar angle-iron, forming again a flange or shelf. What the purpose of that flange is did not appear. The socket bulges out from the side of the deck, and through both sides of the socket, and, of course, through the beam resting in the socket, there is a round hole. Through this hole there should be a bolt with the head at one end and a thread at the other end, on which should be screwed a nut. If this is done, the bolt cannot come loose and the beam cannot be lifted out of the socket. It is then secure, and "securing" means putting in the bolt with a proper nut screwed on to it. The carpenter slipped two bolts through the holes, but neglected to put in nuts at the other end of the bolts. At one end of the beam the diameter of the hole was seven-eighths of an inch; at the other end of the beam the hole was two and a quarter inches. The diameter of the two bolts which he put in was only half an inch, and, therefore, it is quite clear that these bolts would merely lie loosely in the holes with no nuts to secure them, and I have not the slightest doubt that the heads were on the hatch side, so that the beam would look all right to anyone examining the

beam. It would be awkward to get at the thread, because the cargo was on the hatch cover, and the only way of getting at it would, I suppose, be by kneeling on the deck alongside and getting your hand up the other side of the beam. At any rate, the beam was thus not secure. It was left in a very dangerous state. The bolts could slip out and could fall out if they were subjected to any vibration. It was gross negligence to leave them in that condition. Further, it constituted a trap, because it would look all right from the deck or from the hatch.

The proper securing of beams is a matter of grave importance. Experience has shown that, when cranes, having lowered cargo down a hatch, are being wound up, the fall (that is the wire rope and anything attached to the fall-balls, chains, and, above all, hooks) may very easily swing out of position and catch the bottom of a beam and unseat it if it is not properly bolted and secured, and thereby cause it to fall on men who are at work below. Doubtless for that reason, among the Docks Regulations, 1934, made by the Secretary of State under s. 79 of the Factory and Workshop Act, 1901, there is reg. 42, which is to this effect :

The beams of any hatch in use for the processes shall, if not removed, be adequately secured to prevent their displacement.

That comes in pt. IV, and it is preceded by a regulation (sub-para. (d) of the heading "Duties") to this effect :

It shall be the duty of every person who by himself, his agents, or workmen carries on the processes, and of all agents, workmen, and persons employed by him in the processes, to comply with Part IV of these regulations.

It is not easy to apply that general provision to reg. 42. It certainly means that employers and men must not knowingly work in a hatch in which the beams are not secured. It means, I imagine, that the men must believe the beams to be secure. It may go further and mean that they must believe it on reasonable grounds. As to the employer, there is certainly a duty imposed on him to look for himself or by his agent, and, if he delegates the duty of making sure, he still remains answerable for the failure to make sure. I cannot think it means that every man must personally look at and examine every bolt even if he is assured by his foreman that all is in order. I am satisfied in this case that Hill and all the men concerned believed that the beams were secured by bolts, and, as to the five plaintiffs, that they so believed on reasonable grounds. They, or some of them, had heard Hill's request to the second officer, and they relied on Hill, their foreman, making sure before he ordered them to work. I think the regulations imposed a duty on the employer towards the men to see that the regulation was complied with. It was obviously a regulation for the protection of the men. I do not mean by that that it necessarily follows that it was not also for the protection of the ship, but at any rate I am satisfied that one purpose of the regulation was for the protection of the men. Hill did not see that the regulations were complied with, and, therefore, I think that the defendants were guilty of a breach of the regulation. It is unnecessary to decide to what extent the regulation imposes a duty on the men towards the ship. Whatever the measure of the duty imposed on the men, I am satisfied that, if the ship undertakes the duty of making secure and if the men reasonably believe that that duty has been properly performed, the ship cannot rely on any innocent breach of the regulation by the men. The making of this regulation in no way affected the practice at Middlesbrough. There was no reason why it should. There was nothing in it relating to the actual work of securing, and before and since the regulations were made that practice, to which I have referred, was carried out, except for a short period during the war.

The men began to work in the late afternoon. They worked until 6.30, and they resumed at 7, and the accident was about half an hour after that. Their first duty was to place dunnage boards over the hold, on which they were going to place the bags. They then built a platform on which to receive the bags. This platform was brought up to the line, so that the forward side of the platform was up to that line which was supposed to be 3 ft. forward of the coaming on the main deck. The bags, as I have said, were going to be lowered by a crane. The way in which that was done was this. The crane

was first placed so that the sling containing a number of bags made an easy entry into the hatch, and then it was swung aft so that the fall came right up against the coaming on the top deck. The platform was 7 ft. high, and boards were placed on top of it. In both plans which have been put in, the distance from the aft to the forward side of this pile scales something of the order of 8 or 9 feet. [HIS LORDSHIP then dealt with the evidence regarding the position of the platform and the line and continued :—] The evidence of the men is this. They had been receiving slings of bags on to the platform. About 7.30 a sling came down into a not very convenient position on the platform. Therefore, they called out, I suppose to the hatchwayman, who was at the top of the hatch and he handed on the signal to the man in charge of the crane to take the weight, which meant raise the weight a little. The crane-man got this message and he lifted the load. The next thing was that when the load was hanging something like 3 to 6 inches above the platform there was a noise and a warning cry, and the beam and the hatches, and some of the cargo, came crashing down on to the platform. There were four men on the platform and there were four men carrying bags. Three men on the platform were injured and two of the men who were carrying and who were close to the platform. The beam fell diagonally across the platform, though it may have ended up a little aft of it. Whether it had been intentionally removed or whether it fell on the platform or aft of the platform is not quite clear, but it is, at any rate, clear from the evidence that it fell on to the platform and hurt three of the men who were there. A B C

The first issue of fact that is raised between the defendants and the ship is this. The ship says that this accident was caused by the men swinging the sling as far as they could aft, under the orlop deck, bringing a hook or ball up to and under the beam. It stuck there, and when the load was released and the crane pulled up, the hook or the ball got tightened up against the beam and in that way the beam was pulled out. That is their theory. It is said that, if that is the fact, it is plain that this accident was due to the men's negligence. The men all agree that, if they were doing that and if that was the way in which the accident was caused, they would have been doing something which was dangerous, and, therefore, negligent, but seven men denied it. There are the five plaintiffs, a man named Myers and the crane driver. I accept their denials, and it is sufficient if I say that I accept them as far as they relate to the relevant time, that is, the time when this accident happened. I am quite satisfied that the case alleged by the ship is not well founded. D E

I believe, and I find as a fact, that the accident happened in this way. As I have said, I see no reason why I should not accept Jerred's and Pattison's evidence that, in fact, that white line had been drawn further aft than was thought. It is a very easy mistake to make, but, at any rate, I accept their evidence that that staging was further aft than is shown in either plan. Even if the platform was in the exact position shown on the plan, a load coming straight down would be forward of the centre of the platform. If the platform was, as I am pretty sure it was, further aft, that means that to get a sling even into the centre of the platform there would have to be some pushing or swinging to get it there, because obviously a straight drop would merely have put it forward of the platform or just on the fore-part of the platform. The most convenient side of the platform on which to place the bags would be as far aft as one could get it. As the sling came down it was swung or pushed aft so that the load could rest as near to that side as it could safely be put. While that was being done the hook caught on the edge of the beam. As the sling reached the platform and the signal was given to lift, the hook, being lifted, got a good grip of the bottom of the beam and proceeded to pull up the beam. It would be pulled a few inches without moving the bags while it was taking up the slack, and then a few more inches, estimated by one very good witness as not less than three or more than six, and a few more inches would be just enough to pull the beam out of the socket. I am satisfied that there was at the material time no swinging clear of the stage. I believe the men. Some pushing and swinging of the load would be necessary to get it even into the middle of the platform, and still more to get it further aft, and the more the stage was under the beams the more pushing would be wanted. It is sufficient to say that enough swinging or F G H

pushing would be wanted to bring the fall up against the beam. In my opinion, it is plain that the beam was lifted up. It is plain that the hook was the only thing that could do it and it could not have done it unless it was up against it and had caught against it while this operation was being performed. To put part of the platform under the beam some pushing or swinging would be inevitable in order to put the bags into a convenient position, and the hook could quite easily catch or grip that beam.

A On those facts what is in law the result? The defendants had failed to see that all was secure. There was no contributory negligence on the part of the men, and, in my judgment, the defendants had no answer to the claim. Even if, contrary to my view, the plaintiffs were technically themselves at fault with regard to the regulation, I am satisfied that no duty was imposed on them towards their employers, but, even if there were, where the employers accept the responsibility of directing the men as to when it is safe to begin work, I am quite satisfied that the defendants could not have in any way relied on a breach of this regulation by the men, even if there had been one.

B If the defendants have no answer to the claim the question arises: Have they a right to contribution or indemnity against the ship? They are entitled to that if they can make out a case, but it is an essential part of their case that the ship could have been sued by the men. The shipowners were clearly inviters and the men were clearly invitees. They were there at the request of the ship and on the ship's business. The men, using reasonable care for their own safety, were entitled to expect that the occupier would use reasonable care to prevent damage from unusual danger of which he knew or ought to have known. As to traps, which, by using reasonable care, the invitees would not be aware of, the inviters are under a duty not to create them, or, if they have created them, to warn. That is to be found in the judgment of C SCRUTTON, L.J., in *Compania Mexicana de Petroleo El Aguila v. Essex Transport and Trading Co.* (1) (141 L.T. 106, 110). Here the ship, by its carpenter, negligently performed the work of securing the beams. Further, they created a trap which no reasonable examination would have detected. The second officer made an examination and gave an assurance that everything was secure when it was not. The ship chose the place for the stowage, which place was one which involved the fall coming, at best, close to the beam. D The ship knew the importance of securing the beams and it knew of the danger to the stevedores if the beams were not properly secured. There may be no regulation imposing a duty on the ship to do this work, but if the ship, even voluntarily, takes on the duty and performs it and gives an assurance that the duty has been performed, it seems to me that, if there had been no regulation, one would have as perfect a *Heaven v. Pender* (2) case as one could get.

E Can the regulation make any difference? The third party contends that it does, and puts it in three ways. The third party says first: as against you we can rely on the breach of the duty by the men in not making sure that this beam was all right. Secondly, they rely on the negligence with which I have dealt, the negligence alleged of swinging the sling in a dangerous way. F The third way in which they put the case is this. Seeing that there is this duty imposed by the regulation, at any rate on the employer, they have a right to assume that that duty would be performed, and the probability of G the performance of that duty breaks the necessary nexus between them and the men, so that any duty owing to the men would cease to exist.

If the plaintiffs had known that the beam was not secure they might have been in a difficulty. They might have been within the decision of *Hillen and Pettigrew v. I.C.I. (Alkali), Ltd.* (3), but that decision rested on the fact that H the injured plaintiffs knew that they were breaking a regulation and knew that the operation on which they were engaged was an illegal one.

I do not think that the regulation created a duty towards the ship in the circumstances of this case. I refrain from saying that there would be no circumstances in which a duty would be owed to the ship, because, if the stevedores were being paid to do this work, there is no doubt that there would be a duty owing to the ship. It is impossible to contend that the ship could create a dangerous and concealed trap and escape liability by saying to each man: "You ought to have examined everything for yourself. You owed us,

the ship, that duty and you failed to perform it." In this case the officers of the ship knew the practice of the port, the officer in charge knew the practice and knew that the foreman was relying on the ship and on his assurance. The duty imposed by the regulation does not, in my opinion, affect the liability of those who may elect to do the work of securing beams for damage which results from that work being done negligently. It does not lie in the ship's mouth to say to each man: "You ought to have examined and discovered our negligence." It may be said that a ship is under no obligation to do this work, but, if they do it and accept the responsibility, in doing it they have to do it properly.

Lastly, there is the point about the interposition of the employers' duty. The third party seeks to apply what they call the principle of *Donoghue v. Stevenson* (4) and *Haseldine v. Daw* (5). The contention is that the nexus between invitor and invitee is broken by the intervening obligation, resting on the employer, to make sure that the beams are safe and secure. It seems to me that this principle cannot be invoked here. Those two cases were cases dealing, not with the relationship between invitor and invitee, but with the relationship in law between a manufacturer and a purchaser of goods, not from the manufacturer, but from somebody else to whom the manufacturer has sold, and a relationship between a repairer of property and someone other than the person for whom the work of repair was done who suffered damage from negligent work. It is said that the principle laid down was that there is no legal nexus, that is to say, there is no duty owed in such a case unless the manufacturer or repairer knew that in all probability there would be no examination of the article sold or work done before use, but the probability of examination prevented the necessary privity or relationship. *Prima facie*, in those circumstances there is no relationship—it was the absence of an intermediate examination which was held in those cases to create the relationship—but here the legal relationship is created by the invitation and then by the plaintiffs doing work for the invitor under conditions created by the invitor. The third party contends that there ought to have been an examination of their work by the foreman and that the failure to make that examination was the proximate cause of the damage done, or that it, at any rate, destroys any privity between the third party and the stevedores. I do not agree. In the circumstances of this case the foreman owed no duty to the third party to examine the work. The third party knew that there would be no examination. The third party knew that the foreman and the plaintiffs would rely and were relying on the third party and the assurance of the third party's officer in charge. The second officer clearly expected no examination. He said how he had answered even the request made to him by Hill. He had never heard of the regulation, any more than the plaintiffs had heard of it. In my judgment, the existence of the regulation does not, in this case, affect the third party's responsibility for the accident. Their negligence was the effective cause of this accident. Strictly, the defendants and the third party were joint tortfeasors. The foreman, Hill, I suppose strictly made a mistake in trusting to the third party, as the latter well knew, but I am not sure that that gives a right to complete indemnity. I am fairly certain that if Hill had looked he would not have discovered the absence of the nuts, any more than the second officer did, but he did not look.

The conclusion to which I come is this. I give judgment for the plaintiffs against the defendants. I give judgment for the defendants against the third party for nine-tenths of the damages paid and for nine-tenths of the plaintiffs' costs which the defendants have to pay, and all of their costs of the third party proceedings.

Solicitors: *J. W. R. Punch & Robson*, Middlesbrough (for the plaintiffs); *Cohen, Jackson & Scott*, Stockton-on-Tees (for the defendants); *Jacksons, Monk & Rowe*, Middlesbrough, agents for *Alsop, Stevens & Collins Robinson*, Liverpool (for the third party).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

Re ALEXANDER'S WILL TRUST.

[CHANCERY DIVISION (Roxburgh, J.), May 26, 1948.]

Will—Construction—Latent ambiguity—One article available to answer two bequests—Article divisible—Moiety to each beneficiary.

A By a clause of her will the testatrix bequeathed "my five row diamond bracelet" to a beneficiary and by a subsequent clause she bequeathed "my diamond chain bracelet" to another beneficiary. The first of these clauses had been amended in the will as originally drawn and the amendment had been initialled by the testatrix, so it was clear that the testatrix's mind was specifically directed at the execution of her will to that disposition. The testatrix, at the date of her will and at that of her death, as for many years previously, possessed only one diamond bracelet containing eight rows of diamonds, which, according to extrinsic evidence, she generally referred to as "my five row bracelet," sometimes as "my chain bracelet" and sometimes as "my diamond bracelet."

B HELD: (i) the existence of only one article available to answer two bequests framed in different language was a latent ambiguity, so that extrinsic evidence was admissible.

C (ii) as there was good ground for concluding that the testatrix had directed her mind to the earlier gift at the date of execution of the will, the rule that a later disposition prevails over an earlier had no application, and, the article being divisible, each beneficiary was entitled to a moiety.

Dictum of LORD BROUGHAM and VAUX, L.-C., in Sherratt v. Bentley (1834) (2 My. & K. 149, 165), applied.

D [AS TO INCONSISTENT DISPOSITIONS, see HALSBURY, Hailsham Edn., Vol. 34, p. 218, para. 273; and FOR CASES, see DIGEST, Vol. 44, pp. 606-609, Nos. 4335-4365.]

Cases referred to:

- (1) *Sherratt v. Bentley*, (1834), 2 My. & K. 149; 44 Digest 601, 4273.
- (2) *Ulrich v. Litchfield*, (1742), 2 Atk. 372; *sub nom.*, *Francis v. Dichfield*, 2 Coop. temp. Cott. 531; 44 Digest 632, 4642.

E ADJOURNED SUMMONS to determine the disposition of a specific article given by a will to two different beneficiaries. The learned judge held that each was entitled to a moiety. The facts appear in the judgment.

Beswick (Charles Russell with him) for the executors.

D. B. Buckley for the first beneficiary.

P. J. Sykes for the second beneficiary.

F ROXBURGH, J.: This is a difficult case. By cl. 3 of her will, dated Sept. 26, 1941, Lady Florence Alexander, who died on Oct. 19, 1946, made a number of bequests including specific bequests of jewellery. All the bequests in this clause are numbered, and No. 19 is in the following terms:

To Mrs. Arthur Tilney of Sutton Bonnington Loughborough my long pearl earrings—my best presentation bag—and my dressing case with its fittings—my five row diamond bracelet and my black coat with lamb fur collar.

G It may be of importance to note that as this sub-clause in the will was originally typed it ran as follows:

To Mrs. Arthur Tilney of Sutton Bonnington Loughborough my long pearl earrings—my best presentation bag—dressing case five row diamond bracelet and fittings and my black coat with lamb fur collar.

H An alteration in ink has been made inserting the words "and my" before "dressing case" and the words "with its fittings" before "five row diamond bracelet" and striking out the words "and fittings" which originally followed "five row diamond bracelet." That alteration is initialled by the testatrix. I mention this because it is clear that the testatrix's mind was specifically directed at the time of the execution of her will to this disposition. By No. 31 of this list of specific gifts she gave: "To Lady Graham Little of 40 Wimpole Street W.1 my diamond chain bracelet." The testatrix possessed only one article of jewellery which could answer either of those two bequests. It was a diamond bracelet accurately described as a chain bracelet, but containing eight and not five rows of diamonds.

The first question which I have to determine, probably the most difficult and crucial question in this case, is whether that state of affairs produces a latent ambiguity. If it is an ambiguity at all, it is plainly latent because on the face of the will there is no difficulty. One would expect to find two different diamond bracelets, each one available to answer one of the two bequests. The difficulty arises when it is discovered that there is only one bracelet available for that purpose. Is this an ambiguity within the meaning of the authorities? On the whole I think it is.

This question is important because on its determination depends the admissibility of some important evidence. In my judgment, there is a latent ambiguity, and, accordingly, all the evidence which I am about to read is admissible. Miss Atkinson, who was for 14 years before the death of the testatrix on Oct. 19, 1946, in her service as her personal maid, has sworn that she was throughout fully familiar with all the personal jewellery owned by the testatrix during that period. She says: "I have seen and am familiar with the eight row diamond bracelet" which is in question in this case, and she continues: "The testatrix owned and used the diamond bracelet in its present form ever since I first joined her service." So far no objection is taken to Miss Atkinson's evidence, but from now until a point which I will mention later objection was taken. The question was fully argued, and I now hold that the following paragraphs are admissible:

The testatrix . . . referred to [the diamond bracelet] in conversation with me generally as "my five row bracelet" sometimes as "my chain bracelet" and sometimes as "my diamond bracelet." I never knew why she called it "my five row bracelet" though it had eight rows. Whenever, however, the testatrix instructed me to inform her insurance brokers that she was about to take it from the bank where it was deposited she always referred to it as "my five row diamond bracelet."

That ends the paragraphs to which objection was taken as to admissibility. The affidavit continues:

To my knowledge the testatrix, during the time that I knew her, never had any other diamond bracelet.

If I admit that evidence it appears to me to be conclusively established, first, that the testatrix was making no mistake in using the phrase "my five row diamond bracelet," and this disposition must be read as though those words were in inverted commas. For some unknown reason the testatrix liked to call that which was, in fact, an eight row diamond bracelet her "five row diamond bracelet." There is no method of ascertaining on the evidence before me why she adopted that curious appellation for this article of jewellery, but that was her method of referring to it. When she was correcting in ink the disposition in sub-cl. 19 she knew that she had used the words "five row diamond bracelet," she meant to use those words, and intended to describe this particular article, although the word "five" was not right. It is also clearly established that the testatrix sometimes called this her chain bracelet. It, therefore, seems to me plainly proved by this affidavit that when she referred to "my diamond chain bracelet" in cl. 31 she was referring to precisely the same article of jewellery.

What ought I to do in these circumstances? The case is, apparently, without precedent. There seems to have been, so far as the researches of counsel have been able to discover, no case in the reports hitherto on all fours with it. There are cases which bear some resemblance to it, but the resemblance is not very close. There is a well established doctrine that if one finds two repugnant provisions in a will—e.g., as one finds here, the same thing given to two different people—the later disposition prevails. I have to recognise the force of that doctrine which is well established and of long standing. I have also to recognise its unsatisfactory practical operation in a case such as the present when it seems to me to be a reasonable supposition that though sub-cl. 31 stands later in this will the testatrix may have reconsidered cl. 19 at a later stage. I do not hold as a fact that she did. I merely indicate that that possibility makes the doctrine singularly unsuitable for application in a case of this nature.

On the whole I think I am entitled—for nobody has ever questioned the validity of the *dictum* which I am about to read, though equally nobody seems ever to have applied it—to support the judgment which I am prepared to give

by reference to a *dictum* of LORD BROUGHAM AND VAUX, L.C., sitting in appeal in *Sherratt v. Bentley* (1) (2 My. & K. 149, 165) :

It must then be admitted that the great weight of authority, both of LORD COKE and of the modern decisions, is in favour of regarding a subsequent gift in a will as revoking a prior one to which it is repugnant, and not rendering it all void for uncertainty. How far that repugnancy could be got rid of by presuming an intention to give each legatee an equal moiety, where the very same thing is given first to one and then to another, there being no expressions excluding such intention, might be a different question. The repugnancy, which existed in those other cases, may be said not to arise here. If in one part of a will an estate is given to A, and afterwards the testator gives the same estate to B, adding words of exclusion, as "not to A," the repugnance would be complete, and the rule would apply. But if the same thing be given first to A and then to B, unless it be some indivisible chattel, as in the case which LORD HARDWICKE puts in *Ulrich v. Litchfield* (2), the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule as laid down by LORD COKE, and recognized by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety ; though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation.

This bracelet is certainly not an indivisible chattel because it is easy to divide it in a way which will not impair the value of each moiety. I think, therefore, I am entitled to rely on that *dictum* as justifying me in saying that, if in this case I hold that, as the same thing is given to two different persons in different parts of the same instrument, each may take a moiety, I shall not be doing anything "inconsistent with the rule as laid down by LORD COKE, and recognised by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it." Counsel have agreed that, if that is my conclusion, it is not necessary for me to pursue the question to the extent of defining the moieties in which they are to take. I, therefore, do not propose to do so.

Order accordingly. Costs as between solicitor and client out of the estate in due course of administration.

Solicitors : Charles Russell & Co. (for the executors) ; Monier-Williams & Milroy, agents for Smith, Son & Barker, Andover (for the first beneficiary) ; Lawrance, Messer & Co. (for the second beneficiary).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Followed. IRELAND v. TAYLOR.
[1948] 2 All E.R. 450.

CLIFT v. TAYLOR.

[COURT OF APPEAL (Scott, Bucknill and Asquith, L.JJ.), April 23, 26, 27, 28, June 1, 1948.]

Landlord and Tenant—Goodwill—Claim for new lease—Reasonableness—Premises required by landlord for occupation by his firm—Absence of adherent goodwill—Landlord and Tenant Act, 1927 (c. 36), ss. 4 (1), 5 (1), (3) (b) (i), (iv).

In 1934, by a lease expiring on Dec. 25, 1947, the landlord let the ground floor of certain premises to the tenant for use as a tea-shop. The landlord, partner in a firm of estate agents, carried on his own business in the remainder of the building, his firm as a whole having a tenancy from him as landlord. On Dec. 20, 1946, the tenant served on the landlord a notice requiring a new lease, under the Landlord and Tenant Act, 1927, s. 5 (1), and, in an application to the tribunal for that purpose under s. 5 (2), she alleged a right to compensation, under s. 4, for loss of goodwill of £1,500. The landlord's own business had, in the meanwhile, extended to such an extent that he was unwilling to grant a new lease to the tenant on the ground that he required the premises for the occupation of his own firm and that the grant of the lease would not be consistent with good estate management. By s. 5 (1) and (3) (a) of the Act, a tenant is entitled to a new lease only if he is entitled to compensation under s. 4, but the sum which would be awarded him under that section would not compensate him for the loss

of goodwill which he would suffer if he removed to other premises. By s. 5 (3), "the grant of a new lease . . . shall not be deemed to be reasonable . . . (b) if the landlord proves—(i) that the premises are required for occupation by himself . . . or (iv) that . . . the grant of such a lease . . . would not be consistent with good estate management . . ."

HELD: (i) occupation by the landlord and his partners was occupation by the landlord within the meaning of s. 5 (3) (b) (i), and, therefore, the landlord had proved, in accordance with the requirements of s. 5 (3) (b) (i), that the grant of a new lease would not be reasonable. A

(ii) alternatively, since the only part of the tenant's goodwill which could be the subject of compensation was the net rental value of what adhered to the premises in the sense of enuring to the benefit of the landlord in the form of increased rental value after the premises had returned into his possession, the tenant had failed to prove her right to compensation under s. 4, and, accordingly, she was not entitled to a new lease under s. 5. B

Whiteman Smith Motor Co., Ltd. v. Chaplin ([1934] 2 K.B. 35), *applied*.

[AS TO COMPENSATION FOR GOODWILL AND GRANT OF NEW LEASE, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 294-301, paras. 333-345; and FOR CASES, see DIGEST, Supp.]

Cases referred to:

- (1) *Whiteman Smith Motor Co., Ltd. v. Chaplin*, [1934] 2 K.B. 35; 103 L.J.K.B. 328; 150 L.T. 354; Digest Supp. C
- (2) *Charrington & Co., Ltd. v. Simpson*, [1935] A.C. 325; 104 L.J.K.B. 226; 152 L.T. 469; Digest Supp.
- (3) *Butling, Ltd. v. Fytche*, [1948] 1 All E.R. 737.
- (4) *Smith v. Metropolitan Properties Co., Ltd.*, [1932] 1 K.B. 314; 101 L.J.K.B. 110; 146 L.T. 133; Digest Supp.

APPEAL by the landlord from an order made by His Honour JUDGE A. H. ARMSTRONG, sitting at Yeovil County Court, on July 10, 1947, whereby he ordered the landlord to grant a new lease to the tenant, under the Landlord and Tenant Act, 1927, s. 5. The landlord appealed and the Court of Appeal now allowed his appeal. The facts appear in the judgment of the court delivered by SCOTT, L.J. D

Holroyd Pearce, K.C., and *Dare* for the landlord.
G. R. F. Morris and *E. B. McLellan* for the tenant. E

Cur. adv. vult.

June 1. **SCOTT, L.J.**, read the following judgment of the court. This is an appeal by the landlord against an order made by the county court judge on him to grant a new lease under s. 5 of the Landlord and Tenant Act, 1927. The procedure in cases under that section is to be found in s. 21, which provides, by sub-s. (1), that the tribunal shall be the county court, and, by sub-s. (2), that the matter shall first be referred to a referee, as there directed, for inquiry and report back to the county court, in accordance with rules to be made under sub-s. (5). That procedure was followed in the present case. F

The facts of the case are in a small compass. Mr. Taylor, the landlord, is owner in fee of a building suitable for use as business premises, known as 16, Princes Street, in Yeovil, acquired by him in about 1914. It contains three floors. The street is a good street for business offices or for a tea-shop, being in the business centre of the town. The landlord is by profession a land agent. In 1934 he gave Mrs. Clift, the tenant, (and a partner who subsequently died) a lease for 14 years, expiring on Christmas Day, 1947, as, although he was even then employing a staff of 19 or 20, "business was not brisk," as he said in evidence. The lease was of most of the ground floor of the building and of the cellar, with use jointly with the landlord of the yard at the back. The use of the premises was restricted to that of restaurant proprietors, confectioners and caterers. In short, it was to be, and, in fact, was, used throughout the period as a tea-shop. Notice requiring a new lease was served under the Landlord and Tenant Act, 1927, s. 5, on Dec. 20, 1946, by the tenant on the landlord, followed, on Mar. 17, 1947, by an originating application under the Act. Under the latter she alleged a right to compensation (*i.e.*, under s. 4) for loss of goodwill of £1,500. G
H

A During the currency of the lease the landlord carried on and greatly extended his business in the remainder of the building, with the result that, by the time the tenant served her notice, he had five partners and a staff of 41, and the business extended into various allied fields of work, with offices either of the firm or his own in other towns and portions of the staff working in Yeovil in other quarters. The firm and he himself, as its senior partner, had great need for less cramped head office premises, and, in particular, for the free and full use of the ground floor on street level as essential to convenience of office work, for clients, and for display of notices, etc., and, indeed, it was necessary for the prosperity of the greatly enlarged and still growing business, with its ramifications into many allied or compatible departments or activities. The landlord gave evidence before the referee:

B These cafe premises would be highly suitable for the estate agency department. We could accommodate them on the ground floor with partners, who deal with that side, there, and the clerks at the back of the premises. They would be all together, where now they are on different floors and at different places. It is most essential that one should have display for all property for sale in one's window, and auction bills are usually displayed in windows, both for residences, farming and furniture sales and that sort. These cafe premises are highly suitable to us.

C We see no reason for doubting the truth of that evidence. It was uncontradicted. One other feature of the case must be mentioned. During her tenancy the tenant had the advantage for the tea-shop of a private bakery nearby which she rented from some other landlord. It enabled her to build up a trade in the sale of cakes and similar articles baked there, which, no doubt, entered materially into the personal goodwill which she had been able during her lease to build up as an important element in the total goodwill of her business, for which a person carrying on the same trade would be willing to pay substantially if he had the continuing advantage of the site both of the tea-shop and bakery. But the bakery goodwill could not enter into the tea-shop goodwill—at any rate, not that part of the goodwill which would enure to the benefit of the landlord and give rise to a claim for compensation under the Landlord and Tenant Act, 1927.

D The lease in question, being for 14 years from Dec. 25, 1933, was due to expire on Dec. 25, 1947. Section 5 (1) of the Act of 1927 requires notice of a claim for a new lease to be served on the landlord within the period allowed for a claim for compensation under s. 4, and s. 4 (1) (ii) defines that period as not more than 36 months and not less than 12 months before the end of the lease, *i.e.*, in the case before us, ending at Christmas 1946. The notice was, in fact, served on Dec. 20, 1946. Section 5 (2) requires the application to the court to be made not less than nine months before the end of the tenancy (which is three months after the time for serving notice requiring a new lease as required by sub-s. (1)). The claim was filed on Mar. 17, 1947, and was, therefore, in time. We were given to understand that an extension of time for the completion of the proceedings was ordered under s. 5 (13). At any rate, no question of want of jurisdiction was raised before us. The appeal turns almost entirely on the correct interpretation of the Act. In our view, both the referee and the judge misinterpreted and misapplied it, in spite of clear guidance from reported cases. Of these the most illuminating is that of *Whiteman Smith Motor Co., Ltd. v. Chaplin* (1), in which the relevant provisions of the Act were analysed by SCRUTTON, L.J., and MAUGHAM, L.J., sitting as a Divisional Court of the King's Bench Division. Those learned judges made it quite clear that the only part of the tenant's goodwill which is the subject of compensation is the net rental value of what "adheres" to the premises in the sense of enuring to the benefit of the landlord in the form of increased rental value after the premises have returned into his possession. That proposition was quite definitely approved in the House of Lords in *Charrington & Co., Ltd. v. Simpson* (2), by LORD TOMLIN ([1935] A.C. 325, 335, 336):

H It may indeed be doubted whether the term goodwill in its strict sense is appropriate to be introduced into a case where some improvement of rental value has resulted to the landlord from the carrying on of a business on the premises by a previous tenant. It is unfortunate that the section has not been framed with a clearer exposition of its general purpose and with more precision in the use of terms. The section, however, seems to contemplate that in certain cases something in the form of increased value will, after the termination of the tenancy and as the result of the tenant's business

activities during his tenancy, adhere to the premises in the landlord's hands, but that the measure of any compensation to the tenant in respect of it is not what he loses but what the landlord gains.

That view is repeated in different words by LORD MACMILLAN (*ibid.*, 344, 345) :

An incoming tenant may well make payment to an outgoing tenant in respect of the goodwill as he finds it, however arising, but the landlord is not under the Act a purchaser of the goodwill as it stands ; he has to pay statutory compensation to the outgoing tenant in respect of something which the tenant has himself directly created and which he leaves behind in the shape of an added letting value in the premises. The task of discrimination among the elements contributing to added value may be difficult, but the statute has imposed it.

Both referee and learned judge in the present case mis-conceived altogether the nature and limitations of the "adherent" goodwill—the only subject of compensation under s. 4. They both held such erroneous views about the Act that in order to prevent misunderstanding in the future we think it may be useful to call attention to certain features and aspects of the legislation not expressly emphasised in *Whiteman's* case (1). (i) The Act interferes with freedom of contract and thus modifies an important right of the individual. Any real ambiguity of language in any particular provision, still apparent even when construed in the light of the whole Act, ought to be resolved in favour of maintaining common law rights. (ii) For the same reason, its plain meaning should not be strained in favour of any presupposed intention to enlarge the tenant's or to cut down the landlord's contractual rights. (iii) For this purpose the long title of the Act is significant. It limits the scope of the Act to premises "used for business purposes," and treats "improvements" and "goodwill" as strictly parallel subjects for compensation. (iv) That parallelism is worked out in the two sections which create the right to compensation. First, s. 1 deals with improvements, and s. 4 with goodwill, and in each section the operative words of sub-s. (1) down to the word "compensation" are identical. Secondly, the restriction of compensation by s. 1, proviso (a), to "the net addition to the value of the holding . . . which may be determined to be the direct result of the improvement" finds its counterpart in s. 4 (1) in the limitation of compensation to the added rental value of the premises in the hands of the landlord as a result of business previously carried on there by the tenant, coupled with its proviso (a) that the addition must be proved to be "the direct result of the carrying on of the trade or business" by the tenant. Thirdly, the condition imposed by s. 1 (2), that, in determining the amount of net rental value added by the improvements, regard shall be had to a change of user of the premises intended by the landlord, finds its counterpart in proviso (a) to s. 4 (1), that the tribunal shall have regard, in assessing the net added goodwill, to a proved intention to use the premises "for a different and more profitable purpose" —the "more profitable purpose" being defined in s. 4 (2) as measured by increase in rental value. The further condition imposed by s. 4 (1), proviso (d) (ii), that any part of such added value "attributable exclusively to the situation of the premises" shall be disregarded, obviously can have no prototype in the provision about improvements, but reinforces the principle, which governs both sections, that the landlord shall not be called on to pay for any value in his hands, when possession passes to him, which is not solely and directly attributable to the efforts of the tenant. Finally, the same procedure is adopted for the assessment of both heads of compensation : see s. 21 and ss. 1 (3) and 4 (4). Close and detailed consideration of the conditions imposed on the right to compensation under s. 4 is essential, because the right, conferred on the tenant by s. 5, to claim a new lease, is itself thereby made expressly conditional on an "allegation" by him, first, that he is entitled to compensation under s. 4, and, secondly, that that measure of compensation will not compensate him for the loss of his goodwill—meaning, of course, the whole of the tenant's goodwill, not merely that part of it for which s. 4 confers compensation. The whole of the rights conferred on the tenant by s. 5 to apply for a new lease and of the corresponding duty imposed on the landlord to grant it are expressed in studiously cautious and limited language. Section 5 (1) runs as follows :

Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and

carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him.

A It follows from what we have already said that the first ground for allowing the appeal is that there was no evidence before the referee or judge of compliance with the primary condition of the right under s. 4 to compensation for adherent goodwill as defined in the decisions we have quoted. There are, however, three or four other grounds also which are equally cogent. The jurisdiction to order a new lease under s. 5 (2) is discretionary, but the exercise of that power is conditional on the tribunal considering that "in all the circumstances" the grant is "reasonable," and, in our opinion, there was no evidence to justify the tribunal in taking any such view. Section 5 (3) enacts that such a grant shall not be deemed to be reasonable (a) unless the tenant proves three facts, or (b) if the landlord proves any one of four other facts. Under sub-s. (3) (a) there was thus an onus of positive proof on the tenant, and, as we have already said, he must prove the central fact, namely, his right to compensation. Under sub-s. (3) (b) the landlord proved two of his four conditions of exemption, namely, (i) that he "required the premises for his own occupation," and (ii) under para. (iv), that "the grant of such a lease of the premises would not be consistent with good estate management." The facts proved by him as regards exemption (i) are these. The existing arrangement with his partners as to the firm's occupation of the building (excluding the tea-shop) was that the firm as a whole had a tenancy from him as landlord and he assumed that a similar arrangement would be made in regard to the premises previously let for a tea-shop. On this, counsel for the tenant contended that such a lease would not constitute "occupation by the landlord" within the meaning of condition (i) to be proved by the landlord. The answer of counsel for the landlord was that it was open to the landlord to give a mere licence to the firm to use the new premises, which would dispose of that objection. We agree, but we go further. On the reasonable interpretation of the Act it would be ridiculous to suppose that Parliament had intended to complicate the simple business conception of occupation by the landlord by pursuing the irrelevant further inquiry whether he had a partner or partners or whether he let the premises in question to the firm or gave them a licence, but, even if so artificial and technical a construction of the Act as that urged by counsel for the tenant was proper, counsel for the landlord pointed out that, on the basis of the position now obtaining both in equity and at law, as explained with authorities in CHESHIRE'S MODERN REAL PROPERTY, 5th ed., pp. 550, 554, land or any interest in land owned by a partnership and in its possession is occupied by all the partners and by each of them, because they are tenants in common. In addition, counsel for the landlord argued that, had Parliament intended to limit the word "occupation" to the sole occupation of the landlord and to exclude occupation by him as a partner, it could have inserted the word "solely," as was done in the Customs and Inland Revenue Act, 1878, s. 13 (1). There remains the landlord's answer under s. 5 (3) (b) (iv) to the claim for a lease, namely, that it "would not be consistent with good estate management." On this there was overwhelming evidence that the firm needed the tea-shop premises for the proper expansion of their headquarters premises and for display of posters, etc., and we cannot imagine a clearer case of bad estate management than a decision by the senior partner to throw away the opportunity given him by the expiration of the tea-shop lease to bring that part of the premises within the firm's business occupation.

I It will be observed that, under s. 5 (1), the notice of a claim for a new lease has to be served within the same limits of time as the notice of a claim under s. 4, namely, not earlier than three years but not later than one year before the date of expiry of the lease, that the right is conferred as an alternative to the right to compensation, and that the tenant is only called on to *allege* a right to compensation. By s. 5 (2), however, the tenant is given a further period of three months' grace after the expiration of his time for serving notice of claim for compensation, within which he may still serve on the landlord notice of claim for a new lease, and by the same sub-section the tenant is given the right, in the event of his failing to get a new lease by reason of the limitations on the jurisdiction to order a new lease imposed by sub-s. (3), to ask the tribunal to give

him compensation under s. 4. There is in s. 5 (2) another echo of s. 4. In the case of the right to a new lease being excluded by reason of one or other of the provisions of s. 5 (3) (b) (grounds to be proved by the landlord for refusing a lease), compensation is authorised by s. 5 (2), but from its *quantum* must be deducted any element of site goodwill, thus repeating s. 4 (1), proviso (d) (ii). Sections 4 and 5 would seem, in the light of the preceding analysis of certain aspects of them, to provide for the determination by the tribunal of claims under both sections *before* the termination of the relationship of landlord and tenant, with the intention that the claim for compensation under s. 4, the claim for a new lease under s. 5, and the alternative claim for compensation under s. 5 should all be thrashed out on a prophetic basis. We only call attention to this doubtful point of interpretation because this court in *Butlins, Ltd. v. Fyche* (3) discussed a closely allied doubt, although it was not necessary to decide the point, and we recognise there is much to be said for the exposition by TALBOT, J., in *Smith v. Metropolitan Properties Co., Ltd.* (4), which treats the meaning of s. 4 as not open to doubt.

The chief mistake made by both the referee and the judge in their consideration of the net adherent goodwill was their total failure to realise the difference between the global goodwill which the landlord, if able to give vacant possession with long enough tenure, could have sold in the open market to any purchaser in the same trade or business who wanted the site and the very limited adherent goodwill which might have been of value to the landlord and alone is within s. 4. Nor was there any attempt made in the evidence given on behalf of the tenant to eliminate any one of those elements of goodwill which were capable of enuring to the benefit of a purchaser in the same line of business as the tenant, but incapable of enuring to the landlord's benefit. Neither site value, nor the "personal" goodwill attaching to the way in which, and the type of staff with which, the tenant had managed the tea-shop, nor the goodwill value of her separate bakery rented from another landlord was deducted, although they were all possible (though by no means certain) items of value in the tenant's goodwill which could not have enured to the benefit of the landlord. In addition, both referee and judge confused profits with goodwill, wholly ignoring the clear warning given by MAUGHAM, L.J. ([1934] 2 K.B. 36, 50, 51) in *Whiteman Smith Motor Co., Ltd. v. Chaplin* (1). There is one final point we would add, namely, that, if it was obviously so much to the interest of the firm's business to use the ground floor for its own purposes, there cannot be any doubt about that floor carrying a rental value for that purpose which ought to be treated by the court as satisfying the criterion of the phrase, "used for a different and more profitable purpose," in proviso (a) to s. 4 (1) as further defined by s. 4 (2), for we are satisfied that the economic rent which the landlord, if he is to be regarded as separate from his firm, could obtain for the ground floor for the purpose of his firm's business would be far more than the rent which could be obtained for the premises if used for the purpose of a tea-shop.

In the result, we are satisfied that there is no adherent goodwill in the present case and that the report and judgment below must both be set aside and the application alike for a new lease or, alternatively, for compensation refused. The landlord will have the costs here and below.

Appeal allowed with costs.

Solicitors: *Reed & Reed*, agents for *Clarke, Willmott & Clarke*, Taunton (for the landlord); *Markham Thorp & Co.*, agents for *Farnfield & Nicholls*, Gillingham, Dorset (for the tenant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

SWINDON CORPORATION v. PEARCE AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Sellers, JJ.),
May 27, June 4, 1948.]

Town and Country Planning—Interim development—Enforcement of interim development control—Proposed prohibition of use of land—Appeal by occupier—Powers of court of summary jurisdiction—Town and Country Planning (Interim Development) Act, 1943 (c. 29), s. 5 (2), sched. I, para. 3.

The Town and Country Planning Act, 1943, s. 5 (1), provides: "If while a resolution to prepare or adopt a scheme under the principal Act is in force with respect to any area, any development of land within that area is carried out after the commencement of this Act otherwise than in accordance with the terms of the interim development order or of permission granted under that order, then, . . . the interim development authority may, if they are satisfied that it is necessary or expedient so to do having regard to the provisions then proposed to be included in the scheme . . . (b) where the development consists of any use of the land or any building thereon, by order prohibit that use, and, where necessary, reinstate the land." By s. 5 (2) and sched. I, para. 3, on an appeal in respect of a notice of such proposed order, a court of summary jurisdiction, if "satisfied that the interim development authority are entitled to take the proposed action on the grounds specified in the notice . . . shall dismiss the appeal . . . but, if they are not so satisfied, they shall allow the appeal."

An interim development authority gave notice to the occupier of certain land and buildings of their intention to prohibit the use of the premises for the purposes of a second-hand motor vehicle business on the ground that the use was "not in accordance with provisions now proposed to be included in the scheme under which the said use of the land and buildings requires the consent of the interim development authority, which consent has been refused on the ground that such use is injurious to the amenities of the neighbourhood which is mainly residential in character." In allowing an appeal by the occupier, the court of summary jurisdiction had regard to the reasons which had led the authority to serve the notice, and, particularly, to whether the use of the land was injurious to the amenities of the neighbourhood. On appeal, quarter sessions upheld this decision.

HELD: the justices were not entitled to consider the reasons which led the authority to come to the conclusion that it was necessary or expedient to prohibit the development, but could only decide whether the conditions precedent to their giving the notice had been complied with.

Dictum of LORD GREENE, M.R., in Taylor v. Brighton Corporation ([1947] 1 All E.R. 864, 866), *applied*.

[EDITORIAL NOTE.] The Town and Country Planning (Interim Development) Act, 1943, s. 5, sched. I, para. 3, ceases to have effect when the Town and Country Planning Act, 1947, comes into force on July 1, 1948. In the Act of 1947 the section corresponding to s. 5 (2) of, and sched. I, para. 3, to, the Act of 1943 is s. 23 (4).

AS TO CONTROL OF INTERIM DEVELOPMENT UNDER THE TOWN AND COUNTRY PLANNING ACTS, see HALSBURY, Vol. 32, pp. 266-9, paras. 424-426, and Supplement para. 426A; and FOR CASES, see DIGEST Supp.]

Cases referred to:

- (1) *Taylor v. Brighton Corporation*, [1947] 1 All E.R. 864; [1947] K.B. 736; [1947] L.J.R. 1103; 177 L.T. 153; 111 J.P. 343; C.A.
- (2) *Dormer v. Newcastle-upon-Tyne Corporation*, [1940] 2 All E.R. 521; [1940] 2 K.B. 204; 109 L.J.K.B. 708; 163 L.T. 266; 104 J.P. 316; 84 Sol. Jo. 500; C.A.; Digest Supp.

CASE STATED by Wiltshire Quarter Sessions.

The appellants, Swindon Corporation, were the interim development authority for the borough of Swindon for the purposes of the Town and Country Planning Acts. A resolution to prepare a scheme under the Town and Country Planning Act, 1932, was at all material times in force in respect of the borough of Swindon, and on Apr. 3, 1945, the appellants adopted a report under which all uses except for residential purposes of land or buildings included in an area in which Crombey Street was situated were prohibited without the express consent of the appellants

who proposed to include this zoning of the area in the scheme. The respondents were the occupiers of premises at 71, Crombey Street, which they began to use for the purposes of a second-hand motor vehicle business in July, 1946. On Sept. 3, 1946, the appellants refused an application by the respondents for permission to use the premises for this purpose, but the user continued without such permission. On June 3, 1947, the appellants, being satisfied that it was necessary and expedient to do so, resolved to prohibit such use by order and served a notice on the respondents under the Town and Country Planning (Interim Development) Act, 1943, s. 5 (1), stating that they proposed to make the order in 28 days. The respondents appealed to a court of summary jurisdiction, contending that their right of appeal extended to all matters referred to in the appellants' notice and that they could raise the questions whether the use of the land was injurious to the amenities of the neighbourhood and of the merits and justification on town planning grounds of the appellants' refusal of permission and proposed action. The appellants contended that their decision as to the necessity for or expediency of making the proposed order was conclusive, and that, on proof of the facts, the justices must dismiss the appeal. On Sept. 15, 1947, the justices allowed the appeal and on Nov. 5, 1947, quarter sessions dismissed the appellants' appeal therefrom. The Divisional Court now allowed the appellants' appeal from the decision of quarter sessions. The facts appear in the judgment of the court.

H. B. Williams, K.C., and J. T. Molony for the appellants.
Skelhorn for the respondents.

Cur. adv. vult.

June 4. **LORD GODDARD, C.J.**, read the following judgment of the court. On June 17, 1947, the appellant corporation, as the interim development authority under the Town and Country Planning (Interim Development) Act, 1943, served on the respondents a notice of their intention to prohibit the use of certain land for the purposes of a second-hand motor vehicle business. The notice recited that a resolution to prepare or adopt a scheme under the Town and Country Planning Act, 1932, was in force with respect to an area comprising the land in question and that development of that land consisting of the use of that land and buildings thereon for the purpose of a second-hand motor vehicle business was being carried on after the commencement of the Act of 1943 otherwise than in accordance with the terms of the Town and Country Planning (General Interim Development) Order, 1946. The notice then stated that the authority was satisfied that it was necessary or expedient to prohibit that use having regard to the provisions which it was proposed to include in the new scheme, and it, accordingly, notified the respondents that the authority proposed, after the expiration of 28 days from the date of the service of the notice, to make an order prohibiting the aforementioned use of the land and buildings. The notice then set out that:

... the grounds for such action are that the said use of the land is not in accordance with provisions now proposed to be included in the scheme under which the said use of the land and buildings requires the consent of the interim development authority, which consent has been refused on the ground that such use is injurious to the amenities of the neighbourhood which is mainly residential in character.

The respondents entered an appeal to the court of summary jurisdiction sitting at Swindon against the action proposed to be taken by the authority in pursuance of the right of appeal given by s. 5 of the Act of 1943 and sched. I thereto. The justices allowed the appeal and the interim authority appealed to quarter sessions. The appeals committee dismissed the appeal, subject to a Case stated for the opinion of the court.

None of the facts is in dispute with regard to the necessary steps taken by the interim authority, nor was it disputed that the land and buildings were within an area in respect of which a resolution to prepare a scheme was in force. The question at issue is whether, on the hearing of the appeal, the justices were entitled to inquire into the reasons which moved the interim authority to serve the notice which they did, and, in particular, whether it was open to the justices to consider whether the use of the ground would be injurious to the amenities of the neighbourhood, and it would seem to follow, if the contentions of the respondents are correct, that they would also be entitled

to invite the justices to consider whether or not the neighbourhood was mainly residential in character. By s. 5 (1) of the Act of 1943 it is provided :

If while a resolution to prepare or adopt a scheme under the principal Act is in force with respect to any area, any development of land within that area is carried out after the commencement of this Act otherwise than in accordance with the terms of the interim development order or of permission granted under that order, then, subject to the provisions of this section, the interim development authority may, if they are satisfied that it is necessary or expedient so to do having regard to the provisions then proposed to be included in the scheme . . . (b) where the development consists of any use of the land or any building thereon, by order prohibit that use, and, where necessary, reinstate the land.

The development in question in this case was begun after the Act of 1943 came into force and after a resolution to prepare a scheme under the Act of 1932 was in force. Section 5 (2) of the Act of 1943 gives the same right of appeal as did s. 13 (2) to (5) of the Act of 1932, with the modifications contained in sched. I to the Act of 1943 which provides :

3. If on any such appeal the court of summary jurisdiction are satisfied that the interim development authority are entitled to take the proposed action on the grounds specified in the notice, they shall dismiss the appeal and shall by their order empower the authority after the expiration of the said period of 28 days, to remove or pull down the building or work, or to execute the required alterations or works or, as the case may be, shall by their order prohibit the building or land from being used after the period aforesaid without the permission of the authority or in contravention of any conditions subject to which that permission was granted, but, if they are not so satisfied, they shall allow the appeal.

It is contended on behalf of the appellants that, on the plain construction of the provisions of the schedule, the appeal is limited to the question whether the development authority are entitled to take the action proposed in the notice, and that that must mean whether the conditions precedent to their giving the notice have been carried out and whether the land is land to which the scheme applies. They concede that the court could also inquire whether what had been done amounted to "development" within s. 53 of the Act of 1932, whether it took place after the Act of 1943 came into force, and whether it was otherwise than in accordance with the development order. The respondents, on the other hand, contend that the justices are entitled to consider whether, in their opinion, the reasons given by the authority for coming to their decision were justified or not.

The first thing to observe in this connection is that it is unnecessary for the notice to give any reasons why the authority has refused to consent to the use to which it is proposed to put the land. The notice must, no doubt, state that the authority are satisfied that it is necessary or expedient to prohibit the use and that they have refused to give their consent to its use, but they are not required to set out in the notice the reasons that moved them to refuse their consent. It would, indeed, be strange if, because they do so, the person aggrieved can ask the justices to take a different view and to say that the authority were wrong in refusing their consent. Counsel for the appellants called our attention to s. 10 of the Act of 1932. Under that Act, where the Minister has made a general order in respect of interim development, an application for permission to develop the land may be made to a specified authority who may grant the application unconditionally or subject to conditions or may refuse the application. Thereupon, the applicant may appeal to the Minister, whose decision is to be final. Suppose then the applicant, in defiance of that decision, proceeds to develop the land and the authority serve a notice on him under s. 5 of the Act of 1943 of their intention to make an order prohibiting that use and directing him to reinstate the land. If an appeal can be brought against that order and the justices be asked to reconsider the matter, it would be asking them in effect to overrule not only the authority but also the Minister.

In our opinion, it is clear that the justices on this appeal can only decide whether the authority have acted within their jurisdiction, by which we mean in respect of land that is comprised within the order, and whether there has been development contrary to the order, and whether the necessary steps requisite to be taken before a notice is given have been taken. There may be some other matters which the court can consider. We are not intending

to give an exhaustive category, but, in our opinion, it is clear that the court cannot consider the reasons which have led the authority to come to the conclusion whether it is necessary or expedient to prohibit the intent to develop.

In *Taylor v. Brighton Corpn.* (1), a case arising under the same Act, LORD GREENE, M.R., said ([1947] 1 All E.R. 866): "The test which is set up by those words 'necessary or expedient,' in my opinion, is not an objective test in the sense that it is for the court to say whether a provision is necessary or expedient." It is true that he was there referring to provisions which it was proposed should be inserted in a scheme, but it seems to us that that observation applies with equal force to the matter which we are now considering. It is, we think, evident that Parliament meant these matters to be left to the decision of the elected local authority. It is for them to consider, and not for a court, what it is desirable should be done or not done in relation to these schemes, and, provided they are acting *intra vires*, their action cannot be controlled by the courts. It would have been very easy, if Parliament had intended that the decisions of the local authority on such matters should be open to contest before a court, to have used appropriate words giving that right.

Counsel for the respondents called our attention to ss. 12 and 47 of the Act of 1932, which do expressly give a right to a court to override the decision of the authority in respect of the matters there mentioned, but we do not find any words which give this right in respect of matters relating to s. 5. Where matters are left by Parliament to the discretion and judgment of a local authority, the courts ought not, and, indeed, cannot, interfere to overrule or vary what they see fit to do. I may, perhaps, in this respect mention a case in the Court of Appeal, *Dormer and Others v. Newcastle-upon-Tyne Corpn.* (2). That case dealt with an entirely different Act, a private Act conferring powers on the corporation of Newcastle-upon-Tyne. The plaintiffs objected to the way the corporation had exercised the powers given them by the Act in relation to putting railings on the footway for the purpose of protecting foot passengers. In my judgment in that case I said ([1940] 2 All E.R. 527):

The corporation, in the exercise of their discretion, came to the conclusion that it was necessary for the protection of the public in Newcastle that it should. I do not think that this court, or any other court, has any right to canvass the decision of a local authority on a matter of that sort, which Parliament has placed in their hands for decision. It is not a question of whether the Ministry of Transport or the police or the watch committee or anybody else took this view or that view. It is entirely a question for the corporation as a corporation to decide, and their decision on the length or extent of this fence cannot be reviewed by this or any other court.

Exactly the same principles apply, we think, to this case. The justices, therefore, had no power to allow the appeal, and it follows that the order of the appeals committee in dismissing the authority's appeal was wrong. The case will be remitted to the appeals committee answering the question submitted in the negative, with an intimation that the order suggested in para. 8 of the Case should be made. The appellants will have the costs of the Case and the argument in this court.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *D. Murray John*, town clerk, Swindon (for the appellants); *Pennington & Son*, agents for *Lemon, Humphreys & Parker*, Swindon (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WILMOT v. WILMOT AND MARTIN (DAY INTERVENING).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), April 29, 30, May 3, 4, 1948.]

Divorce—Condonation—Husband and guilty wife living together in same house, but with no marital intercourse—Husband desirous of reconciliation, but wife's refusal—Parties continuing to live together as before—Revival of husband's condoned adultery by subsequent act of adultery disclosed in discretion statement—Discretion of court—Exercise in wife's favour.

A husband and wife, who were married in 1931, had become estranged by 1939 and, although they continued to live together in the same house and the wife did the housekeeping, they had no marital intercourse, hardly spoke to each other, and had their meals separately. In 1942 the husband went to the Far East in the Royal Air Force and was taken prisoner by the Japanese. On his return to England in 1945, the parties resumed the same kind of relationship as had existed before the husband went away. In November, 1945, the husband discovered a letter to the wife from the co-respondent and suspected that she had been guilty of adultery. On Dec. 9, while away from home, the husband wrote a letter to the wife asking her to make it up with him and to give up the co-respondent. When the husband returned home on Dec. 11, the wife confessed that she had committed adultery with the co-respondent while the husband was a prisoner, and she said that she still loved the co-respondent and refused the husband's attempt at reconciliation. On learning this, the husband took no action of any kind and the husband and wife continued to live together, in the same way as they had been doing hitherto, until July, 1946, when the husband left the wife. The husband then brought a petition for divorce on the ground of the wife's adultery, but the wife contended that he had condoned her adultery and there had been a complete reinstatement of the wife by the husband. The husband claimed (a) that, as there had been no displacement by him of the wife, there could be no replacement, and (b) that, on the facts of the case, there was no condonation, since both husband and wife must be parties to a condonation. In 1936, the husband had committed adultery which had been condoned by the wife. In 1938, he again committed adultery, but this fact was not disclosed until the discretion statement was filed in his petition.

HELD : (i) where a husband and wife were together when the confession or discovery of adultery was made, there could be a merely notional displacement which might be immediately made good by condonation or reinstatement.

Fearn v. Fearn ([1948] 1 All E.R. 459), distinguished.

(ii) there was no authority for the proposition that there could be no condonation unless the guilty party consented to being condoned, and, on the facts, the husband had reinstated the wife in her position in the household and in the state of conjugal cohabitation after he became fully aware of her adultery and had condoned it.

(iii) the fact that the wife's adultery had been condoned did not affect the exercise by the court of its discretion in her favour, and, although she could not rely on the husband's adultery in 1938 as a ground for divorce, it was sufficient to revive the previous condoned adultery, and she was, accordingly, entitled to a divorce.

[AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-682, paras. 1004-1009; and FOR CASES, see DIGEST, Vol. 27, pp. 336-341, Nos. 3161-3213.]

Cases referred to :

- (1) *Keats v. Keats and Montezuma*, (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 27 Digest 336, 3166.
- (2) *Fearn v. Fearn*, [1948] 1 All E.R. 459.

PETITION by the husband for divorce on the ground of the wife's adultery. CROSS-PETITION by the wife for divorce on the ground of the husband's adultery.

The parties were married in 1931, and by 1933 differences had arisen between them because the husband desired to have children, but the wife did not. In or about 1935, the husband committed adultery with a prostitute, and, as a result, he contracted a venereal disease of which he was in due course cured.

He admitted to the wife the adultery and the fact that he had contracted a venereal disease, but she condoned the adultery and marital intercourse between the husband and wife continued to take place, although infrequently. In 1937 the wife became attracted by another man, and, although no adultery took place, the relations between the husband and the wife became worse. In 1938 the husband again committed adultery with a prostitute, but he did not disclose that fact until the discretion statement was filed in his petition. By 1939 marital intercourse between the parties had completely ceased, and, although they continued to live in the same house they were barely on speaking terms, and had put their matrimonial affairs into the hands of solicitors. In 1942 the husband joined the Royal Air Force and was posted to the Far East where he was taken prisoner by the Japanese. On his return to England in 1945 the parties lived together in the same house and the wife continued to do the housekeeping, but there was no marital intercourse, they spoke very little to each other, they seldom had meals together, and they did not go about together. In November, 1945, the husband discovered a letter to the wife from the co-respondent which indicated that the wife had committed adultery with him while the husband was abroad. On Dec. 9, 1945, while away from home, the husband wrote a letter to the wife, entreating her to make it up with him and give up the co-respondent. On Dec. 11, the husband returned home and had an interview with the wife, and she admitted the adultery and stated that she loved the co-respondent and would go to him if it were possible. On learning this, the husband took no action of any kind, and matters continued between them as they had been previously. At Christmas, the husband and wife went away together to stay with the wife's sister. About the end of January, 1946, the husband consulted solicitors and asked the wife to leave the house, but she refused to do so and the parties continued to live together in the matrimonial home until July, 1946. Early in 1946 the husband met the intervener with whom he became friendly, and in the summer of that year he promised to marry her if it ever became legally possible for him to marry again. The husband now petitioned for divorce on the ground of the wife's adultery, but the wife contended that her adultery had been condoned and brought a cross-claim for divorce against the husband on the ground of his adultery in 1936 and with the intervener. Both parties asked for the discretion of the court in regard to their own adultery. The intervener was dismissed from the suit during the proceedings, on the ground that adultery between her and the husband had not been proved. WILLMER, J., held that the husband had condoned the wife's adultery and dismissed his petition, and granted a decree *nisi* to the wife on the ground of the husband's adultery in 1936 which was condoned by the wife but revived by the act of adultery in 1938.

Karminski, K.C., and *R. J. A. Temple* for the husband.

Beufus, K.C., and *Stephen Terrell* for the wife.

Melford Stevenson, K.C., and *Hollins* for the intervener.

The co-respondent did not appear and was not represented.

WILLMER, J. [after stating the facts]: On the part of the husband there was adultery in 1936, which was, admittedly, condoned by his wife, but it was revived by the husband's adultery in 1938, an act which has never been condoned, for the simple reason that, until the discretion statement was filed, it was not, in fact, known to the wife. The wife cannot rely as ground for dissolution on the act of adultery in 1938, but it is sufficient to revive the previous condoned adultery. Therefore, the wife has proved to the satisfaction of the court that the husband has been guilty of adultery which, although condoned, has been revived, and the husband has proved to the satisfaction of the court that, during his absence overseas, the wife was guilty of adultery with the co-respondent. It is common ground that there was no question of sexual intercourse having taken place after the husband's discovery of the wife's adultery, but counsel for the wife contends that the continuation of this strange living together under the same roof amounts, in fact, to a complete reinstatement of the wife in her position as wife, and, therefore, amounts in law to complete condonation by the husband in respect of the wife's adultery. I have avoided the use of the word "cohabitation" because it is objected that this was not a state of cohabitation at all. Counsel for the husband contends that the parties were not cohabiting, but were merely living together

in the same house in circumstances which, had the question been before the court, would have justified the court in arriving at a finding of desertion. Although I have not to decide that point, it is not one which impresses me very favourably. I find some difficulty in seeing how the husband can say that he has been deserted by the wife when he has been living with her in circumstances in which he entrusts her with the management of the household, takes her about to social functions as his wife, makes her a wifely allowance for housekeeping, and takes her away to stay with friends as his wife. Apart from the question of cohabitation, counsel for the husband contends, first, that there has been no reinstatement in this case because there was never any displacement of the wife from the position which she previously occupied, and, secondly—and this, I think, is the more formidable of the two points—that there cannot be any question of condonation, because it takes two to make condonation in the same way as it takes two to make a quarrel. It is urged that, although the husband did, undoubtedly, in the early stages of his discovery wish for a reconciliation, the wife would never have one, and it was she who resisted the overtures of the husband and refused to have her adultery condoned.

I was referred to most of the well-known cases on the subject of condonation, beginning with the classic case of *Keats v. Keats and Montezuma* (1), which, I am told, was the first case in which a contested question of condonation came before the Divorce Court when it was first established, and ending with *Fearn v. Fearn* (2) which, so far as I know, is the most recent pronouncement of the Court of Appeal on the subject of condonation. It is not necessary to refer to the earlier cases, because they are, I think, quoted and summed up in the judgment of BUCKNILL, L.J., in *Fearn v. Fearn* (2). In that case the question was whether mere words of forgiveness, unaccompanied by any acts, amounted to condonation, *i.e.*, the issue which was before the court in that case was quite different from the issue in this case, but one of the grounds for the decision was that there could be no question of reinstatement because there had been no displacement of the guilty wife from the position which she had previously occupied. In *Fearn v. Fearn* (2) the husband became aware of his wife's adultery while he was serving overseas in the Central Mediterranean Forces. There was obviously nothing he could do about it in the physical sense except to write, and he did write—a letter of forgiveness—and he refrained from doing what he might have done, namely, stop the wife's allowance then and there. Later, in consequence of further information, he changed his mind and decided to petition for divorce, and he was met with the plea that his letter of forgiveness, coupled with his earlier failure to stop his wife's allowance, amounted to condonation. The Court of Appeal decided that there could be no question of reinstatement because the wife had never been displaced, and it is said that the same argument applies to this case. In my judgment, that argument cannot be sustained. In the ordinary case, where the parties are face to face when the confession or discovery of adultery is made, *prima facie* the guilty wife does not have to be displaced from her position. The husband may take time to think it over, but he may, if he is of a forgiving nature, respond immediately by saying: "I forgive you all you have done and I propose that we go straight on together." In other words, his action may result in there being, in fact, no break whatever in the continuation of the association of husband and wife. It seems to me that it is a straining of language to say that there is no reinstatement because there has been no displacement. The displacement, in other words, may be merely a notional displacement, and it may be immediately made good by condonation or reinstatement on the part of the husband. The proposition that it takes two to bring about condonation, in the same way as it takes two to make a quarrel, is one of such simplicity that, if it were sound in law, I should have expected it to be well-founded in authority, but, although I have asked for authority for the proposition, I have had none. No case has been cited to me which lays down, as a matter of law, that condonation, before it can be operative, must be something joint between the two parties, or that there can be no condonation unless the guilty party consents to being condoned.

It seems to me, in those circumstances, that, on this question of condonation, I have to ask myself a simple question on the facts, bearing in mind the strange relationship which existed between these parties before the

discovery. That question is: "Did the subsequent behaviour of the husband and subsequent treatment of his wife by the husband amount to a reinstatement of the wife or condonation?" [His LORDSHIP reviewed the evidence on this matter, and continued:] I can find, in fact, no change in the relationship between the parties after Dec. 11, as compared with what it was before Dec. 11, and I can find no change for a period of some months after that date. About Jan. 27, 1946, the wife went away for a short holiday without informing the husband. The husband was a little annoyed about this and took the opportunity of altering the arrangement with relation to the housekeeping money which he had previously credited to a joint bank account. From then onwards he paid cash weekly, and, with the first payment of weekly cash, he wrote a message on the back of the envelope in which the money was left, saying:

Enclosed housekeeping money Feb. 1 to Feb. 7 included. You left this house four days ago without telling me you were going or what your intentions were . . .

He then went on to explain that he was, on that account, varying the arrangements as to the method of paying the housekeeping money. The fact that, as late as January or February, 1946, the husband complained because his wife went away without telling him where she was going, thereby to some extent interfering with the even flow of domestic affairs and of management of the domestic household, seems to me to be most informative with regard to the husband's attitude, and, indeed, to the attitude of both parties. I say both parties, because, although it may be said that the wife did not want to have her adultery condoned, she did continue to live in the husband's house and behave in the same way towards the husband as she had behaved previously. She continued to run the household as a housewife and to perform such wifely duties as she had done for a good many years. It seems to me in those circumstances, and I so find, that after Dec. 11 the parties continued in exactly the same way, with exactly the same relationship, as they had for a very long time before, and, although that relationship was a somewhat strange one, it was, nevertheless, a relationship which, in my judgment, can only be described as one of conjugal cohabitation. It seems to me, therefore, that I should be doing violence to the facts in this case if I came to any other conclusion than that the husband reinstated his wife in her position in the household and in the state of conjugal cohabitation after he became fully aware of her adultery. In other words, I am satisfied that the husband did duly and freely condone the wife's adultery with the co-respondent with full knowledge of all the facts.

That finding makes it impossible for the husband's petition to succeed. Does the fact that I have found the wife's adultery was condoned affect the exercise of my discretion in her favour? It seems to me not. If I were prepared otherwise to exercise my discretion in her favour, the fact that I am dismissing the husband's petition on the ground of condonation does not seem to me to make any difference. As matters stand, the husband is guilty of an act of adultery in 1936 which is relied on by the wife—condoned, it is true, but revived by a subsequent act of adultery in 1938—and I have to ask myself the question: "Do I withhold relief or do I grant relief at my discretion, having regard to the wife's subsequent adultery with the co-respondent in 1944 or 1945?" I think that a not immaterial consideration is the fact that the first act of adultery perpetrated by the husband resulted in his contracting a venereal disease, a fact which was, no doubt, a cause of the deterioration in the relationship between these parties. Although that fact does not by any means excuse the wife's adultery during the husband's absence abroad, it goes some way to diminish the extent of her blameworthiness. In all the circumstances I think it is a proper case in which I can exercise my discretion in the wife's favour and pronounce a decree *nisi* of dissolution on the wife's cross-charge.

Husband's petition dismissed. Decree nisi granted to the wife. Wife to pay the costs of the intervener.

Solicitors: *Rowe & Maw* (for the husband and the intervener); *Kenneth Brown, Baker, Baker* (for the wife).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

WEBSTER v. HIGGIN.

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley and Evershed, L.JJ.),
June 2, 3, 1948.]

Hire Purchase—Collateral agreement—Abrogation—Parol warranty during negotiations of "roadworthiness" of motor car—Subsequent formal document excluding warranties.

In the course of negotiations for the purchase of a second-hand motor car on hire purchase terms the vendor's agent told the purchaser that, if he bought the car, the vendor would guarantee that it was in good condition and that he would have no trouble with it. The purchaser signed a hire purchase agreement which contained *inter alia* the following clause: "The hirer is deemed to have examined (or caused to be examined) the vehicle prior to this agreement and satisfied himself as to its condition, and no warranty, condition, description or representation on the part of the owner as to the state or quality of the vehicle is given or implied . . . any statutory or other warranty, condition, description or representation whether express or implied as to the state, quality, fitness or roadworthiness being hereby expressly excluded."

HELD: the wording of the clause in the hire purchase agreement was not sufficiently clear to abrogate the separate collateral agreement constituted by an offer of a guarantee and the signing of the hire purchase agreement by the purchaser.

[AS TO CONSTRUCTION AND EFFECT OF CONDITIONS AND WARRANTIES, see HALSBURY, Hailsham Edn., Vol. 29, pp. 52-56, paras. 64-68; and FOR CASES, see DIGEST, Vol. 39, pp. 414-422, Nos. 480-546.]

APPEAL by the plaintiff from an order of His Honour JUDGE STEWART, made at Leeds County Court, and dated Oct. 22, 1947, whereby, in an action for the return of a motor car bought on hire purchase terms and for the balance of instalments due, the learned judge rescinded the agreement and ordered repayment of the deposit and instalments paid, on the ground that a representation of "roadworthiness" which induced the defendant to purchase the car amounted to a condition precedent and it had not been fulfilled. The appeal was allowed, but on the ground that what was offered was a collateral guarantee, and, on the undertaking of the defendant to return the car and of the plaintiff that he would no longer regard the hire purchase agreement as being on foot for any purpose, the order for repayment of deposit and instalments was affirmed. The facts appear in the judgment.

Stanley-Price for the plaintiff.

Hurwitz for the defendant.

LORD GREENE, M.R.: The plaintiff is a garage proprietor and part of his business consists in dealing in second-hand cars, among other ways, by means of contracts of hire purchase. The defendant, having been attracted by one of the plaintiff's advertisements, discussed with the plaintiff's foreman the purchase of a car described as a 1933 Hillman 10 horse power car. They discussed it on a hire purchase basis, but at that stage no terms of any hire purchase agreement were gone into, much less agreed. In the result, the defendant, who was not acquainted with motor cars beyond being able to drive them, without examining the car in question and without even having the engine started up, signed a document on the invitation of the plaintiff's foreman. That document is called an order form. It is a printed form with the plaintiff's name printed on it as a heading. It purports to be addressed to him, and by it a proposing purchaser says: "I hereby accept your offer to sell and order from you on the terms and conditions following and overleaf." There are a number of headings dealing with various things. The car, with its colour and upholstery, is described, the price, such matters as the licence and insurance which are to be paid for, and the date for delivery are specified. The document ends by having written in, apparently by the plaintiff, "H.P. Form"—i.e., hire purchase form—"to be signed May 14." It is clear that the only form of purchase which the parties at this stage were contemplating was one by way of hire purchase. The hire purchase form referred to in this "order form" is not in any way identified, and it is not suggested that the

words ought to be construed as referring to some particular kind of form. The position, therefore, was that no contract came into existence by the signature on this order form by the defendant for the simple reason that it was a document which contemplated the execution of a definite contractual document, namely, a hire purchase agreement, the terms of which had never been agreed, save in so far as certain matters are referred to, such as the amount of the deposit, the period and the instalment. That, of course, is insufficient to constitute a contract because hire purchase agreements contain a large number of clauses which are not in any sense uniform. Variations are to be found, and the forms which are commonly adopted have varied from time to time. It seems to me, therefore, that this document was in no sense a contractual document.

The importance of it lies in this. On the back of it are set out what are called "Terms and Conditions." The relevant condition is condition 4:

The purchaser acknowledges that he has not been induced to enter into this purchase by any representation as to quality, fitness for any purpose, performance or otherwise of the goods other than the representation contained . . . if the goods be not new, in the written description entered on this order form.

If that had been a contractual document, I could have understood the argument that the purchaser was binding himself in the terms of condition 4, whatever those words may mean, and that he would have so bound himself even if he had not read it, but it was not a contractual document, and before it was signed something had happened which is, to my mind, of crucial importance and was obviously so regarded by the learned county court judge. In the course of a conversation which the defendant had with the plaintiff's foreman, whose authority is not in any way in dispute, the foreman said: "If you buy the Hillman 10 we will guarantee that it is in good condition and that you will have no trouble with it." Those words in the context are obviously an offer of a collateral guarantee. It is a guarantee to the defendant that, if he will enter into a contract of purchase, the guarantee will be given to him. I may say at once that that guarantee was broken as completely and thoroughly as any guarantee can possibly be broken. The evidence relating to the inside of that motor car, given by an expert whose testimony was accepted by the county court judge, amounted to a most deplorable description of what in effect was nothing but a mass of second-hand and dilapidated ironmongery.

If the order form, to which I have just referred, was not contractual, what was it? Reliance is placed on the fact that the defendant signed it. The evidence was that, although he had it in his hand, he did not read it, and that was accepted by the judge. The position at that moment, if correctly analysed, appears to me to have been this. The foreman offers a guarantee. He obtains the signature of the purchaser to a document which I cannot help thinking both parties thought, but, in my view, wrongly thought, was contractual. That document contained a condition which is said to amount to a statement that no guarantee is given. If the document was not contractual, it was nothing more than what I may call a warning. Putting the warning into words it would be this: "I, the foreman, offer you a guarantee, but I warn you that that guarantee has no effect whatsoever." That is what is said to be the construction of condition 4 of that document. If it was a warning, it could only be effective if it was brought clearly to the attention of the person to be warned. He should have been warned that he could place no reliance whatsoever on the clear guarantee offered by the foreman, and merely because he signed at the foot of that document without ever reading that part, or having his attention called to it, does not, to my mind, make it possible to suggest that there is anything in that document which precludes him from relying on the clear guarantee on the faith of which he was negotiating. At a subsequent date the hire purchase agreement was signed, and, in my view, the signature on that hire purchase agreement was the act by which the defendant accepted the offer of a guarantee. The guarantee was: "If you buy this car, I will guarantee it." He bought the car when he put his signature to the hire purchase agreement, for I do not think he bought it before that date in the sense of being contractually bound to take it. It is said, however, that when the defendant signed the hire purchase agreement, the collateral

offer of a guarantee which he accepted by signing that agreement was entirely abrogated and nullified by a term in the agreement itself.

A We, therefore, have this curious position, analysing the words again: "If you, the purchaser, will sign this contract which contains an exclusion of every guarantee, I will guarantee the car." Of course, that is nonsense, but parties often make nonsensical arrangements. If the contract meant that, we should be bound to give it that meaning, but, whether or not it has that effect must, in my opinion, be a pure question of construction of the contract. The relevant clause in the contract, cl. 5, was in these words:

The hirer is deemed to have examined (or caused to be examined) the vehicle prior to this agreement and satisfied himself as to its condition, and no warranty, condition, description or representation on the part of the owner as to the state or quality of the vehicle is given or implied . . .

B I pause there for a moment. To succeed the plaintiff must satisfy us that those words not merely exclude the giving of any warranty, in the contract of sale itself, but that they are sufficient to exclude the operation of a warranty which was given in consideration of the purchaser entering into the contract. In my opinion, that is not the true construction of those words. It is to be noted that the words are "no warranty . . . is given or implied." What is the meaning of the present tense there? Is it to be read not only as incorporating something that is given or implied by or in this agreement, but also as extending to something which was given may be weeks, and, indeed, on the evidence some fortnight, before the agreement was signed? According to the plaintiff the present tense—"is given or implied"—has a meaning which it will not bear in the context. If the words had been, not merely "no warranty is given or implied," but "any warranty given collateral to this agreement is hereby extinguished," the position, no doubt, would have been different. If words to that effect had been given, the result would, as I have said, been farcical because the guarantee would then be offered in consideration of the purchaser signing a document by which he agreed that the guarantee should be of no value whatsoever. It seems to me that to produce such a result very clear words are wanted, and I do not find them in what I have read. The agreement continues:

E . . . any statutory or other warranty, condition, description or representation whether express or implied as to the state, quality, fitness or roadworthiness being hereby expressly excluded . . .

Again, I read those words as meaning a representation expressed in the document or implied from something in the document. The word "being" is, I think, important because it is the common way and the proper way of giving a definition or an elaboration of something that has already been said. If it was intended to carry the matter further, it would have been in the form of a separate sentence and not in the form of a present participle. If that be right, those words do not add anything to the exclusion by the earlier part of the clause of any representation which is given or implied in the document. The words of the clause are not sufficiently clear to abrogate a separate collateral agreement constituted by an offer of a guarantee and its acceptance by the signing of this document by the purchaser. It appears to me that on the evidence the proper and, indeed, the only conclusion to which the county court judge ought to have come was that there was a collateral guarantee which was broken and that there was nothing in the hire purchase agreement or in the order form to exclude or abrogate that guarantee. That is a question of law with which this court is competent to deal. There are no matters of fact in the judgment of the learned judge which are contrary to the conclusions which I have indicated. The question turns, in my opinion, on the proper conclusion of law to be drawn from the facts found by the county court judge and the true construction of the relevant documents read in the light of such circumstances as are relevant on a question of construction. On that basis, in my opinion, the appeal should be dismissed.

H **WROTTESELEY, L.J.:** I agree. In the course of the arguments I am bound to say I felt some doubt, not about any matter relating to the order form, as to which it is enough for me to say that I agree entirely with what has fallen from the MASTER OF THE ROLLS, but as to the collateral warranty

found by the judge and by him described as a condition precedent. This warranty was, in effect, that the car was roadworthy, that being the basis of any possible future contract, whereas when I go to cl. 5 of the ultimate written agreement entered into by the parties, I find the clause reading as follows :

The hirer is deemed to have examined (or caused to be examined) the vehicle prior to this agreement and satisfied himself as to its condition, and no warranty, condition, description or representation on the part of the owner as to the state or quality of the vehicle is given or implied, or as to the fitness of the vehicle for any purpose, any statutory or other warranty, condition, description or representation whether express or implied as to the state, quality, fitness or roadworthiness being hereby expressly excluded, both during the hiring and in the event of sale under cl. 7.

By this clause the defendant is clearly bound, even though, as he says, he never read it. I think it is impossible to reconcile these two matters—on the one hand, the collateral warranty, and, on the other hand, cl. 5 of the hire purchase agreement. One has to bear in mind that fraud is not found by the learned county court judge. Still, I agree with counsel for the defendant when he submits that to see whether a clause like cl. 5 in a subsequent written agreement excludes a previous agreement or a representation or condition clearly made and entered into, as this one was, the subsequent clause must be strictly and literally construed, and against the person who desires to rely on it. From that point of view, I have come to the conclusion that the words of cl. 5 are not so clear as to invalidate the original promise, warranty, or condition, which was the basis of the whole of the negotiations, including the subsequent written contract. For that reason, I agree that the appeal must be dismissed.

EVERSHED, L.J. : I also agree. Out of respect for the argument of counsel for the plaintiff I add a few observations of my own on the crucial point, namely, the interpretation of cl. 5 of the hire purchase agreement. In view of the findings of the learned judge it is, as it seems to me, plain that, apart from any effect which the hire purchase agreement may have had, what was said by the foreman on May 8—"If you buy the Hillman," etc.—must *prima facie* have given rise to an independent contract of warranty, the offer of that warranty being accepted by the defendant when he signed the hire purchase contract. The real question is whether the language of the hire purchase contract, particularly cl. 5, is such that it must be taken to have had the effect of negating or immediately rendering nugatory any independent contract of warranty. As the MASTER OF THE ROLLS has pointed out, to produce such a result clear language must be used. Is there to be found such clear language in cl. 5? Clause 5, it may be said, contains three parts:—(i) "the hirer" (*i.e.*, the defendant), "is deemed to have examined (or caused to be examined) the vehicle . . . and to have satisfied himself as to its condition"; (ii) "no warranty on the part of the owner as to various matters is given"; and, (iii) "any statutory or other warranty being expressly excluded." For the reasons given by the MASTER OF THE ROLLS, the third part must, on a proper construction, be explanatory and adds nothing to the essential middle part. As to the first part, it is a fact that the defendant had satisfied himself as to the condition of the car, because he believed what the foreman, who had examined the car, had told him. As to the middle part, the vital word is the present tense "is," in contrast with the perfect in the first part "have examined" and "have satisfied." In those circumstances, it would seem impossible to say that cl. 5 clearly has the effect of abrogating the collateral contract of warranty which was brought into being by the execution of, but otherwise wholly independent of, the hire purchase agreement. For those reasons, as well as those stated, I agree that this appeal fails.

Appeal dismissed with costs.

Solicitors: *Taylor, Jelf & Co.*, agents for *Denison, Thackray & Fraser*, Leeds (for the plaintiff); *I. Goldman & Son*, agents for *Saffman, Fielding & Co.*, Leeds (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re JEFFREY (deceased), WELCH AND ANOTHER v. JEFFREY AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), June 1, 2, 1948.]

Will—Construction—Division *per capita* or *per stirpes*—Gift of residue “to my brothers A. and B. also C. and D.—equally”—C. and D. children of a deceased brother of testatrix.

By her will the testatrix disposed of her residuary estate, after the death of the life tenant, in the following words: “To my brothers R. and A. S.-J. also G. and E. S.-J.—equally.” The will of the testatrix was handwritten. It was probable that there was a full stop or an indication of a pause by the dropping of the pen on the paper before the word “also,” but it was impossible to say whether or not “also” began with a capital letter. G. and E. were the children of a deceased brother of the testatrix. The question was whether the division of the residuary estate was to be *per capita*, entitling each beneficiary to one-quarter, or *per stirpes*, entitling the two brothers to one-third each and the two children of the deceased brother to one-third between them.

HELD: there was nothing in the context to displace the *prima facie* rule that division should be *per capita*, particularly as each beneficiary was named, and, accordingly, each was entitled to one quarter of the residuary estate.

[AS TO DISTRIBUTION *per Capita* AND *per Stirpes*, see HALSBURY, Hailsham Edn., Vol. 34, pp. 356-359, paras. 402-405; and FOR CASES, see DIGEST, Vol. 44, pp. 991-1003, Nos. 8490-8605.]

Cases referred to:

- (1) *Re Hall, Parker v. Knight*, (1948), 64 T.L.R. 243.
- (2) *Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357; 100 L.J.Ch. 237; 145 L.T. 632; Digest Supp.

ADJOURNED SUMMONS to determine questions arising under the will of the testatrix. The report deals with the question whether, on the death of the tenant for life, the residuary estate should be divided between the four named beneficiaries *per capita* or *per stirpes*. ROXBURGH, J., held that, on the true construction of the will, the division was to be *per capita*. The facts and the relevant provision of the will appear in the judgment.

Michael Albery for the executors.

G. T. Hesketh for the tenant for life.

Danckwerts for Reginald Salisbury-Jones.

W. F. Waite for Alfred Salisbury-Jones.

Milner Holland, K.C., for Arthur Guy Salisbury-Jones.

John Bradburn for Ellaline Salisbury-Jones.

ROXBURGH, J.: The question which I have to determine is whether, at the death of Robert Henry Jeffrey (the tenant for life), the defendants, Reginald Salisbury-Jones, Alfred Salisbury-Jones, Arthur Guy Salisbury-Jones and Ellaline Salisbury-Jones, are each entitled to a quarter share of the residuary estate, or whether the defendants, Reginald and Alfred Salisbury-Jones, are each entitled to a one-third share thereof, and the defendants, Arthur Guy and Ellaline Salisbury-Jones, are each entitled to a one-sixth share thereof. The words which I have to construe are:

At his death to my brothers Reginald and Alfred Salisbury-Jones also Guy and Ellaline Salisbury-Jones—equally—.

First, there is a question whether there is, or is not, in the original will, a full stop after the words “Alfred Salisbury-Jones,” and a corresponding question whether the word “also” is introduced with a capital letter or a small letter. Curiously enough, both those are difficult questions. I have looked carefully at the original will. On the whole, I think that, if there is not a full stop, there is a dot, an indication of pause by the dropping of the pen on to the paper, after the words “Alfred Salisbury-Jones.” As regards the letter “a” of “also,” it might be either a capital letter or a small letter. It is impossible to be certain which it is.

In that state of affairs I must consider, first, the state of the law, and my task up to this point is extremely easy, because HARMAN, J., has considered the matter recently in *Re Hall, Parker v. Knight* (1). Before I read his judgment, I think it desirable to say that there is a passage in the headnote which seems to me not to be justified by the judgment. That passage is as follows:

... where the division is between members of the same family not all of the same generation the presumption is that a stirpital distribution is intended.

I do not think that my brother so held, and I much prefer to read the passages from the judgment with which, with respect, I entirely concur, and which are of assistance to me today. The will he had to consider was in the following terms:

I leave to my sister Maud Beatrice Parker half of my estate—£100 to Elsie Parrott, the remainder to be divided equally between my youngest sister May, and my niece Irene and her children.

HARMAN, J., said (64 T.L.R. 243, 244):

Having regard to the cases, I agree with the submission that there is a *prima facie* rule that division should be *per capita*. This is, however, only a *prima facie* rule and it is one which may quite easily be displaced by the context: see *Re Dale* (2), *per LUXMOORE, J.* ([1931] 1 Ch. 357, 367). In my opinion the circumstances of the present case are sufficient, together with the existence of the comma, to displace the rule, which is only meant to form a guide when there is no other context. Through the cases there runs this reconciling provision—that cases of [*per capita*] distribution are not generally cases of family distribution, but that cases of stirpital distribution are cases of family division.

There is no doubt that I must approach this will having in mind the *prima facie* rule that the division should be *per capita*, but also that the rule may quite easily be displaced by the context. Is there any context here which tends to displace the rule? This is a gift to four persons *nominatim*, and I understand that none of the cases in which there has hitherto been a stirpital distribution has been a case where there was a gift to four persons *nominatim*. The only possible context here is either in the word "brothers," or in the word "also," or in both those words. As regards the word "brothers," the testatrix groups the brothers together in one group—Reginald and Alfred Salisbury-Jones. She does not say "to my brothers Reginald Salisbury-Jones and Alfred Salisbury-Jones." In exactly the same way, she groups together Guy and Ellaline Salisbury-Jones. She does not describe them as, but, in fact, they are, children of a deceased brother. Counsel for Reginald and Alfred Salisbury-Jones asked me to attach importance to the word "also," but the testatrix could not have said "and," because neither Guy nor Ellaline was a brother or sister. Accordingly, she had to change the word to some extent, and, to my mind, the word "also" was used merely to differentiate Guy and Ellaline from persons whom she had described as brothers. My own belief as to the mental process by which this sentence was evolved is that the testatrix was, first, thinking of the identity of her beneficiaries. She thought at once of her brothers, Reginald and Alfred Salisbury-Jones, and she then dropped her pen. Then she remembered her nephew and niece, whom she introduced with the word "also." She then made a dash, and after that she thought: "In what shares and proportions are those persons entitled?", and she determined—a natural determination when one is naming people individually—that she would like them each to take the same amount though they stood in different generations. I must confess I find it impossible to discover any context here to displace the *prima facie* rule. Accordingly, the four beneficiaries take in fourths.

Declaration accordingly. Costs of all parties, as between solicitor and client, in due course of administration.

Solicitors: *Edwin Coe & Calder Woods* (for the executors and some of the beneficiaries); *Lazarus & Son* (for a beneficiary); *Haslewood, Hare & Co.* (for a beneficiary).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

BANNISTER v. BANNISTER.

[COURT OF APPEAL (Scott and Asquith, L.JJ., and Jenkins, J.), May 5, June 8, 1948.]

Trust—Constructive trust—Sale of cottage—Oral undertaking by purchaser to permit vendor to occupy cottage rent free.

On the plaintiff's oral undertaking that the defendant would be allowed to live in a cottage rent free for as long as she desired, the defendant agreed to sell to him that and an adjacent cottage. The plaintiff's undertaking was not included in the formal conveyance. Subsequently, with the defendant's consent, the plaintiff occupied the whole of the first-named cottage with the exception of one room, which the defendant continued to occupy. In an action for the recovery of possession of that room the plaintiff claimed that the defendant had been occupying it as a tenant at will and that her tenancy at will had been duly determined by notice to quit. The defendant counterclaimed for a declaration that the plaintiff held the cottage in trust for her for her life:—

HELD: (i) the oral undertaking given by the plaintiff created a life interest in the cottage in favour of the defendant, determinable on the defendant ceasing to live in it.

Buck v. Howarth ([1947] 1 All E.R. 342), distinguished.

(ii) the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is not confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises so soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available. Nor is it necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another.

(iii) the defendant was, therefore, entitled to a declaration that the plaintiff held the house on trust during her life to permit her to occupy the same for as long as she desired, and subject thereto in trust for himself, and the plaintiff was not entitled to an order for possession.

[AS TO CONSTRUCTIVE TRUSTS, see HALSBURY, Hailsham Edn., Vol. 33, pp. 138-141, paras. 235-238; and FOR CASES, see DIGEST, Vol. 43, pp. 631-642, Nos. 700-784.]

Cases referred to:

- (1) *Buck v. Howarth*, [1947] 1 All E.R. 342; 176 L.T. 320.
- (2) *Re Carne's Settled Estates*, [1899] 1 Ch. 324; 68 L.J.Ch. 120; *sub nom.*, *Re St. Donats Settled Estates*, 79 L.T. 542; 40 Digest 735, 2647.
- (3) *Re Boyer's Settled Estates*, [1916] 2 Ch. 404; 85 L.J.Ch. 787; 115 L.T. 473; 40 Digest 731, 2619.
- (4) *Booth v. Turle*, (1873), L.R. 16 Eq. 182; 37 J.P. 710; 43 Digest 556, 75.
- (5) *Chattock v. Muller*, (1878), 8 Ch. Div. 177; 42 Digest 459, 286.
- (6) *Re Marlborough (Duke)*, *Davis v. Whitehead*, [1894] 2 Ch. 133; 63 L.J.Ch. 471; 70 L.T. 314; 43 Digest 555, 62.
- (7) *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196; 66 L.J.Ch. 74; 75 L.T. 502; 43 Digest 558, 87.

APPEAL by the plaintiff from an order of His Honour JUDGE PRATT, made at Brentwood County Court, and dated Sept. 19, 1947, dismissing his claim for possession of a room in a cottage and allowing a counterclaim by the defendant for a declaration that the plaintiff held the cottage in trust for her for her life. The appeal was dismissed and the learned judge's order affirmed subject to a variation by substituting a declaration to the effect that the plaintiff held the cottage in trust during the life of the defendant to permit her to occupy the cottage for so long as she desired and subject thereto in trust for the plaintiff. The facts appear in the judgment of the court read by SCOTT, L.J.

Rowntree for the plaintiff.

Dennis Smith for the defendant.

Cur. adv. vult.

June 8. **SCOTT, L.J.**, read the following judgment of the court. This is an appeal from an order of the Brentwood County Court dated Sept. 19, 1947, dismissing a claim by the plaintiff against the defendant for possession of the downstairs front room of a cottage known as No. 30, Maryland Cottages, Mountnessing, Essex, and allowing a counterclaim by the defendant for a declaration that the plaintiff held No. 30, Maryland Cottages in trust for the defendant for her life.

No. 30, Maryland Cottages and the adjoining cottage, No. 31, had belonged to the defendant's husband who died intestate in 1939. Under his intestacy the defendant, as his widow, became entitled to his residuary estate (including the two cottages) for life with remainder to his brothers and sisters. It appears, however, that by a family arrangement the brothers and sisters gave up their respective reversionary interests in the two cottages for the defendant's benefit and that at the date of the agreement mentioned below they were her absolute property. Towards the end of 1942 there were negotiations between the defendant and the plaintiff (who is her brother-in-law) for the sale of the two cottages by the defendant to the plaintiff and these negotiations resulted in an oral agreement between them. There was a conflict of evidence as to the terms of this oral agreement, but the learned county court judge accepted the defendant's evidence about it. According to the defendant's evidence the plaintiff said he would let her have the price her husband paid for the cottages, namely, £250. The defendant replied that she would let the plaintiff have the cottages at that price if he would let her rent the one, by which she clearly meant No. 30, in which she was living at the time. The plaintiff then said: "I do not want to take any rent, but will let you stay as long as you like rent free." He further said he was going next door, *i.e.*, to No. 31. The defendant thereupon agreed to sell the two cottages to the plaintiff on these terms. She would not have sold the two cottages to the plaintiff "if this had not been agreed," by which she meant if the plaintiff had not agreed to let her stay in No. 30 as long as she liked rent free.

The sale thus orally agreed on was completed by a conveyance dated Jan. 7, 1943, which was a plain conveyance on sale of the two cottages by the defendant to the plaintiff at the price of £250, containing no reference at all to the stipulation to the effect that the defendant was to be allowed to stay in No. 30 as long as she liked rent free. According to the uncontradicted evidence of a local auctioneer and valuer (which was accepted by the learned county court judge), the value in 1943 of the two cottages, with rent restricted tenants in occupation of each, would have been £400, to which £100 should be added on the assumption of a sale with vacant possession. The price of £250 paid by the plaintiff must, therefore, be taken to have been at least £150 below the contemporary value of the two cottages and to have amounted to not more than five-eighths of such value.

After the sale the defendant seems to have remained in occupation of the whole of No. 30 until the autumn of 1945, when the plaintiff and his wife had to give up the house they had been living in, and, with the defendant's consent, moved into No. 30, the defendant making room for them by letting them have all except the downstairs front room, into which she appears to have taken as much of her furniture as she conveniently could, leaving the rest in other parts of the cottage. Early in 1947 a Mr. and Mrs. Freeman, who had, apparently, been the plaintiff's tenants at No. 31, moved into the rooms in which the plaintiff and his wife had been living at No. 30 and the plaintiff and his wife moved into No. 31. The defendant had previously revoked her permission for the occupation of these rooms by the plaintiff and his wife, and the plaintiff let the Freemans into occupation of them without the defendant's consent. Since the sale of the two cottages to the plaintiff he has paid the sched. A tax, and, apparently, also the rates, on both of them, and has also paid for repairs. The Freemans have been treated by the plaintiff as occupying the rooms in No. 30 taken over from him as his tenants and they have been paying rent to him. On the other hand, the defendant has ever since the sale been living in No. 30, or latterly in the downstairs front room of No. 30, rent free.

The plaintiff, having given the defendant notice to quit the downstairs front room of No. 30, with which she refused to comply, commenced the present action, claiming by his particulars of claim dated Oct. 2, 1947, possession of the room in question on the footing that the defendant had been occupying it as a tenant at will at no rent and that her tenancy at will had been duly determined by notice to quit. The defendant counterclaimed in the action for a declaration to the effect that the plaintiff held No. 30 in trust for the defendant for life, with an alternative claim for specific performance which was not pursued, and ancillary claims for possession of No. 30 other than the downstairs front room (which also was not pursued), and damages for trespass. In the result, the learned county court judge, by his order dated Sept. 19, 1947, dismissed the plaintiff's claim with costs, and on the defendant's counterclaim awarded her £10 damages with costs and made a declaration to the effect claimed by her. In view of the learned county court judge's acceptance of the defendant's evidence he necessarily found as a fact that the oral agreement as a result of which the defendant conveyed Nos. 30 and 31 to the plaintiff for £250 included an undertaking by the plaintiff to permit the defendant to stay in No. 30 for as long as she liked rent free, and that, but for this undertaking, the defendant would not have sold the two cottages to the plaintiff at what, on the uncontradicted evidence of value, he rightly described as "a bargain price." He further found as a fact that there was no fraud in the case. On these findings of fact he held that on well-known equitable principles there was (as he put it) an implied or inferential trust, or, in other words, a constructive trust, of No. 30 under which the plaintiff held that property in trust for the defendant for life.

The conclusion thus reached by the learned county court judge was attacked in this court on substantially the following three grounds:—First, it was said that the oral undertaking found by the learned county court judge to have formed part of the agreement—namely, that the plaintiff would let the defendant stay in No. 30 as long as she liked rent free—did not, as a matter of construction of the language used, amount to a promise that the defendant should retain a life interest in No. 30, but amounted merely to a promise that the plaintiff would allow the defendant to remain in No. 30 rent free as his tenant at will. Secondly, it was said that, even if the terms of the oral undertaking were such as to amount to a promise that the defendant should retain a life interest in No. 30, a tenancy at will free of rent was, nevertheless, the greatest interest she could claim in view of the absence of writing and the provisions of ss. 53 and 54 of the Law of Property Act, 1925. Thirdly, it was said that a constructive trust in favour of the defendant (which the absence of writing admittedly would not defeat) could only be raised by findings to the effect that there was actual fraud on the part of the plaintiff and that the property was sold and conveyed to him on the faith of an express oral declaration of trust which it would be fraudulent in him to deny. It was, accordingly, submitted that the learned county court judge's conclusion that there was a constructive trust could not stand since it was negated by his finding that there was no fraud in the case and by the absence of any evidence of anything amounting to an express oral declaration of trust.

In support of the first of these three objections reliance was placed on Buck v. Howarth (1), in which a King's Bench Divisional Court held that the occupant of a house who had been told by a predecessor in title of the freeholder "that he could live in the house until he died" (an oral and, it would seem, a purely voluntary promise) was given an uncertain interest in the premises and that the law would presume a tenancy at will, with the result that proceedings under the Small Tenements Recovery Act, 1838, could be taken. That was, obviously, a very different case from the present one and we find ourselves unable to derive any assistance from it. The promise was a purely voluntary one, and any court would naturally have been slow to construe it as intended to confer a life interest, even if it was literally capable of that construction. Moreover, whatever the words may have meant, the case clearly fell within s. 54 of the Law of Property Act, 1925, under which interests in land created by parol have the force and effect of interests at will only. (There was, of course, no question of a resulting trust as there might have been if the occupant of the house had been a former owner who had sold the freehold on the faith of a similar promise.) In the present

case the defendant did, on the facts found, sell and convey the property on the faith of the oral undertaking and would not otherwise have done so, and the undertaking must be assumed to have been regarded as reserving to her a benefit worth at least £150, or three-eighths of the contemporary market value of the property without vacant possession. We, therefore, see no reason why the words of the undertaking should not be given the most favourable construction, from the defendant's point of view, of which they are properly capable. Similar words in deeds and wills have frequently been held to create a life interest determinable (apart from the special considerations introduced by the Settled Land Act, 1925) on the beneficiary ceasing to occupy the premises: see, e.g., *Re Carne's Settled Estates* (2), and *Re Boyer's Settled Estates* (3). In our view, that is the meaning which should, in the circumstances of the present case, be placed on the words of the oral undertaking found by the learned county court judge to have been given by the plaintiff. **X** We are, accordingly, of opinion that the first objection fails, though the interest promised to the defendant by the plaintiff must, we think, be taken to have been a life interest determinable on her ceasing to occupy No. 30 and not a life interest *simpliciter* as held by the learned county court judge. **X**

As will be seen from what is said below, the second objection (based on want of writing) in effect stands or falls with the third, and it will, therefore, be convenient to deal with that next. **X** It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available. **X** Nor is it, in our opinion, necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another. The above propositions are, we think, clearly borne out by the cases to which we were referred of *Booth v. Turlle* (4), *Chattock v. Muller* (5), *Re Duke of Marlborough* (6), and *Rochefoucauld v. Boustead* (7). We see no distinction in principle between a case in which property is conveyed to a purchaser on terms that the entire beneficial interest in some part of it is to be retained by the vendor (as in *Booth v. Turlle* (4)) and a case, like the present, in which property is conveyed to a purchaser on terms that a limited beneficial interest in some part of it is to be retained by the vendor. We are, accordingly, of opinion that the third ground of objection to the learned county court judge's conclusion also fails. His finding that there was no fraud in the case cannot be taken as meaning that it was not fraudulent in the plaintiff to insist on the absolute character of the conveyance for the purpose of defeating the beneficial interest which he had agreed the defendant should retain. The conclusion that the plaintiff was fraudulent, in this sense, necessarily follows from the facts found, and, as indicated above, the fact that he may have been innocent of any fraudulent intent in taking the conveyance in absolute form is for this purpose immaterial. The failure of the third ground of objection necessarily also destroys the second objection based on want of writing and the provisions of ss. 53 and 54 of the Law of Property Act, 1925.

Some point was made of the payment by the plaintiff of the sched. A tax and other outgoings in respect of both cottages as a circumstance inconsistent with the interest in No. 30 to which the learned county court judge has held the defendant entitled. In our view, this circumstance was clearly a matter to be taken into account in determining whether the defendant's evidence as to the terms of her bargain with the plaintiff was to be accepted, and we have no reason to suppose that the learned county court judge did not take it into account. He held, nevertheless, that the defendant's version of the transaction was the true one, and we certainly cannot regard that finding of fact.

turning as it did essentially on the credibility of the witnesses, as open to review on this ground. We think it is clear on the facts that there has been nothing amounting to a cesser or renunciation of occupation by the defendant so as to bring her determinable life interest in No. 30 to an end. She has throughout been in personal occupation either of the whole of No. 30 or, latterly, of the downstairs front room. The learned county court judge has held that the plaintiff and his wife came to live in the other rooms by her permission, that is to say, as her licensees or tenants at will. Nor, in our view, can the plaintiff claim that the defendant's interest was affected by his letting the Freemans into occupation of these rooms after such permission was revoked. The learned county court judge has, indeed, held that since such revocation the plaintiff has been a mere trespasser.

In the result, we hold that the appeal fails and the order of the learned county court judge should be affirmed, but in the interests of accuracy we think his order should be varied by substituting a declaration to the effect that the plaintiff holds No. 30 in trust during the life of the defendant to permit the defendant to occupy the same for so long as she may desire to do so and subject thereto in trust for the plaintiff. A trust in this form has the effect of making the beneficiary a tenant for life within the meaning of the Settled Land Act, 1925, and, consequently, there is a very little practical difference between such a trust and a trust for life *simpliciter*. The appeal will be dismissed with that variation in the form of the order. The plaintiff must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors: *Kenneth Duthie & Co.* (for the plaintiff); *Landons* (for the defendant).

[*Reported by C. St.J. NICHOLSON, ESQ., Barrister-at-Law.*]

DUKE'S COURT ESTATES, LTD. v. ASSOCIATED BRITISH ENGINEERING, LTD.

[CHANCERY DIVISION (Harman, J.), June 1, 1948.]

Practice—Particulars—Defence—Forfeiture of lease—Onus on plaintiff to prove case—Defendant's denial involving double negative.

Lease—Forfeiture—Breach of covenant alleged—Onus of proof.

The plaintiffs let certain premises to the defendants for a term of years from Oct. 25, 1945, the defendants covenanting that they would use the demised premises only as offices in connection with their business of engineers and with other businesses in which they or their subsidiary or associated companies might be interested. The lease provided that the user of part of the premises as offices by the defendants' subsidiary or associated companies should not be deemed an underletting or parting with possession within cl. 2 (17) of the lease, which contained the usual lessee's covenant against underletting or parting with possession without consent. The plaintiffs brought an action for forfeiture of the lease, alleging, by para. 5 of the statement of claim, that the defendants had used the premises or permitted them to be used for the purpose of their businesses by certain companies and persons, or, alternatively, that the defendants had underlet or parted with possession to the same persons. By para. 7, the plaintiffs alleged that the companies and persons mentioned in para. 5 "are not subsidiary or associated companies of the defendants and the businesses carried on by such companies and persons are not businesses in which the defendants and their subsidiary or associated companies are interested." The defendants in their defence in substance admitted that the companies mentioned in para. 5 of the statement of claim had used part of the demised premises as offices by their (the defendants') permission, but they denied underletting or parting with possession. Paragraph 4 of the defence stated: "The defendants deny each and every allegation in para. 7 of the statement of claim." The plaintiffs applied for particulars of the implied positive allegation in para. 4 of the defence.

HELD : (i) *prima facie* the burden was laid particularly on the plaintiffs to prove that the defendants had permitted user by persons not associated in business with the defendants, and the burden remained on the plaintiffs in spite of the admission in the defence.

Doe d. Bridger v. Whitehead, (1838) (8 Ad. & El. 571) and *Toleman v. Portbury*, (1870) (L.R. 5 Q.B. 288), *applied*.

(ii) although the defendants' denial in para. 4 involved a double negative, it did not necessarily involve an affirmative allegation. The area of controversy was clear, and, especially having regard to the fact that this was a forfeiture action, it was for the plaintiffs to prove their case, without assistance, and particulars would not be ordered.

Pinson v. Lloyds and National Provincial Foreign Bank, Ltd. ([1941] 2 All E.R. 636), *distinguished*.

[AS TO PARTICULARS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 275-282, paras. 465-467; and FOR CASES, see DIGEST, Pleading, pp. 193, 194, 197-205, Nos. 1634-1638, 1660-1710.]

Cases referred to :

- (1) *Doe d. Bridger v. Whitehead*, (1838), 8 Ad. & El. 571; 3 Nev. & P.K.B. 557; 1 Will. Woll. & H. 521; 7 L.J.Q.B. 250; 2 Jur. 493; 112 E.R. 955; 31 Digest 364, 5096.
- (2) *Toleman v. Portbury*, (1870), L.R. 5 Q.B. 288; 39 L.J.Q.B. 136; 22 L.T. 33; 18 W.R. 579 Ex. Ch.; 31 Digest 467, 6137.
- (3) *Pinson v. Lloyds & National Provincial Foreign Bank, Ltd.*, [1941] 2 All E.R. 636; [1941] 2 K.B. 72; 110 L.J.K.B. 657; 165 L.T. 360; 2nd Digest Supp.

PROCEDURE SUMMONS by the plaintiffs for particulars of the defence to an action for the forfeiture of the lease of certain premises for breach of a covenant as to the user of those premises. HARMAN, J., refused the application. The facts appear in the judgment.

Gerald Upjohn, K.C., and *George Pollock* for the plaintiffs.

Sir Andrew Clark, K.C., and *R. O. Wilberforce* for the defendants.

HARMAN, J. : The plaintiffs are seeking against the defendants forfeiture of an underlease of property in Jermyn Street and Duke Street, St. James's and granted from Mar. 25, 1945, having a long term of years to run. The material clause is rather curious. It is a covenant by the defendants that the defendants :

... will use the demised premises only as offices in connection with the defendants' business of engineers and/or other businesses in which the defendants and their subsidiary or associated companies may be interested.

So far, therefore, they may only use the premises as offices in connection with either their own business or other businesses in which, though not their own, they may be interested or in which their subsidiaries or their associates have an interest. There is a proviso that the user of part of the demised premises as offices by the defendants' subsidiary or associated companies shall not be deemed an underletting or parting with possession within the meaning of cl. 2 (17) of the underlease which is the ordinary lessee's covenant not to underlet or part with possession of the premises without consent; there is the usual proviso for re-entry.

Paragraph 5 of the statement of claim alleges that the defendants have used the premises or permitted them to be used for the purpose of their businesses by certain companies and persons set out. Alternatively, it is alleged that the defendants have underlet or parted with possession to the same persons. Paragraph 7 alleges that the several companies and persons mentioned in para. 5 :

... are not subsidiary or associated companies of the defendants and the businesses carried on by such companies and persons are not businesses in which the defendants and their subsidiary or associated companies are interested.

In other words, the pleader recognises that for the plaintiffs to succeed it is necessary that he should prove that the persons to whom permission to use part of the offices has been given are not within the privileged class. There is an allegation of breach of the clause regarding the use of the premises and also of that relating to assigning or underletting, an allegation that there has been the usual notice and failure to remedy, and a claim for forfeiture. By their defence the defendants admit that the companies mentioned in para. 5 of the statement of claim have used parts of the demised premises as offices by their

permission. On the other hand, the defendants deny that they have ever underlet or parted with possession of the demised premises or any part thereof. That may mean, as I read it, that there has been no underletting or parting with possession in the sense of the proviso to which I have referred. Paragraph 4, which is the subject-matter of controversy, states: "The defendants deny each and every allegation in para. 7 of the statement of claim," that is to say, the defendants deny that the several persons and companies in question are not subsidiary or associated companies. That being a double negative, it must involve the assertion by the defendants that those companies and persons are companies subsidiary to or associated with themselves.

The question is whether they must give particulars of that implied allegation. There are two things to be said. The first is that this is an action of forfeiture and in the wisdom of our ancestors an action of forfeiture was always regarded with a good deal of strictness, because it was an action to destroy an estate created by a plaintiff and, therefore, no assistance was given to him in the way of discovery of documents, or of that other form of discovery—interrogatories, to help him to prove his case. Therefore, I think that this action is one in which the plaintiffs must prove their case with strictness. Secondly, it seems to me that the question of onus is very relevant here. It is clear that, if it is for the defendants to prove their implied affirmative—that is to say, if it is for them to prove that the persons or companies in question are their associates or subsidiaries—they must give particulars of that allegation, but, if it is not and the case stands in such a way that, if the plaintiffs prove nothing about the matter one way or the other, they fail, the matter needs looking into again.

It seems to me that *prima facie*—although I am only deciding this so far as it is necessary for the purpose of my decision—the burden in a forfeiture action (as is shown by the two cases cited to me by counsel for the defendants, *Doe d. Bridger v. Whitehead* (1) and *Toleman v. Portbury* (2)), is particularly laid on the plaintiff, and here the plaintiffs, in order to deprive the defendants of the estate which the plaintiffs have granted to them, must show that the defendants have permitted user by persons who are not associated with them in the various aspects of their business. It does not seem to me enough for them to come to the court and say: "The defendants admit that they have permitted these people to occupy part of the premises and, therefore, it is for them to prove that they are within the privileged class." The boot is on the other foot. If the action depended on the covenant not to assign or underlet, the matter might be quite different. If the defendants then wished to confess and avoid by alleging that they had assigned or underlet, but had been permitted to do so, the burden would clearly be on them.

I come to the conclusion, therefore, that the burden remains on the plaintiffs in spite of the admissions made in the defence, and the question then arises whether, as counsel for the plaintiffs submits to me, *non obstante* the question of burden, he is entitled to know what case it is, as he says, that he has to meet. I do not think that is the right approach. The duty of the plaintiffs in a case like this is to prove their case. It is true that the defence involves an implied affirmative, but it is not every double negative or implied affirmative that requires particulars to be given. In the latest case on the subject, *Pinson v. Lloyds and National Provincial Foreign Bank, Ltd.* (3), GODDARD, L.J., said ([1941] 2 All E.R. 642):

In the present case, the plaintiff's advisers would not know from this defence whether they had to be prepared to meet a case that the defendants carried out some of the purchases or sales referred to in the particulars of the statement of claim under a general authority and others under a special authority, and, if the latter, whether from the plaintiff or from an agent alleged to be authorised by her, nor whether all or any of the authorisations were express or implied. If the pleading is not such as will fairly enable the opposite party to know the case he has to meet, further particulars ought to be ordered.

I, of course, accept that, but, in my judgment, it does not apply to the present case. It is not a question of what case the plaintiffs have to meet. The plaintiffs have to make their case in the face of the defendants' denial. In *Pinson's* case (3), counsel for the defendants had admitted before the court that he intended under a mere traverse to set up what he called an affirmative case, that is to say, to prove under a general denial that such transactions as

he had taken part in had, in fact, been authorised. That, of course, was a position which was concealed in a traverse and required particulars. As GODDARD, L.J., said (*ibid.*, 641):

A bare traverse is a perfectly good plea, provided that all that is thereby intended is to put the plaintiff to proof of his case. It may be, however, that concealed in a traverse there is an affirmative case, and this may well be so when the traverse is of a negative averment. If it is clear to the court, either from the nature of the case or from the admission of counsel or otherwise, that it is intended to set up an affirmative case, so that the traverse is what has been described as a pregnant negative, then it seems to me that particulars of the affirmative case ought to be delivered. Otherwise, both the opposite party and the court will be in doubt as to what issues are to be determined at the trial.

I cannot see that there is any doubt here what is the issue to be determined at the trial. It is whether the persons who were permitted to occupy portions of these premises were within the permitted relationship with the defendants. It is for the plaintiffs to prove they were not, and not for the defendants to prove that they were. There is no difficulty in seeing what will be the area of the controversy at the trial. STABLE, J., in his judgment in *Pinson's* case (3) said (*ibid.*, 644):

A traverse involving a double negative may fall under one of three heads. First, it may be a mere traverse involving no affirmative allegation. Secondly, it may be a negative pregnant, which contains within the double negative an affirmative allegation. Thirdly, its true nature may be left in doubt. In my judgment, the defendant at the trial of the action can do no more than put the plaintiff to the proof of the negative alleged. He can seek to shake or destroy by cross-examination any evidence which the plaintiff may bring on the point, but, once the plaintiff has established a *prima facie* case, the defendant on such a pleading cannot, in my judgment, set up an affirmative case in answer, because, *ex hypothesi*, that would be to set up a case which he has not pleaded, which is what the rules expressly preclude him from doing. If it falls under the second head, the double negative extends beyond a mere traverse, and amounts, as in the present case, to this: "If you establish a *prima facie* case that I sold or purchased shares for you, and that, in so doing, I acted without authority, then I intend to call evidence to establish that on each or some of the occasions there was an express authority to act as I did or an implied authority to be derived from certain facts." That, in my judgment, is to set up an affirmative case of which particulars ought to be given, and none the less so because the affirmative case is concealed, albeit imperfectly, in a negative shell.

Counsel for the defendants alleges that this is a mere traverse. In other words, it involves, he says, no affirmative allegation, although on the face of it a double negative in a sense involves an affirmative. On that footing, the burden being, as I think, on the plaintiffs, it would not be right to order particulars. There may be, of course, consequences arising from that which may prove to be very difficult for the defendants at the trial, for, if the plaintiffs should succeed in establishing a *prima facie* case in respect of one of these companies, it may well be that with the pleadings in their present state the defendants will be precluded from producing evidence to show that, though *prima facie* a company is outside the permitted ranks, yet for some reason or another which has not been disclosed it is within them. As to that I say nothing. All I say is that at this stage I do not propose to order any particulars of these allegations, particularly having regard to the fact that this is a forfeiture action. To order these particulars would go far towards making the defendants—who as I assume for the present purpose but without intending finally to decide the point, are not bound to give any discovery—disclose their hand and provide the plaintiffs with material for proving their case, the onus being on the plaintiffs in an action of this sort to prove their case without any such assistance. On those grounds I refuse this application. The costs will be the defendants' costs in any event.

Application refused. Costs to be the defendants' in any event.

Solicitors: Kenneth Brown, Baker, Baker (for the plaintiffs); Ashurst, Morris Crisp & Co. (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

DENMAN v. BRISE.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), June 4, 1948.]

Rent restriction—Possession—House destroyed by enemy action—Contractual tenancy not determined—House rebuilt—Tenant refused possession by landlord—Notice to tenant to quit—Claim by tenant for possession.
Lease—Impossibility of performance—Frustration.

A A dwelling-house, subject to the Rent Restrictions Acts, and let on a monthly tenancy, was destroyed by enemy action in 1940. The landlord erected a new house on the site of the old one, and on Feb. 17, 1948, when the house was fit for occupation, the tenant attempted unsuccessfully to get the keys from the landlord, who denied him possession of the premises. On Mar. 9, 1948, the landlord served on the tenant a notice to quit, determining the contractual tenancy on Apr. 30, 1948. The tenant claimed possession.

B HELD : (i) on the facts, there had never been an abandonment or surrender of the contractual tenancy by the tenant, who was, therefore, entitled on Feb. 17, 1948, to possession, and the court would not permit the landlord to exclude the tenant from the protection of the Rent Restrictions Acts by taking advantage of his own wrongful act in refusing the tenant physical occupation, but would order that the tenant be put into possession.

C (ii) the contract of tenancy was not terminated under the doctrine of frustration which had no application to a demise of real property.

Leightons Investment Trust, Ltd. v. Cricklewood Property and Investment Trust, Ltd. ([1943] 2 All E.R. 97), considered.

D [AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-334, paras. 392-399; and FOR CASES, see DIGEST, Vol. 31, pp. 575-581, Nos. 7226-7297.]

Cases referred to :

- (1) *Leightons Investment Trust, Ltd. v. Cricklewood Property and Investment Trust, Ltd.*, [1942] 2 All E.R. 580; [1943] K.B. 493; 112 L.J.K.B. 83; 167 L.T. 348; C.A., [1943] 2 All E.R. 97; [1943] K.B. 493 at p. 496; 112 L.J.K.B. 438; 169 L.T. 116; H.L., [1945] 1 All E.R. 252; [1945] A.C. 221; 114 L.J.K.B. 110; 172 L.T. 140; 2nd Digest Supp.
- E (2) *Matthey v. Curling*, [1922] 2 A.C. 180; 91 L.J.K.B. 593; 127 L.T. 247; 31 Digest 342, 4857.
- (3) *London and Northern Estates Co. v. Schlesinger*, [1916] 1 K.B. 20; 85 L.J.K.B. 369; 114 L.T. 74; 30 Digest 343, 14.
- (4) *Whitehall Court, Ltd. v. Etlinger*, [1920] 1 K.B. 680; 89 L.J.K.B. 126; 122 L.T. 540; 30 Digest 467, 1296.
- (5) *Swift v. MacBean*, [1942] 1 All E.R. 126; [1942] 1 K.B. 375; 111 L.J.K.B. 185; 166 L.T. 87; 2nd Digest Supp.
- F (6) *Taylor v. Caldwell*, (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 12 Digest 371, 3093.
- (7) *Ellis and Sons Amalgamated Properties, Ltd. v. Sisman*, [1948] 1 All E.R. 44.
- (8) *Simper v. Coombs*, [1948] 1 All E.R. 306.

G APPEAL by the landlord from an order of His Honour JUDGE DAYNES, K.C., at Bromley County Court, dated May 11, 1948, granting possession of a dwelling-house to the tenant. The Court of Appeal dismissed the appeal. The facts appear in the judgment of TUCKER, L.J.

F. D. L. McIntyre for the landlord.

Werninck for the tenant.

H TUCKER, L.J. : In 1940 certain premises situate at No. 18, St. Francis Close, Orpington, had been let by the landlord to the tenant at a rent of £4 6s. 8d. per month. Those premises were destroyed completely by enemy action on Dec. 17, 1940, and, consequently, the tenant no longer occupied them. In due course the landlord erected a new house on the site of the old house. Those are the facts as found by the learned county court judge. He says, after referring to the destruction on Dec. 17, 1940 :

On that day the house was destroyed by an enemy bomb, but the tenant's contractual tenancy continued until it was determined by the notice to quit, which was dated Mar. 9, 1948, and was served within two or three days, determining the tenancy on Apr. 30. In the meantime the house had been rebuilt. It was fit for occupation

on Feb. 17, 1948. On that very day the tenant attempted unsuccessfully to get the keys from the landlord. The first question arises in this way. It is said that on Feb. 17, 1948, the tenant was no longer a tenant of the property and, therefore, no longer had possession, which the tenant by law enjoys. In my view, the tenant was a tenant on Feb. 17, and he had possession in the sense that he had the right to occupy. He had no possession in the sense that he had the actual occupation. I find as a fact that the tenant had done nothing to abandon the tenancy . . . The landlord was completely wrong in doing this [sic] as long as the contractual tenancy continued. But the result of that was that when the contractual tenancy expired the tenant, although having the right of possession, was not in actual occupation. In my view, it is sufficient for a person complying with a notice to quit to have the right to occupy and the will to occupy, even if the will is frustrated by the landlord, in order to become a statutory tenant, and I come to the conclusion that the tenant became a statutory tenant.

First, I think that there was ample evidence on which the learned judge could arrive at all his findings of fact. Correspondence which has been read to us shows that, although there was complete silence during the period from 1940 until the house was nearing completion, as soon as the tenant became aware that the house was being built and was nearing completion he took steps to claim his right to occupy it. Thereafter there were negotiations for the purchase of the house, but I can find no trace of any act on the part of the tenant which amounted to an abandonment of the premises, much less any facts from which the court could infer that there had been a surrender of the tenancy. Subject to a point to which I shall proceed in a moment—namely, the last point argued by counsel for the landlord, that, as at the date of the hearing before the county court or as at the date of the expiration of the notice to quit, the tenant was not physically in actual occupation of the premises, therefore, he cannot claim the protection of the Rent Restrictions Acts—I should have thought that this was a clear case where the contractual tenancy has subsisted throughout. There was no evidence of any abandonment, no evidence of any surrender, with the necessary result that on Feb. 17, 1948, when there was on the site a completed house fit for occupation, the tenant was the tenant of that house and entitled to occupy it. He was at that date ready and willing and anxious to occupy, but the landlord would not give him the key of the premises. Accordingly, he was unable to obtain occupation. If he had obtained occupation, then at the date of the expiration of the notice to quit he would have been a tenant in physical occupation of the premises within the Rent Restrictions Acts and, therefore, entitled to rely on the protection of those Acts.

The question arises whether the landlord can be heard to say: "You must be excluded from the benefits of the Acts because I wrongfully prevented you getting into the house and putting yourself into a position in which you would be able to claim the protection of the Acts." I do not think that a county court can be put into the position of being precluded from seeing that that is, in fact, done which should have been done. I think it is clear, from all the authorities to which counsel for the landlord has referred, that broadly speaking the proposition has long been recognised that only an occupying tenant can claim the protection of the Rent Restrictions Acts, but, in my view, the tenant here is not primarily claiming protection under the Acts. He is claiming to be put into possession of premises of which, at the material date, Feb. 17, he was the contractual tenant. It is the landlord who is really seeking to make use of the Rent Restrictions Acts by saying: "Because at a date subsequent to Feb. 17 I gave you a notice to quit and you are, through my own act, not the occupying tenant, I am entitled to claim the benefit of that notice to quit and you on your part are not entitled to claim the benefit of your tenancy." I think that that would be a position which would be contrary to one's ideas of justice and equity and that any court must have power in circumstances such as the present to order that the landlord shall put the tenant back into the position in which he should have been on Feb. 17. He having been put into that position, the subsequent rights of the parties can, no doubt, be worked out in the appropriate proceedings to ascertain how they stand under the provisions of the Rent Restrictions Acts. That is my view with regard to the first two points put forward by counsel for the landlord, namely, that on the facts of this case the only proper inference as a matter of law was that there had been an abandonment or a surrender and that in any event the tenant, not

having been in actual physical occupation, could not claim the right of possession.

There was one further point which was that, in any event, the contract of tenancy had been frustrated. In regard to that, I do not think that point is really open to him. In *Leighton's Investment Trust, Ltd. v. Cricklewood Property and Investment Trust, Ltd.* (1), that very point was dealt with in this court. ASQUITH, J., had dealt with the case as a judge of first instance and he had said ([1942] 2 All E.R. 581):

A It is not disputed that the doctrine of frustration has no application to an ordinary lease: *Matthey v. Curling* (2); *London and Northern Estates Co. v. Schlesinger* (3), and *Whitehall Court, Ltd. v. Ettlinger* (4), nor has it any application to a furnished lease, which was decided recently by BIRKETT, J., in *Swift v. MacBean* (5).

In this court that judgment was upheld in a short judgment of the court delivered by MACKINNON, L.J., in which, after stating the facts, he said ([1943] 2 All E.R. 98):

B In our opinion the plaintiffs are clearly right. The doctrine of frustration, which was first clearly enunciated in 1863 in *Taylor v. Caldwell* (6), has been applied to a variety of contracts; but it has never been applied to a demise of real property. Indeed there is clear authority that it cannot. This is to be found in *London and Northern Estates Co. v. Schlesinger* (3), in *Whitehall Court v. Ettlinger* (4), and in *Matthey v. Curling* (2). All these cases, and many others, have recently been reviewed by BIRKETT, J., in *Swift v. MacBean* (5), in a careful judgment. We do not think it is necessary to examine the question further. It is impossible for the defendants to rely upon the doctrine of frustration to relieve them from their obligation as tenants under a demise of land for 99 years.

C It is true that when the case reached the House of Lords the House decided the appeal on a different point, and it was held ([1945] A.C. 221):

D . . . even if the doctrine of frustration could apply to a lease, the circumstances did not justify such application; the lease had not been determined by frustration, and the liability for rent continued.

LORD SIMON, in his speech said (*ibid.*, 227):

E Two questions are raised by the appeal: first, can the doctrine of frustration apply to determine a lease? and, secondly, even if it can, are the circumstances in the present case such as to produce the result that the lease has been determined by frustration? If, my Lords, we all agree (as I understand we do) that the answer to the second question is in the negative, it is not essential in the present case to reach a conclusion on the first question (as to which I gather that our opinions are divided). Nevertheless, I propose to express my opinion with regard to both questions, since the more general issue has been much discussed and was pronounced on in the courts below, where it was regarded as concluded by authority, including the authority of this House, in *Matthey v. Curling* (2).

F It is perfectly true that LORD SIMON and LORD WRIGHT went on to express their views, which were that the doctrine of frustration could be applied to a lease and that, at any rate, *Matthey v. Curling* (2) was no authority to the contrary, but LORD PORTER expressed no view on the point and LORD RUSSELL and LORD GODDARD both took the contrary view. In that state of authority I think the decision of this court binds us and that it must be for the House of Lords at the appropriate time to resolve this problem. Therefore, I do not think counsel for the landlord can succeed on that branch of his argument.

G There is no note of the learned county court judge that that point was argued before him, but counsel tells us the point was taken and I accept what he says.

H I do not think it really necessary to refer to the authorities which have been cited by counsel for the landlord. *Ellis and Sons Amalgamated Properties, Ltd. v. Sisman* (7) was referred to, to which decision COHEN, L.J., and myself were both parties. I do not think there is any assistance to be obtained from that case in the present appeal. Both of us adumbrated the possibility of this point arising. I do not think there is anything in either of our judgments which really throws any light on the problem which we have now to decide. We have been referred to a decision of DENNING, J., in *Simper v. Coombs* (8), which shows that, unless there has been any abandonment, or surrender, or something of that kind, *prima facie* the lease will continue in circumstances such as the present. In that case, there had been no notice to quit and the point now involved did not arise. It comes before us as a fresh point. I think in these cases it must always be a question of fact whether or not the

tenant who has been absent from the bombed premises has acted in such a way that the court will infer that there has been an abandonment or surrender. In the present circumstances, there was ample evidence to support the view that the learned county court judge took, namely, that there had been no abandonment, that the tenancy subsisted, and that the landlord could not now rely on the notice to quit which had been given by him at a subsequent date to the date on which he should have admitted the tenant to occupation of these premises. I think this appeal fails.

SOMERVELL, L.J. : I agree and I desire to add nothing on the issue as to frustration or as to abandonment as I agree with everything which **TUCKER, L.J.**, has said on those points. On the third point I only desire to add a few sentences. On the basis that there was no abandonment or surrender the tenant was entitled to possession of this dwelling-house on Feb. 17 when it became habitable. He was prevented from exercising that right by the landlord. If the landlord had not prevented him he would have been in actual occupation at the time the subsequent notice to quit had expired and could clearly have claimed his rights under the Rent Restrictions Acts. The third point, therefore, as it seems to me, can be stated in this way : Are the rights to be determined as if the tenant had been allowed to exercise his right which the landlord prevented him from exercising, or must the position be treated on the basis that the landlord can take advantage of his own wrong and say : "He was never in possession or occupation and, therefore, cannot claim the protection of the Acts ?" To that question, it seems to me, there is one very clear answer. The rights of the parties must be determined on the basis that the tenant had been allowed to exercise the right which he plainly had and which the landlord prevented him from exercising. For the reasons given by the learned county court judge and by my brother I agree that the appeal should be dismissed.

COHEN, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *William Sturges & Co.* (for the landlord) ; *Sandom, Kersey & Tilleards* (for the tenant).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

Reversed. C.A. [1948] 2 All E.R. 482.

ALEXANDER MOUNTAIN & CO. v. RUMERE, LTD.

[**KING'S BENCH DIVISION** (Lord Goddard, C.J.), June 8, 1948.]

Practice—Parties—Substitution of plaintiff—Claim of executrix to be substituted as plaintiff—Writ issued in trading name of deceased person—Deceased trading as a firm, but without partners—R.S.C., Ord. 16, r. 2.

A.M. was the sole proprietor of a business which he carried on under the name of "A.M. & Co." After his death his executrix, who continued to carry on the business under the same trading name, brought an action in the name of "A.M. & Co. (trading as a firm)" the action being on a contract made by A.M. during his lifetime. On an application to amend the writ by substituting the executrix as plaintiff :—

HELD : there was no power under R.S.C., Ord. 16, r. 2, to amend the writ by substituting the executrix as plaintiff.

Tetlow v. Orela, Ltd. ([1920] 2 Ch. 24), followed.

Hill & Son v. Tannerhill ([1944] K.B. 472), distinguished.

[AS TO SUBSTITUTION OF A PLAINTIFF, see **HALSBURY**, Vol. 26, pp. 20, 21, para. 17 ; and FOR CASES, see **DIGEST**, Practice, pp. 404, 405, Nos. 1051-1057.]

Cases referred to :

- (1) *Hill & Son v. Tannerhill*, [1944] K.B. 472 ; 113 L.J.K.B. 456 ; 170 L.T. 404 ; 2nd Digest Supp.
- (2) *Tetlow v. Orela, Ltd.*, [1920] 2 Ch. 24 ; 89 L.J.Ch. 465 ; 123 L.T. 388 ; Digest, Practice, 267, 50.
- (3) *Clay v. Oxford*, (1866), L.R. 2 Exch. 54 ; 4 H. & C. 690 ; 36 L.J.Ex. 15 ; 15 L.T. 286 ; Digest, Practice, 267, 49.

SUMMONS for leave to amend the writ and pleadings in an action by substituting a plaintiff.

The action was brought by the executrix of Alexander Mountain in the name of "Alexander Mountain & Co. (trading as a firm)." The deceased had carried on business as "Alexander Mountain & Co.," although he had no partners, and after his death the executrix continued to carry on the business under the same name. The action was on a contract made by the deceased during his lifetime. At the hearing of the action, leave was sought to amend the writ and pleadings by substituting the executrix as plaintiff, as the personal representative of Alexander Mountain, but LORD GODDARD, C.J., held that he had no power, under R.S.C., Ord. 16, r. 2, to make the amendment. The facts appear in the judgment.

C. H. Duveen for the executrix.

Gardiner, K.C., and *W. Gumbel* for the defendants.

LORD GODDARD, C.J. : When this case was called on, counsel for the executrix of Alexander Mountain called my attention to the fact that an unfortunate mistake had been made. The action had been brought in the name of "Alexander Mountain & Co. (suing as a firm)," and he admitted that the late Mr. Alexander Mountain carried on business in the name of Alexander Mountain & Co. without any partners. He also admitted that Mr. Alexander Mountain was dead, and the probate of his will has been produced. It showed that he died on July 10, 1947, the writ in this action being issued on Oct. 24, 1947. By his will his widow, Doris Mountain, was appointed executrix. Probate was granted to her and she is the sole legatee under the will. Counsel for the executrix has asked me to substitute the executrix as the plaintiff in the action. The defendants, on the other hand, have taken the objection that I have no power to make that amendment. If I had the power, I should certainly do it. As the point raised was one of some importance and may go to the Court of Appeal, it seemed to me that the best way of dealing with the matter was to invite counsel for the executrix to take out a summons returnable at once, asking for leave to amend, which I would treat as a summons taken out before the hearing of the action, so that, if my judgment had to be against him, as I feel it must be, he could go to the Court of Appeal, and, if the Court of Appeal should take a different course, then the action would remain alive and all the expense would not have been thrown away. Accordingly, a summons was taken out and returned to me on the same day. It is on this summons, which applies for leave to amend, that I now have to give my decision.

The action is brought on a contract made by the late Mr. Alexander Mountain in his lifetime, and it is brought, and could only be brought, as he is dead, by his executrix for the benefit of his estate. The fact that the executrix will take as sole legatee under the will does not seem to me to matter. She must sue, if at all, in a representative capacity as representing the late Mr. Alexander Mountain. If this action had been brought by Mr. Alexander Mountain in his lifetime, the title of the writ would not have been right, because the action could not have been brought by "Alexander Mountain & Co (suing as a firm)," as there was no firm. It should have been brought by Mr. Alexander Mountain, though I do not suppose there would have been any objection if he had described himself on the writ as "trading as Alexander Mountain & Co." If, however, the action had been brought in the name of "Alexander Mountain & Co." by mistake, then the decision in *W. Hill & Son v. Tannerhill* (1) would have enabled me to have amended the writ. In that action *W. Hill*, an individual trading alone and without partners as *W. Hill & Son*, issued a writ in the firm name, contrary to R.S.C., Ord. 48A, r. 1. The Court of Appeal held that, as *W. Hill* was an actually existing person and the real plaintiff in the action, he was entitled to the order. The words "& Son" were struck out and the action was allowed to remain as though the proper plaintiff, *Walter Hill*, had been substituted. *DU PARCQ, L.J.*, said ([1944] K.B. 472, 475) :

I do not say what we should have done or what the learned judge would have been in a position to do if there had been no "W. Hill" of the address given and the owner of the lorry had been someone of a different name trading in the name of "W. Hill & Son." A question may arise about that some day, but in this case there is a "W. Hill," and all that need be said is that "and Son" ought not to have been added.

Counsel for the executrix in this case argued that *DU PARCQ, L.J.*, left open the very question that arises here today, and invited me to give a decision on it.

I do not feel convinced that the question that DU PARCQ, L.J., left open is the question that arises today.

It seems to me the only point that I have to decide is whether I have power to amend this action under R.S.C., Ord. 16, r. 2, which provides :

Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

I am not at all satisfied that "*bona fide* mistake" in the rule means a mistake as to the effect of the rules. I think that it means a slip, or something of that sort. I do not think it means a mistake as to what the practice of the court is, and I am doing no injustice to anybody if I say that there is no evidence before me that there was here a *bona fide* mistake. Apparently, it was considered that, because the executrix was carrying on the business of the deceased, therefore she was the proper plaintiff and entitled to sue in the name under which he had been carrying on the business. If the action were properly constituted in the name of the plaintiff, it should have been "Doris Mountain, plaintiff," while "Alexander Mountain & Co." could only refer to the late Mr. Alexander Mountain.

In *Tellow v. Orela, Ltd.* (2), which was a judgment of no less an authority than the late LORD RUSSELL OF KILLOWEN (then RUSSELL, J.), the facts seem to be singularly similar to the facts of this case. There, an action was commenced in the name of a dead man, which has been done in the present case, since it is admitted that there was no firm of Alexander Mountain & Co., and, had he been alive, Alexander Mountain would have been the only person entitled to sue. In *Tellow v. Orela, Ltd.* (2) it was sought to substitute, as plaintiff, the dead man's widow, whom he had appointed by his will as his executrix and who had carried on the business after his death, which is exactly what happened here. RUSSELL, J., in dealing with the application to substitute the executrix as plaintiff, referred to *Clay v. Oxford* (3), which was decided under the Common Law Procedure Act, 1852, and said ([1920] 2 Ch. 24, 26) :

... *Clay v. Oxford* (3) arose under ss. 34 and 222 [of the Act of 1852]. The head-note is : "Where an action is commenced in the name of a dead man, his representatives cannot be substituted as plaintiffs." There, the action was commenced on May 10, in the name of John Clay, as plaintiff. It was afterwards discovered that John Clay had died before the date of the writ, and on June 14 a summons was taken out to substitute the names of his executrix and executor as plaintiffs. That summons was abandoned ; but on Nov. 7 another summons to the same effect was taken out and MARTIN, B., made the order prayed. A rule *nisi* to rescind that order having been obtained, the matter was argued. The court, consisting of KELLY, C.B., BRAMWELL, B., CHANNELL, B., and PIGGOTT, B., was unanimous in rescinding the order . . . Thus under the Common Law Procedure Act, 1852, there was no power to substitute as plaintiffs the representatives of a man who was dead when an action was commenced in his name, either under the special provisions of the Act or under the general words of s. 222. In that condition of things the present rules were framed, and the question is whether they allow that which the Act of 1852 did not allow. I do not think they do, and it would be straining the rules to hold otherwise. The rules relied on are rr. 2 and 11 of Ord. 16 . . . In my opinion [r. 2] means that, where an action has been commenced between two living parties by a living plaintiff, and the living plaintiff afterwards turns out to be the wrong person, an application may be made to the court, and the court can substitute another person for the living plaintiff or may add another person as co-plaintiff as the case may be. But it does not justify the court in creating a plaintiff in an action for the first time.

RUSSELL, J., then concluded his judgment by saying (*ibid.*, 27) :

In my opinion the names of "parties improperly joined" and the names of "parties who ought to have been joined" are, within the meaning of that rule, the names of living persons.

As I understand, the only distinction which counsel for the executrix draws between *Tellow v. Orela, Ltd.* (2) and this case is that, in this case, the action was commenced, not in the name of Alexander Mountain, but in the name of "Alexander Mountain & Co.", which I have already pointed out is wrong. I cannot agree that two wrongs make a right, and that would be the effect of

my decision if I held that I could distinguish this case from *Tetlow's* case (2). If the action had been brought by the executrix in the name of Alexander Mountain, it would have been in breach of the rules, and, if the action was brought by the executrix in breach of the rules, describing her as "Alexander Mountain & Co.," it would not distinguish the case in any way from the decision of RUSSELL, J., in *Tetlow v. Orela, Ltd.* (2). Therefore, much as I regret having to do it, I feel obliged to give effect to the objection that has been taken, and to dismiss this summons with costs. I think the proper order to make is to stand over the action for fourteen days, and, if notice of appeal is given within that time, until the Court of Appeal have given their decision. If the Court of Appeal uphold my decision, the action will stand dismissed with costs. Of course, that will not prevent the executrix from bringing another action. If, on the other hand, the Court of Appeal take a different view from that which I have expressed, then the action may be reinstated in the list, keeping its place.

Summons dismissed with costs.

Solicitors: *Forsythe, Kerman & Phillips* (for the executrix); *C. Grobel, Son & Co.*, agents for *Arthur Robson*, Chiswick (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Not followed. WHITE v. WHITE. *Not followed.* CACKETT (ORSE. TRICE)
[1948] 2 All E.R. 151. v. CACKETT. [1950] 1 All E.R. 677.

GRIMES (otherwise EDWARDS) v. GRIMES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Finnemore, J.), May 10, 1948.]

Nullity—Wilful refusal to consummate marriage—Coitus interruptus—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (a).

In 1946, the parties went through a ceremony of marriage. Against the wishes of the wife, the husband always persisted in the practice of *coitus interruptus*. The wife petitioned for a decree of nullity, on the ground that the marriage had not been consummated.

HELD: *coitus interruptus* was not a full and natural intercourse, but, by its very nature, was partial and incomplete, and the marriage had, therefore, not been consummated and the wife was entitled to a decree.

D—e v. A—g (falsely calling herself D—e), (1845) (1 Rob. Eccl. 279), *applied*.

[EDITORIAL NOTE. Compare the decision in this case with that of WILLMER, J., in *White v. White* (p. 151, *post*) where he decided that the practice of *coitus interruptus* did not prevent the consummation of the marriage, and, therefore, that the wife petitioner was not entitled to a decree of nullity on the ground that her husband had wilfully refused to consummate the marriage.

FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 7 (1) (a), see HALSBURY'S STATUTES, Vol. 30, p. 339.]

Cases referred to :

- (1) *Baxter v. Baxter*, [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479.
- (2) *D—e v. A—g (falsely calling herself D—e)*, (1845), 1 Rob. Eccl. 279; 27 Digest 267, 2350.
- (3) *L— v. L— (otherwise D—)*, (1922), 38 T.L.R. 697; 27 Digest 267, 2357.
- (4) *Snowman (otherwise Bensinger) v. Snowman*, [1934] P. 186; 103 L.J.P. 87; 151 L.T. 180; Digest Supp.

PETITION by the wife for a decree of nullity on the ground that, by insisting on the practice of *coitus interruptus*, the husband had wilfully refused to consummate the marriage. A decree *nisi* was granted. The facts appear in the judgment.

Tolstoy for the wife.

The husband was not represented.

FINNEMORE, J.: This case raises a point of considerable interest which was deliberately left undecided by the House of Lords in *Baxter v. Baxter* (1). The point is whether a marriage has been consummated when the practice of *coitus interruptus* has always been followed.

The wife, Mrs. Grimes, is asking for a decree of nullity of her marriage with the respondent husband, Walter Robert Grimes, on the ground that he has wilfully refused to consummate the marriage. The parties went through a ceremony of marriage on Sept. 21, 1946, and from first to last the only form of intercourse—a term I use neutrally for the moment—which took place between the parties was that which is described as “*coitus interruptus*,” that is to say, on every occasion, and there were many, when there was intercourse between these two people, the husband withdrew before emission. The wife says that from the beginning she objected, for she wanted to have children. The husband said he did not want children and there never would be any children, and his mother had so advised him. The two mothers appear to have taken part in the discussion when it was apparent, as it soon was, not surprisingly, that the young people were not getting on very happily together. The wife’s mother said this was an unnatural way of living and could be injurious to health. The husband’s mother said: “Nonsense,” and added she had advised her son to adopt this practice and he was going to do so. He continued, and refused to have intercourse with his wife in the normal way at any stage. Finally, the parties became estranged, and, for some considerable time now they appear not even to have corresponded.

It is now plain, following *Baxter v. Baxter* (1), that, if a husband and wife, when having intercourse use preventatives so that children may not result, that is to be regarded as full sexual intercourse between them and results in the marriage being consummated. Here, however, it is argued that, if the practice adopted is that of *coitus interruptus*, there is no proper intercourse and, therefore, no consummation of the marriage, irrespective of any question of there being children or no children. The argument of counsel for the wife can be stated quite simply and shortly, and it is that for a marriage to be consummated there must be normal and full intercourse. It has been laid down by the House of Lords that there may be such normal and full intercourse although preventatives are used to prevent the conception of children, but it has always been held, from the earliest days that, to establish consummation of marriage, intercourse must be natural and complete. There is no natural and no complete intercourse unless there is emission from the one into the body of the other, and, therefore, the practice of *coitus interruptus* does not merely prevent the procreation of children. It also prevents any real intercourse at all, and, therefore, consummation of marriage. Counsel cited a number of authorities, going back before the beginning of last century and contended that it has always been held that there must be emission into the body of the other party to create consummation of marriage. The real difficulty is that all these decisions were before the passing of the Matrimonial Causes Act, 1937, and relate to charges of impotence and incapacity because in those days no-one had thought of wilful refusal as a ground for relief of this kind. I do not think that alters the principle involved because whether a husband, under the old law, was unable to perform the act, or whether, under the statute of 1937, he refuses to perform it, the result is the same. There is no proper intercourse, and, it is argued, no consummation. Counsel referred me to the passage in *BAYLE, DICTIONARY DES MAIZEAUX*, relating to the old-fashioned methods of examination of the parties. It certainly says in terms that one of the things the viewers must look for is that emission which was a vital element in consummation. One of the things they have to examine is where, what, and what type of emission is produced. The passage is at p. 800 in vol. 4 and it says (*inter alia*) that the viewers must inform themselves “whether the intromission has been made; and also *an facta sit emissio, ubi, quid, & quale emissum*.” Counsel then referred to *BECK’S MEDICAL JURISPRUDENCE*, p. 56, again suggesting that emission is an essential part of intercourse: “The inability to propel the semen out of its vessels is frequently to be considered as an absolute cause; but generally it is a curable one.” We are not concerned here with the medical side of the point and merely seek some further authority that emission is one of the qualities essential to produce a proper act of normal intercourse. Counsel further cited *CHITTY’S MEDICAL JURISPRUDENCE*

at pp. 374 and 375 :

It may here suffice to observe, that imperfections constituting impotency rarely occur, and that many supposed defects may be removed by surgical operation. Impotency may exist on the part of the man or of the woman, though in the great majority of instances on record, it has been alleged against the former ; and though not a very frequent event in either sex, is comparatively more rare in the female. In the male it denotes an incapacity *erectio ac intromissio penis cum emissione seminis*.

That is laying down quite plainly that without penetration and emission there is incapacity, and, therefore, in those days, grounds for alleging non-consummation owing to incapacity on the part of the man if he was unable to do those necessary things.

It would follow, in my opinion, that, if that be true, then under the new law, if the man, although he is able to do those things, wilfully refuses to perform them, he is not performing the normal and full act of intercourse, and, therefore, he is not consummating the marriage.

I think, perhaps, that the strongest case—certainly the most famous one which sums up all this matter—is the well known judgment of DR. LUSHINGTON in *D—e v. A—g* (2). DR. LUSHINGTON says (1 Rob. Eccl. 298) :

I apprehend that we are all agreed that, in order to constitute the marriage bond between young persons, there must be the power, present or to come, of sexual intercourse. Without that power, neither of two principal ends of matrimony can be attained, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence.

Here DR. LUSHINGTON is laying down two ends of matrimony. One is, of course, the procreation of children, but the other is the providing of lawful and normal methods of people satisfying their sexual desires apart from licentiousness or indiscriminate intercourse with other people. He continues (*ibid.*) :

Though all are so far agreed, this unanimity of opinion does not remove the existing difficulty, for that difficulty lies in the meaning of the term “sexual intercourse.” How is it to be defined ? This is a most disgusting and painful inquiry, but it cannot be avoided. Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse ; it does not mean partial and imperfect intercourse ; yet, I cannot go the length of saying, that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with ; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all. I can never think that the true interest of society would be advanced by retaining within the marriage bonds parties driven to such disgusting practices. Certainly it would not tend to the prevention of adulterous intercourse, one of the greatest evils to be avoided.

DR. LUSHINGTON goes on to draw a vital distinction between full intercourse, though malformation may make conception impossible, and incomplete intercourse and says (*ibid.*, 299) :

If there be a reasonable probability that the lady can be made capable of a *vera copula*—of the natural sort of *coitus*, though without power of conception, I cannot pronounce this marriage void . . . If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect, and unnatural *coitus*, I would pronounce the marriage void . . . In the case first supposed, the husband must submit to the misfortune of a barren wife, as much when the cause is visible and capable of being ascertained, as when it rests in undiscoverable and unascertained causes. There is no justifiable motive for intercourse with other women in the one case, more than in the other. But when the *coitus* itself is absolutely imperfect, and I must call it unnatural, there is not a natural indulgence of natural desire ; almost of necessity disgust is generated, and the probable consequences of other connexions with men of ordinary self control become almost certain. I am of opinion that no man ought to be reduced to this state of quasi unnatural connexion, and consequent temptation, and, therefore, I should hold the marriage void.

It is argued in this case that *Baxter v. Baxter* (1) falls into the first of these classes, *i.e.*, a natural sort of *coitus*, though without power of conception, while the practice of *coitus interruptus* falls into the second class as incipient, imperfect, and unnatural. If DR. LUSHINGTON's principles are applied to the facts of the present case I think it is right to say that there was never any natural or complete intercourse. Certainly there was no intercourse designed to give the proper satisfaction to the woman and no intercourse likely or designed to do either of

the very things which DR. LUSHINGTON lays down as essential to normal, natural and complete intercourse and, therefore, to consummation.

As I understand it, *Baxter v. Baxter* (1) decided that there may be all the normal elements of intercourse, including emission and, consequently, satisfaction, but there has been introduced an artificial preventative to stay the possible procreation of children. That, the House of Lords has said, does not prevent consummation of the marriage. It prevents the procreation of children, but it is a form of intercourse which in these days ordinary people would accept as natural and complete, and, therefore, it amounts to consummation, a word which is to be understood, as LORD JOWITT, L.C., said in his speech ([1947] 2 All E.R. 892): "in common parlance and in the light of social conditions known to exist." The point here is whether *coitus interruptus* is a natural and complete intercourse. All the authorities that have been cited to me, going back a long time, plainly suggest that it is not, because, for there to be natural and complete intercourse, there must be emission within the body of the wife. In the present case there was no such intercourse. It is difficult to see how a *coitus* which is *interruptus* can be said to be complete. *D—e v. A—g* (2), and the view laid down by DR. LUSHINGTON therein, have been cited and approved more than once since. It was referred to in *L— v. L—* (3), decided by HORRIDGE, J., which differs on its facts from the present case. The wife, owing to an operation, was sterile, and the husband sought to obtain a decree of nullity on that ground. The petition was rejected by the learned judge because sterility was no ground for nullity. The parties could perform the normal act of intercourse which, under ordinary conditions, would or might result in the procreation of children. He held that, as sexual intercourse was possible, the fact that it could not result in children because of the wife's condition was irrelevant, but HORRIDGE, J., accepts the great opinion of DR. LUSHINGTON in *D—e v. A—g* (2) on this particular point. In *Snowman v. Snowman* (4), BATESON, J., in his judgment, again cited ([1934] P. 188) the words I have quoted from DR. LUSHINGTON's speech in *D—e v. A—g* (2):

There must be degrees difficult to deal with; but if [the intercourse is] so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all.

That case also was decided before the Act of 1937, but I can see no difference in principle since 1937 as to what intercourse means. It is true that we are dealing with a case, not where one party is incompetent or incapable, but where he wilfully refuses to perform the act which is the full act of intercourse consummating the marriage.

I have come to the conclusion that to provide a successful defence both in a case of incapacity and in one of wilful refusal intercourse must equally be full and natural intercourse, and I hold that *coitus interruptus* is not a full and natural intercourse, but, by its very nature, a partial and incomplete intercourse. I find, on the facts, that the husband here always and against the wishes of the wife, carried out this practice which prevented a normal, complete or natural intercourse. Accordingly, I am satisfied that the husband wilfully refused to consummate the marriage and that the wife is entitled to the relief for which she asks. Accordingly, I pronounce a decree of nullity.

Decree nisi of nullity.

Solicitor: *Seton Pollock*, Services Divorce Department, Law Society (for the wife).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

WHITE (otherwise BERRY) v. WHITE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), May 11, 12, 1948.]

Nullity—Cruelty—Wilful refusal to consummate marriage—Coitus interruptus—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (a).

The parties went through a ceremony of marriage in 1937. In spite of the wife's protests the husband consistently practised *coitus interruptus*, with the result that the wife, who was of a nervous disposition, suffered in health. She was examined by a mental specialist who, in a report to her doctor, said, *inter alia*, that, unless the husband could be persuaded to change his attitude, to cease the practice of *coitus interruptus* and start a family, as the wife desired, psychotherapy could have no lasting effect. The specialist's report was shown to the husband by the wife's doctor, but the husband persisted in the practice. The wife petitioned for a decree of nullity under s. 7 (1) (a) of the Matrimonial Causes Act, 1937, on the ground of the husband's wilful refusal to consummate the marriage, and, in the alternative, for a decree of dissolution on the ground of the husband's cruelty, both claims being based on the same course of conduct.

HELD: the marriage had been consummated, and, therefore, the wife was not entitled to a decree of nullity: *Baxter v. Baxter* ([1947] 2 All E.R. 886) applied; but the husband's conduct, which he knew was resented by, and was undermining the health of, the wife, constituted cruelty in law, and the wife was entitled to a decree of dissolution on that ground.

Grimes (otherwise Edwards) v. Grimes ([1948] 2 All E.R. 147), not followed.

[EDITORIAL NOTE.] Compare the decision in this case with that of FINNEMORE, J., in *Grimes v. Grimes* (p. 147 *ante*) where he decided that *coitus interruptus* was not full and natural intercourse, and, therefore, the marriage had not been consummated, so that the wife was entitled to a decree of nullity on the ground of the husband's wilful refusal to consummate the marriage.

FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 7 (1) (a), see HALSBURY'S STATUTES, Vol. 30, p. 339.]

Cases referred to:

- (1) *Baxter v. Baxter*, [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479.
- (2) *Grimes (otherwise Edwards) v. Grimes*, (1948), *ante* p. 147.
- (3) *D—e v. A—g (falsely calling herself D—e)*, (1845), 1 Rob. Eccl. 279; 27 Digest 267, 2350.
- (4) *L. v. L. (otherwise D.)*, (1922), 38 T.L.R. 697; 27 Digest 267, 2357.
- (5) *Rice v. Raynold-Spring-Rice*, [1948] 1 All E.R. 188; [1948] L.J.R. 675.

PETITION by the wife for a decree of nullity on the ground that the husband, by consistently practising *coitus interruptus*, had wilfully refused to consummate the marriage, and, in the alternative, for a decree of dissolution on the ground of cruelty. A decree of nullity was refused, but a decree *nisi* of divorce was granted on the ground of the husband's cruelty. The facts appear in the judgment.

Victor Williams for the wife.

Marshall-Reynolds and *Cridlan* for the husband.

WILLMER, J.: This case started with a petition by the wife for the decree of nullity on the ground of the alleged wilful refusal of the husband to consummate the marriage. The petition is anterior in date to the well known decision of the House of Lords in *Baxter v. Baxter* (1). Shortly after the decision of the House of Lords in that case the petition was amended by adding an alternative plea, namely, that, assuming the marriage to be a valid marriage, the husband was guilty of cruelty so as to justify the court in pronouncing a decree of dissolution. The ground on which both the prayer for nullity and the alternative prayer for dissolution are based is an allegation that from beginning to end the husband practised what is known as *coitus interruptus*. It is said, in the first place, that in those circumstances the marriage has never been consummated and that the non-consummation was due to wilful refusal on the part of the husband, and, in the alternative, assuming the marriage to have been consummated, that the conduct of the husband in relation to his sexual behaviour has amounted to cruelty so as to warrant a decree of dissolution.

The husband, by his answer, merely denies each and every allegation contained in the petition and the amended petition. There is no cross prayer for relief on his part. I have had the benefit of hearing the evidence of both the parties. I have also heard some valuable medical evidence called on behalf of the wife, and I have had the additional advantage of hearing evidence from the wife's sister, with whom the parties resided for a considerable period of the married history. I would like to say at once—because this conclusion influences all the other conclusions at which I have arrived—that, having heard the evidence of the parties, I was left in no doubt that the husband was a witness on whose statements I could place no reliance. On the other hand, I thought that the wife gave her evidence fairly and well, and on most of the crucial points where her evidence could be tested it was well supported both by her sister's evidence and by the medical evidence of the doctors. Generally speaking, therefore, I approach this case on the basis that the wife's account of what happened is substantially to be believed, and the husband's account, where it differs from the wife's, is not to be believed.

That being so, I can state the salient facts quite briefly. The parties were married, or went through a ceremony of marriage, in September, 1937. It is common ground that no intercourse at all took place for six months and that about six months after the marriage what is called *coitus interruptus* took place. The wife's case is that thereafter, throughout the married life, intercourse was rarely resorted to—only about once in every three or four months or so—and that whenever it was resorted to it always took the form of *coitus interruptus*. She says—and I believe her—that she showed her husband quite plainly that she did not approve of it and made it clear to him that she wanted children, but that she received an answer from him either that he did not want to risk children because he could not afford them or that he was too tired. The husband says that from time to time, and, in particular, on an occasion about nine months after the marriage, there was full intercourse between the parties, but he goes on to say that after that he sometimes indulged in *coitus interruptus* and sometimes had full intercourse. Without going into details, I wholly disbelieve that story, and I accept the wife's version that throughout the married life the husband persistently followed this practice of *coitus interruptus*.

The wife was a woman of a somewhat nervous disposition. She had, before marriage, had a nervous breakdown, and I think that there is no doubt, in view of the medical evidence which I have received, that the practice of *coitus interruptus* (which also deprived her, if not of the possibility, at least of the likelihood, of having children, and, therefore, led to a certain amount of friction between the parties) had its effect on her health, and in the later years of the marriage she was repeatedly having to go into hospital suffering from nervous complaints. I need not go into detail about these visits to hospital. The matter came to a head in the spring of 1946 when her own general practitioner thought that he ought to take a second opinion from a mental specialist. Accordingly, the wife was sent to visit Dr. Strauss, a specialist in nervous diseases, who has given evidence before me. A copy of his report, written at the time, is also before me. The significance of this report is that the wife's own medical adviser summoned the husband to see him and read to him extracts from the report so that the husband could be left in no doubt of the view which had been taken, namely, that it was his conduct to a large extent which had brought about the bad state of health of the wife. I have no doubt that the husband fully understood exactly what the specialist had to say.

The extracts from Dr. Strauss's report are as follows. The first extract is from part of the history of the case and it reads as follows:

The marriage was disastrous from the start. Her husband was unwilling to have children, and *coitus interruptus* has been practised throughout marriage, so that Mrs. White has never had any satisfaction whatsoever from the sexual side of married life. In any case, sexual intercourse takes place very seldom—about once in two or three months, at the most.

There is another passage in the report which is also material, and which was also read and explained to the husband.

Unless her husband can be persuaded to change his whole attitude, to cease the practice of *coitus interruptus*, to start a family—and much else, I do not see how psychotherapy can have any lasting effect. I leave you to judge whether Mr. White is capable

of appreciating the situation and possesses the goodwill to try and put it right. If you think that nothing can be done along these lines, Mrs. White would be well advised to separate from her husband and go and live with one of her sisters.

It was in response to that paragraph of Dr. Strauss's report that Dr. McLean very properly thought it was his duty to interview the husband and see what he could do. The interview resulted in nothing. The husband was un-cooperative and continued as he had previously conducted himself. In May, 1946, the wife again had to go to hospital. She was advised then not to go back to her husband, but she did so and remained with him until she once more had to go into hospital in November, 1946. During the period between May and November there was no intercourse whatsoever. When she was in hospital in November, 1946, the wife made up her mind that she could not go back to the husband again, and there has been no co-habitation since that date.

I should state that in this case there is evidence from Dr. McLean that, when *coitus interruptus* is practised, the possibility of conception none the less remains, and for this reason. According to him, many men do in fact have a small emission of semen before the main emission that follows on the completion of the act. There is always the possibility, therefore, that from this minor preliminary emission conception may result. Dr. McLean said that, speaking as a medical adviser, he would not recommend the practice of *coitus interruptus* as a means of birth control. That may or may not be of some materiality. It seems to me a significant piece of evidence, because, if I came to the conclusion that in such circumstances a decree of nullity could be pronounced on the ground of non-consummation, one might get a very curious result. The marriage would be annulled on the supposed ground of non-consummation, notwithstanding the fact that the wife might have borne, not one child, but many children. It seems a curious position that that which might very well produce a child or children should at the same time be a reason for obtaining a decree of nullity on the ground of non-consummation.

In those circumstances, the points which I have to determine are (i) whether the wife is entitled to a decree of nullity on the ground of wilful refusal of the husband to consummate the marriage, such non-consummation consisting of the practice which he followed of having only *coitus interruptus* and never complete intercourse. If I decide that in the affirmative, the other question does not arise. If, on the other hand, I decide that there is no ground for a decree of nullity, then I must go on to consider (ii) whether the husband's practice of *coitus interruptus* and his persistence in that practice, which he knew his wife resented and was undermining her health, is sufficient to constitute cruelty so as to entitle the wife to a decree of dissolution.

Let me deal with the question of nullity first. It is, to my mind, an extremely difficult question, as well as being one of extreme importance. It is a question which the House of Lords specifically left open for future decision when they had *Baxter v. Baxter* (1) before them. I shall have to refer to that case, and to the speech of LORD JOWITT, L.C., because it appears to me that, notwithstanding the express reservation of this subject for future consideration, the House of Lords have, inferentially, at any rate, decided the question of principle which must lie at the root of the question. Before I do that, however, I should refer to the fact that only two days ago, FINNEMORE, J., had before him an undefended petition in *Grimes (otherwise Edwards) v. Grimes* (2). There the petition was brought by a wife praying for a decree of nullity on the ground of wilful refusal having regard to the fact that the husband had persisted throughout the marriage in *coitus interruptus*—in other words, the same ground was put forward in that case as has been put forward in this case. That case was undefended and this case has been defended, but, as I have already explained, having accepted the evidence of the wife and rejected that of the husband, I am really in the same position, as far as the facts are concerned, as FINNEMORE, J., in *Grimes (otherwise Edwards) v. Grimes* (2). I have, however, had the advantage of hearing argument on both sides in this case, and, although I naturally have the highest regard for the view expressed by FINNEMORE, J., I cannot in the circumstances regard his decision as necessarily binding on me, especially if I come to the conclusion, as I do, that the reasoning of the House of Lords in *Baxter v. Baxter* (1) must impel me to the contrary conclusion. I regret very much that, within two days, there should be contrary decisions on what appears

to be the same point, but it only goes to emphasise what I said at the beginning, that this is an extremely difficult point and one which will, in my humble judgment, at some stage have to be decided by a higher tribunal.

The reasons why I have come to a conclusion differing from that of FINNEMORE, J.—i.e., the conclusion that I cannot in this case pronounce a decree of nullity—are as follows. In *Baxter v. Baxter* (1) the House of Lords, quoting with approval both the decision and reasoning of DR. LUSHINGTON in *D. v. A.* (3), drew a distinction between conception, on the one hand, and mere *coitus* on the other. *D. v. A.* (3) was a case, not of wilful refusal (because it was decided many years before that was made a ground for nullity), but a case of incapacity. It was a husband's petition for nullity. It was proved that the wife was completely without a uterus, and that her vagina, instead of the normal dimensions, measured only some two inches. DR. LUSHINGTON took the view, in which the House of Lords concurred, that the matter for decision was whether the malformation of the vagina was such as to render *coitus* impossible. The question whether conception was possible was in his view beside the point. DR. LUSHINGTON actually went so far as to adjourn the case for further evidence on the question whether medical skill could do anything to cure the malformation of the wife's vagina. In *Baxter v. Baxter* (1) ([1947] 2 All E.R. 886, 890) LORD JOWITT, L.C., reads this quotation from the judgment of DR. LUSHINGTON in *D. v. A.* (3) (1 Rob. Eccl. 279, 299):

"In one sense of the term, there can be no doubt, namely, that as relates to conception, the malformation is incurable; but it is to me doubtful, whether they mean that it is incurable as to the mere *coitus*. In this difference, I think, lies the true distinction. If there be a reasonable probability that the lady can be made capable of a *vera copula*—of the natural sort of *coitus*, though without power of conception, I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect, and unnatural *coitus*, I would pronounce the marriage void."

LORD JOWITT, L.C., goes on:

That means that had DR. LUSHINGTON been satisfied that the vagina could by natural or artificial means have been extended by two inches or thereabouts he would have been obliged to refuse a decree on the ground that the wife was capable of *vera copula*, the complete absence of the uterus notwithstanding.

The decision in *D. v. A.* (3) was followed, as the House of Lords pointed out, by HORRIDGE, J., in *L. v. L.* (4). LORD JOWITT, L.C., ([1947] 2 All E.R. 886, 891), quotes the following passage from the judgment of HORRIDGE, J., in that case (38 T.L.R. 697, 698):

Does "a capacity of consummation" mean penetration merely or penetration followed by fertility? The authorities cited in the footnote certainly speak of the procreation of children as being essential to marriage, but the question is whether they refer merely to the capacity to procreate, or to the capacity to do an act which usually results in procreation. The question would be of greater difficulty if it were not for the decision of DR. LUSHINGTON in *D. v. A.* (3). In that case the respondent had no uterus, and the vagina was very short. If Mr. Bayford's argument were correct, counsel for the petitioner in that case would merely have had to prove that the respondent had no uterus; but the question whether the possibility of partial penetration was a ground for refusing relief was there exhaustively considered, and the decision turned on the impossibility of complete penetration. All that inquiry would have been unnecessary if Mr. Bayford's argument were sound, and in that sense the question was directly involved in the case, and I cannot regard DR. LUSHINGTON'S opinion on this point as *obiter*.

LORD JOWITT, L.C., continues:

The learned judge then said that the passages to which I have already referred disposed of the husband's case. I am in complete agreement with this judgment.

There we have the House of Lords completely agreeing both with the decision and with the reasoning of HORRIDGE, J., in *L. v. L.* (4). LORD JOWITT, L.C., in effect, sums up his decision and the decision of their Lordships by quoting a passage from LORD STAIR'S INSTITUTIONS, 1832, I, tit. 4, para. 6, which, I may say, has been much relied on by both sides in argument before me. The passage is this:

So then it is not the consent to marry; as it relateth to the procreation of children, that is requisite; for it may consist, though the woman be far beyond that date;

but it is the consent whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds ; as the general end of the constitution of marriage is the solace and satisfaction of man.

It seems to me that, if one looks at the principle underlying the decision in *Baxter v. Baxter* (1), the House of Lords was drawing the same distinction as had been drawn in the earlier cases cited between conception, on the one hand, and mere conjunction of bodies, on the other. The question, therefore, is what is meant by this "conjunction of bodies" or, to use the Latin phrase, *vera copula*. There is no question in this case, but that full entry and penetration has been achieved. It is submitted on behalf of the wife that there is no *vera copula* unless there is not only full entry and penetration, but also completion of the act within the body of the woman, whether with or without the use of mechanical contraceptives. On the other hand, it is contended that there is a complete conjunction of bodies, a *vera copula*—which means literally "true conjunction"—as soon as full entry and penetration has been achieved. What follows goes merely to the likelihood or otherwise of conception.

In my judgment, the latter contention must be correct. It seems to me to follow from the reasoning of the House of Lords in *Baxter v. Baxter* (1). I find it impossible, having heard this matter fully argued, to say that this marriage has not been consummated. Much as I regret to arrive at a different view from FINNEMORE, J., on this point, I feel bound to say that I cannot pronounce a decree of nullity in this case.

That makes it necessary for me to consider whether a case of cruelty has been made out. I introduce the discussion on that by again referring to *Baxter v. Baxter* (1). In the concluding passage of his speech the LORD CHANCELLOR says this ([1947] 2 All E.R. 886, 892):

I take the view that in this legislation Parliament used the word "consummate" as that word is understood in common parlance and in the light of social conditions known to exist, and that the proper occasion for considering the subjects raised by this appeal is when the sexual life of the spouses, and the responsibility of either or both for a childless home, form the background to some other claim for relief.

It seems to me that the House of Lords was there saying that questions arising out of imperfect intercourse of one sort or another may very well arise in connection with allegations of cruelty. Similarly, they may arise in desertion cases where matters of that sort are put forward by the opposite party as constituting reasonable cause, and that, in the view of the House of Lords, is the proper place to consider sexual irregularities of the sort contemplated. What the House of Lords was saying in relation to intercourse with the use of contraceptives seems to me to apply equally to the case of *coitus interruptus*—a proper place to consider the effect of that is in relation to claims that may be made for dissolution on the ground of cruelty or desertion.

My attention was drawn to the case of *Rice v. Raynold-Spring-Rice* (5), which followed very shortly after the decision of the House of Lords in *Baxter v. Baxter* (1). That was a case in which the Divisional Court, hearing an appeal from justices, came to the conclusion, in agreement with the view of the justices, that *coitus interruptus*, practised by one party against the will of the other, was a good ground for the other spouse separating from the offending party, that is to say, was such as to constitute a good defence to a claim based on desertion. In argument I asked counsel for the husband whether, on the basis of the facts as I have now found them, the wife would have a good defence if sued by the husband for desertion, and, as I understood him, he was not prepared to contend that she would not. That, of course, is not sufficient by itself to make out a case of cruelty, although it goes some way along the road. Here, however, I have, as it seems to me, all the necessary facts which would entitle me to pronounce a decree on the ground of cruelty. I have a course of conduct persisted in by the husband, notwithstanding the objection and repeated complaints of the wife. I have a course of conduct which, according to the medical evidence, is calculated to impair the health of a woman of nervous disposition such as the wife in the present case. I have a course of conduct which did, in fact, according to the medical evidence, result in serious injury to the health of the wife. There may well have been other causes contributing to the wife's breakdown in health. Her health did, undoubtedly, break down, but I am left in no doubt, having heard the wife's evidence and the

medical evidence, that, at any rate, one of the potent factors contributing to the breakdown in health was the persistent refusal of the husband to have full intercourse in the normal way. I am not saying by any means that the practice of *coitus interruptus* is a ground in every case for pronouncing a decree on the ground of cruelty. The evidence of the doctor which I have heard is that there are many cases, where the parties are a normal man and a normal woman, in which it does no harm to either of them, but where one gets a woman of a nervous disposition like this the practice, as I understand it, may be most damaging to health. A husband must take his wife as he finds her, and, if she is a woman of a type who needs the full and natural completion of the act, to persist in withholding it from her, in the face of her repeated complaints and objections, is in itself an act of cold, calculated cruelty. If, as in this case, it does result in serious injury to health or does contribute in marked degree to the breakdown of health of the other spouse, then, in my judgment, it is only right that this court should give relief. Therefore, I come to the conclusion that in this case the persistence in the practice of *coitus interruptus*, although it does not enable me to say that the marriage has never been consummated, is, nevertheless, a matter which merits the condemnation of the court, and is abundantly sufficient to entitle the wife to the alternative relief claimed. I, therefore, propose to reject the prayer for a decree of nullity and to pronounce a decree *nisi* of dissolution on the alternative ground

Decree nisi with costs.

Solicitors: *Joynson-Hicks & Co.*, agents for *W. Davies & Son*, Woking (for the wife); *Joseph Lilly* (for the husband).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

Re PASKINS' WILL TRUSTS. PASKINS *v.* UNDERWOOD AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), June 10, 1948.]

Will—Construction—Gift of house on trust for sister for life—Gift over to testator's housekeeper "provided she is living with my sister at the time of my sister's death"—Housekeeper living in the same house, but entirely apart from sister, at time of sister's death.

In 1938, the testator made an arrangement with M.U. whereby she and her child were to be allowed to have two rooms in his house and M.U. was to act as his companion and housekeeper. In the following year, the testator's sister, an elderly woman, also came to live with them. By his will, dated Feb. 22, 1939, the testator gave the house on trust for the sister for life and, on the sister's death, on trust for M.U. absolutely, "provided she is living with my sister at the date of my sister's death," but, if M.U. predeceased the sister or was not living with the sister at the date of the sister's death, the house was to form part of the residuary estate, which was given to the testator's son. The testator died on Mar. 25, 1941, and for about a year after his death the sister and M.U. continued to live together happily, but the relationship then changed, they ceased to have their meals together, M.U. only looked after the rooms she herself occupied, and she ceased to do anything with the sister, who lived alone in part of the house, and bought and prepared her own food. On June 12, 1945, the sister gave M.U. notice to leave the house, but M.U. refused to go, and claimed that, in view of the reversionary gift of the house to her conditional on her residence with the sister, she had an implied right to reside in the house. In September, 1945, the sister met with an accident (from the effect of which she died on Oct. 15, 1945), but during her illness M.U. gave her no help:—

HELD: (i) "living with" a person implied personal association with that person and not merely residing in proximity with him without personal contact, and, therefore, M.U. was not "living with" the sister at the date of the sister's death within the meaning of the will and was not entitled to the house under the terms of the will.

(ii) the reversionary gift of the house to M.U. did not confer on her an implied right to continue to reside in the house irrespective of the sister's wishes to enable her to satisfy the condition on which the gift was made.

[AS TO CONDITIONS RELATING TO RESIDENCE, see HALSBURY, Hailsham Edn., pp. 109, 110, note; and FOR CASES, see DIGEST, Vol. 44, pp. 468, 469, Nos 2879-2888.]

WITNESS ACTION.

A By his will, the plaintiff's father, Arthur Paskins, gave a leasehold house on trust for his sister, Alice Paskins, for her life, and after her death on trust for the first defendant, Minnie Underwood, absolutely, provided she was living with the sister at the date of the sister's death, and, if she was not doing so, the house was to fall into the residuary estate, which, subject to the sister's life interest therein, was given to the plaintiff absolutely. The testator died on Mar. 25, 1941, and the sister died on Oct. 15, 1945. The plaintiff claimed :
B (i) a declaration that Mrs. Underwood was not living with the testator's sister at the time of the sister's death within the meaning of the will, and (ii) an order directing the second defendant, Mabel Minnis, (who was sued as the sister's personal representative), to assent to the property vesting in the plaintiff for the residue of the term. Mrs. Underwood counterclaimed (i) for a declaration that she was living with the testator's sister at the date of the sister's death within the meaning of the will, and (ii) for an order directing the property to be vested in her. VAISEY, J., held that Mrs. Underwood was not living with the testator's sister at the date of the sister's death within the meaning of the will, and gave judgment for the plaintiff. The facts and the relevant provisions of the will appear in the judgment.

Hewins for the plaintiff (son of the testator).

C. A. Settle for the first defendant (Mrs. Underwood).

W. G. H. Cook for the second defendant (Mabel Minnis).

VAISEY, J.: This action is entitled "In the matter of the trusts of the will of Arthur William Paskins" who, at all material times down to the date of his death, resided at a house called "The Nest" in Weston Lane, Woolston, in the county borough of Southampton. The story begins with the testator reading in a newspaper an advertisement which was inserted by the first defendant, Mrs. Underwood, in which she expressed the desire for two unfurnished rooms for herself and a child in return for services. The testator wrote to Mrs. Underwood, informing her that he could let her have the two rooms, but not so much for the services which would be required as for the sake of refined and congenial company in his home. He then went on to explain that he was a very elderly man living alone in his own residence which was already comfortably furnished. As a result of that letter, the testator and
E Mrs. Underwood came to an arrangement under which, as from April, 1938, she and the testator set up a common home and lived together, with Mrs. Underwood's child, as one family and in complete harmony, Mrs. Underwood acting as housekeeper and companion and doing a woman's work about the house for this small party. The arrangement seems to have worked very well. Mrs. Underwood looked after the testator, did the cooking, mending,
F cleaning, buying of provisions, and so forth, and, as far as I can make out, the whole of the expenses of the establishment were borne and paid by the testator. No doubt, Mrs. Underwood gave full consideration for the accommodation which she enjoyed for herself and her child, and I have every reason to suppose that she made the concluding years of the testator comfortable and happy.

On Feb. 22, 1939, after this arrangement had continued for several months, the testator made his last will. By that will he appointed the National Provincial Bank, Ltd., to be his executor and trustee, and he gave the house (known as "The Nest") to the bank on the following trusts :
H

To permit my sister Alice Paskins to have the use and enjoyment thereof during her life she keeping the same in good and tenantable repair paying all outgoings in respect of the property and keeping the same insured against loss or damage by fire And on the death of my said sister upon trust for Mrs. Minnie Underwood (provided she is living with my sister at the date of my sister's death) absolutely But if the said Minnie Underwood shall have predeceased my said sister or shall not be living

with my sister at the date of my sister's death then the said message or premises shall fall into and form part of my residuary estate.

After giving his sister the use of the furniture and effects in the house for her life, he directed that after her death that furniture and those effects should fall into and form part of his residuary estate, and the residuary estate was given on trust, so far as is material, for the sister, Alice Paskins, for her life and after her death to the testator's son, Dr. William Arthur Paskins, absolutely. Finally, the testator explained that he had refrained from appointing his son to be executor and trustee of the will owing to the fact that he was living abroad.

At about the time of the making of that will, the testator's sister, Alice Paskins, joined the party at "The Nest" and she made the fourth of a quartet which continued to live there down to the death of the testator, which occurred on May 25, 1941. Harmony continued to prevail. When the testator died, the sister, Alice Paskins, was the tenant for life of the house and she continued to live there. For a year or more after the death of the testator, Alice Paskins, Mrs. Underwood and Mrs. Underwood's child continued to live together happily, but by the end of 1942 the relations between Miss Paskins and Mrs. Underwood changed for the worse and persons who down to that time had been a happy party became completely at variance. Instead of having their meals together, Miss Paskins and Mrs. Underwood had their meals separately. Mrs. Underwood continued to keep the rooms particularly occupied by her clean and in good order, and Miss Paskins, to use the language of Mrs. Underwood, "retreated to the front of the house." At that time Miss Paskins was between 80 and 90 years old and, although her mind was perfectly clear, I do not think that there can be much doubt that she was becoming feeble. On the evidence I am satisfied that during the last two years of her life she was living in something not far removed from squalor. The front room on the ground floor in which she spent her days was very dirty, she kept herself warm with an oil stove as best she could, and such food as she ate during that time was bought and prepared by herself. Mrs. Underwood ceased to do anything whatever, except, occasionally, the very slightest items of service, for Miss Paskins, the owner of the house in which she was living. There was no common life between Miss Paskins and Mrs. Underwood during 1943, 1944 and such part of 1945 as Miss Paskins was living. In September, 1945, Miss Paskins slipped in her room and suffered an injury which prevented her from moving, but Mrs. Underwood gave no help in the illness and friends of Miss Paskins came in to do for her what was necessary. I find as a fact that, for a considerable time before, and, what is more important, at the time of the death of Miss Paskins, there had been a complete separation between her and Mrs. Underwood and they were not living together. There was no personal association between them down to and including the date of Miss Paskins' death. I agree that there was physical proximity. They were separated only by the thin walls of the house, and they must have met on the staircase, but, so far as it was possible for people living under the same roof to live apart, I think that they were doing so. I do not think that the expression in the will, "living with my sister," indicates a condition of mere proximity. I think it means living with the sister in the sense of being personally associated with her, and of such personal association I have no evidence whatever that I can accept. The evidence which I can accept is all the other way. In my view, Mrs. Underwood was not living with Miss Paskins in any sense which I can attach to the words of the will.

If it is necessary for me to decide whose fault this separation was, I am bound to say that on the evidence before me I should incline to the view that it was the fault of Mrs. Underwood. I think it is highly significant that when Miss Paskins met with this accident and was visited by one of her friends, Mrs. Underwood volunteered the remark: "This is my house." In my judgment, however, it is not necessary for me to apportion the blame. Miss Paskins may have been a bad tempered, querulous and troublesome old lady whom it was no pleasure to serve, but I do not find any such thing proved. Even if the separation was more her fault than that of Mrs. Underwood, that does not alter the fact that, according to the words of the will as I construe them, Mrs. Underwood ceased to live with Miss Paskins long before the date

of Miss Paskins' death (which occurred on Oct. 15, 1945, as a result of the accident), and was continuing to live apart from her at that date. Assuming that Miss Paskins had been entirely capricious, I cannot see that this reversionary gift to Mrs. Underwood obliged Miss Paskins to continue to associate with Mrs. Underwood if the association had become uncongenial to her.

On June 12, 1945, the solicitors for the bank, acting also for Miss Paskins, wrote to Mrs. Underwood, saying that they had been instructed to give her a week's notice to remove herself and her personal belongings from "The Nest," "the reason for your being given such notice being that your behaviour and conduct towards Miss Paskins has given her great dissatisfaction since Mr. Paskins' death." The letter continued :

The legal position is that Miss Paskins as tenant for life of "The Nest" has full powers of selling, leasing and managing the property, the property passing to yourself upon the death of Miss Paskins, providing you are living with her at that time. It is clear from Mr. Paskins' will that it should be in the sole power of his sister to decide whether or not you should be allowed to continue to live with her after his death, in other words, that Miss Paskins is the sole arbiter of your suitability to be found living with her at the date of her death.

In reply to this letter, Mrs. Underwood's solicitor wrote, saying :

I do not know what the testator's intention was when he made the will but it would appear that the reversionary gift to my client conditional on her residence with Miss Paskins implies a right for her to reside at "The Nest." I have, therefore, advised my client to remain there.

I have never yet heard it said that a legacy to servants if they are in the service of a third person at the time of that third person's death obliges that third person to continue to employ the servants so as to enable them to qualify for their legacies. That seems to me to be ridiculous. I cannot use any other term in regard to the claim put forward by the solicitor of Mrs. Underwood. I cannot see on what possible ground it could be said that Miss Paskins was obliged for the rest of her days to keep Mrs. Underwood in her house, whether she liked her or not, merely to enable Mrs. Underwood to comply with the condition in the will. Such a contention seems to me to be quite unfounded.

For the reasons I have given, the condition imposed by the testator's will as that on which Mrs. Underwood should take the property has not been fulfilled. "Living with a person" implies personal association with that person and is not satisfied by mere proximity or by anything short of personal contact. I think that that is particularly the case if one looks, so far as one is entitled to look, at the conditions which existed when the testator made his will, at which time the association between him and Mrs. Underwood, and, shortly afterwards, between him, Mrs. Underwood and Miss Paskins, had been wholly amicable and, indeed, involved something like the setting up and maintenance of a common home. I make an order declaring that Mrs. Underwood was not living with Alice Paskins at the date of her death within the meaning of the testator's will. I will order the second defendant to assent to the property vesting in the plaintiff for the residue of the term of years which the lease granted. As regards the counterclaim, I must dismiss it and I must order the first defendant, Mrs. Underwood, to pay the costs of the plaintiff both of the action and of the counterclaim.

Judgment for the plaintiff. First defendant to pay the plaintiff's costs of the action and the counterclaim. Costs of the second defendant to come out of the testator's estate.

Solicitors : *Vertue, Son & Churcher*, agents for *Churcher & Churcher*, Gosport (for the plaintiff); *White & Leonard*, agents for *R. H. Cross*, Southampton (for the first defendant); *Mawby, Barrie & Letts*, agents for *Bell, Pope & Bridgwater*, Southampton (for the second defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

R. F. FUGGLE, LTD. v. GADSI *Applied.* GOLDTHORPE v. BAIN.

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley and Goff, C.J., and Lord Evers, M.R.)
[1952] 2 All E.R. 23.

June 8, 9, 1948.]

Rent Restriction—Recovery of possession—Dwelling-house required as residence for “person engaged in whole-time employment” of landlord—Employee under contract, but unable to commence work owing to illness—Termination of contract shortly after order of county court—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (g).

The landlords claimed possession of a dwelling-house under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (g), on the ground that it was required for occupation as a residence for W., a person engaged in their whole-time employment. W. was engaged on July 11, 1947, and was to commence work on Sept. 10, 1947, by which date he had freed himself from his previous employment, but he was taken ill on Sept. 7, 1947, and was unable to commence work until Oct. 30, 1947. The hearing of the action in the county court began on Oct. 1, 1947, and judgment was delivered on Oct. 29, 1947. The employment of W. was terminated on Nov. 5, 1947.

HELD : (i) the language of para. (g) was satisfied if there was a contract for service and the date thereby fixed for the commencement of the service had already arrived at the time of the hearing, which was the relevant date, and the fact that W. was not able to work owing to illness did not negative the view that at that date he was engaged in the whole-time employment of the landlords.

Benninga (Mitcham), Ltd. v. Bijstra ([1945] 2 All E.R. 433), distinguished.

(ii) with regard to the termination of W.'s employment on Nov. 5, 1947, the Court of Appeal could not take into account a matter which had happened after the hearing in the county court which, if it had happened before the hearing, might have affected the judge's findings of fact, and, if the tribunal of fact was satisfied, under s. 3 (1) of the Act, on adequate evidence, that it was reasonable to make an order for possession, the Court of Appeal could not interfere.

Quære : Whether an employee could be described as being engaged in the whole-time employment of the landlord, if, at the date of the hearing, the employee was under notice, given or received, determining the engagement.

[AS TO RECOVERY OF POSSESSION OF PREMISES REQUIRED FOR OCCUPATION AS A RESIDENCE FOR LANDLORD'S EMPLOYEE, see HALSBURY, Hailsham Edn., Vol. 20, p. 331, para. 395; and FOR CASES, see DIGEST, Vol. 31, pp. 580, 581, Nos. 7292-7295.]
Case referred to :

(1) *Benninga (Mitcham), Ltd. v. Bijstra* [1945] 2 All E.R. 433; [1946] K.B. 58; 115 L.J.K.B. 28; 173 L.T. 298; 2nd Digest Supp.

APPEAL by the landlords from an order by His Honour JUDGE DONE, made at Watford County Court and dated Oct. 29, 1947, refusing the landlords' claim for possession of a dwelling-house which they required for occupation as a residence by their employee. The appeal was allowed, and an order was made for possession. The facts appear in the judgment of LORD GREENE, M.R.

M. H. Lush for the landlords.

The tenant did not appear.

LORD GREENE, M.R. : In the action in which this appeal is brought the landlords sought to obtain possession of a dwelling-house on the ground that they “reasonably required” it “for occupation as a residence for some person engaged in [their] whole-time employment.” I take those words from the relevant part of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933,—para. (g) of sched. I to that Act. That paragraph deals with one of the cases in which the court is empowered to make an order without proof of alternative accommodation. Certain conditions must be fulfilled. Thus (i) it must be reasonable to make the order; (ii) the dwelling-house must be reasonably required for the occupation stated; (iii) it must be shown that the tenant was in the employment of the landlord or of a former landlord when the dwelling-house was let to him. All those conditions the county court judge held to be fulfilled, and he would have made the order for possession but for a point of law on which he conceived himself to be bound by what he understood was the

effect of observations made by the members of the Court of Appeal in *Benninga (Mitcham), Ltd. v. Bijstra* (1). Those observations related to the words in para. (g.), "some person engaged in his whole-time employment," and the judge came to the conclusion that the person for whom possession was sought could not be properly described as engaged in the whole-time employment of the landlords.

The house with which we are concerned in the present case was occupied by a man in the employment of the landlords who left in July, 1942. On July 25, 1942, the tenant and his wife went into occupation under a contract of tenancy which the county court judge found was a contract with the tenant and not with his wife. The tenant's occupation and employment was such as to bring para. (g) into operation. On July 11, 1947, the landlords engaged one Wilson to enter their employment. At first his engagement was made conditional on accommodation being found for him, but, having regard to the coming into force of the Control of Engagement Order, 1945, the landlords engaged him on a firm engagement to start work on Sept. 10, 1947. By that time he had freed himself from his previous occupation, but, unfortunately, three days before Sept. 10, he was taken ill, and, although he gave evidence at the hearing, he was not then fit to begin work. There was no suggestion at the hearing nor did the judge take the view, that by reason of his inability to start his work on the date agreed, namely Sept. 10, the contract had been determined. In fact, Wilson began work on Oct. 30.

The hearing in the county court began on Oct. 1, and was adjourned to Oct. 22. On Oct. 29 the county court judge delivered judgment dismissing the claim. After having referred to the observations in this court in the *Benninga* case (1), he said :

I feel it right to follow the opinions expressed by the Lords Justices in that case. It seems to me that the paragraph gives two alternative conditions, with which the landlord must comply. Either the man at the date of the hearing must be a person engaged in his whole-time employment, or, if not engaged in his whole-time employment, he must be a person with whom a contract for such employment has been entered into, that is to say, a contract conditional on housing accommodation being provided.

I did not read the latter limb of para. (g) because it is not relevant to the present case. It would have been relevant if the original arrangement had stood, but, as I have said, that was altered in view of the Control of Engagement Order, 1945. The county court judge went on to say :

It seems to me that, if the man is not working, but a contract for employment was made with him, that is not enough unless it is a contract of a particular kind, namely, a conditional contract of this nature. The alternative to that is a person actually engaged in employment, that is to say, not only under contract, but working.

That appears to me to make clear what was passing through the judge's mind. He reads the words "engaged in his whole-time employment" as referring to a man who is not merely under contract but who is also actually working at the relevant date. At the relevant date, the date of the hearing in the county court, Wilson was not under contract to anybody other than the landlords. Under that contract he was bound to begin his work on Sept. 10. Had he done so, there is no question that the county court judge would have made the order. The only reason why he did not make the order was that the man was not physically able to begin work on Sept. 10. In my opinion, that is a misreading of the language of the section which is satisfied where there is a contract for services and the date thereby fixed for the commencement of the services has arrived at the time of the hearing. If the date for the commencement of the services arrives at some future date, the observations in this court on which the county court judge relied would no doubt apply, because in the *Benninga* case (1) that is actually what happened.

Although we shall presently see the difference between the two cases, I may shortly refer to the facts in that case. The landlords were alleging that they required the premises in question for a man called Schuler who, they said, was a workman engaged in their whole-time employment. They had arranged in February, 1945, with Schuler for him to come into their employment, but that was not a contract for the immediate beginning of work because Schuler was under a contract with somebody else and that contract persisted until Apr. 16, 1945, which was the first day on which he became free to work for the landlords. The

hearing in the county court took place on May 2, 1945. The plaintiff was issued on Mar. 20, 1945, on which day it was manifest that Schuler could not have begun his work because he was still under contract with his former employer. It is also clear that by May 2 the contract to engage him which had been made in the preceding February became capable of practical fulfilment because by Apr. 16 he was free and, therefore, at the date of the hearing, he was not merely under the contract which had been come to long before, but was actually engaged in the work which the contract contemplated. The argument was that the relevant date for ascertaining whether he was engaged or not was the date of the plaintiff, but the court negatived that. On the subject of engagement there were some observations of MACKINNON, L.J., and MORTON, L.J., which I must read. MACKINNON, L.J., says this ([1945] 2 All E.R. 433, 435):

The word "engaged" is deplorably ambiguous. An employer "engages" a servant when he makes an agreement with him for his services. A workman is "engaged" on work when he is actually carrying it out. In fact "engage" of a master has an entirely different meaning to "engaged in" of a workman. In the phrase we are concerned with the use is of the workman. I do not find it necessary to express a final opinion on the point, but I am inclined to think that it was not until Apr. 16, 1945, that Schuler became a "person engaged" in the whole-time employment of the plaintiffs, however obvious it may be that the plaintiffs had "engaged" Schuler long before that date.

In that case it so happened that the date as from which Schuler was able to begin his work coincided with the date when he actually did begin his work. Here the date on which Wilson was engaged to begin his work was Sept. 10, but that on which he actually began work was later, the postponement not being due to a suspension or cancellation of the contract of engagement, but simply to his ill-health. The reasoning of the county court judge would have prevented the landlords getting possession if Wilson had only been in bed for a week with a cold. In point of fact his illness was longer because it involved an operation, but that does not affect the contract. The facts are quite different from those in reference to which the observations of MACKINNON, L.J., were made in the *Benninga* case (1). I think myself that MORTON, L.J., and MACKINNON, L.J., mean precisely the same thing, but I find in the actual language used by MORTON, L.J., a slightly clearer exposition of the point. What he says is this (*ibid.*, 436):

There can be no doubt that Schuler was a person engaged in the whole-time employment of the plaintiff company from Apr. 16, 1945, onwards.

That, of course, was the date on which he became free from his existing engagement, and on which, in fact, he did commence his work because he, unlike Wilson, did not suffer from any temporary indisposition. MORTON, L.J., goes on:

It is, therefore, unnecessary to decide whether he answered this description at an earlier date, but I think that he did not, for the reasons stated by MACKINNON, L.J. . . . It seems to me that from February to April, 1945, Schuler had been engaged for whole-time employment in the future by the plaintiff company but was engaged in the whole-time employment of other persons.

To emphasise the distinction, the word "for" and the word "in" are printed in italics, which, no doubt, represented the Lord Justice's own underlining in the script of his judgment, but it brings out this point. It was true that under the February arrangement Schuler was engaged for employment and under a contract for that purpose, but he was not engaged in the employment until he was free from his existing contract. It seems to me that, once this is appreciated, the county court judge's interpretation is one which cannot be supported. In my judgment, on the facts of this case, at the relevant date—the date of the hearing in the county court—Wilson was engaged in the whole-time employment of the landlords.

The county court judge having found all other relevant facts in favour of the landlords, that would be an end of the matter but for one circumstance which I ought to mention. The tenant, who was successful in the county court, has not appeared before us. Counsel for the landlords, with great propriety, called our attention to a matter which had happened since the judgment, and the matter was this. He told us that Wilson commenced work on Oct. 30—that is, the day after the judgment was delivered, but, for some reason which we do not know, he terminated his employment on Nov. 5. It does not appear exactly how it was terminated, but one thing is clear—at the date of the hearing there

was no current notice to determine the contract of engagement. Counsel informed us of that fact because he thought it was right that we should know it, but he argued, and, in my opinion, correctly, that it does not entitle us to re-examine the questions of fact which the judge decided, particularly the question of reasonableness. I must not be taken as expressing any opinion, but if, at the date of the hearing in such a case as this, the man for whom the house is required is under notice given or received determining the engagement, it may be that the county court judge would be right in holding that he could not be described as being engaged in the whole-time employment of the employer. I say nothing about it one way or the other. I merely call attention to the point. Another question which might arise in those circumstances was whether it would be reasonable at the date of the hearing to make the order, but no circumstance of that kind existed here. On the evidence before him, the judge came to a finding of fact which it was essential for him to decide, namely, the matter of reasonableness, and on the evidence there is no question that he had ample jurisdiction to come to such a conclusion. Indeed, I should have been surprised if he had not.

What is the position of this court? On the facts as they existed at the hearing and as found by the judge, once the judge's error of law, if I may respectfully say so, is put right, the order would automatically follow, but something happened after the hearing which, if it had happened before the hearing took place, might have led the county court judge to take a different view from that which he did take on the facts. Ought this court to pay regard to some matter which has happened since the hearing which, if it had happened before the hearing, might have affected the judge's findings of fact? In my judgment, this court cannot take into account such subsequent matters of fact. If it did so, it would be setting itself up as a judge of fact on a matter which the legislature has put into the hands of the county court judge, and as to which, if the county court judge, on adequate legal evidence, has decided, this court has no jurisdiction whatever to interfere with his decision. The only thing that this court could ever do in such a case as that, if it was right to take such a matter into account, would be to send the action back to the county court judge to decide the issues of fact in the light of the new circumstances. That, as it seems to me, would be intolerable, because there would never be finality. It seems to me that, once one allows this court to examine new facts which have taken place after the judgment on which itself it is not competent to judge, one would completely lose all finality, and nobody would know where he was. It might be suggested that this court, which on appeal would be making the order, ought not to make it unless it were satisfied as to the reasonableness of making it. In my judgment, when s. 3 (1) of the Act speaks of the court being satisfied that it is reasonable to make an order, it means that the tribunal of fact must be satisfied that it is reasonable to make an order. Once the tribunal of fact is so satisfied on adequate evidence, the competence of this court to dabble in that matter is completely ruled out.

That conclusion seems to me to be quite consistent with one aspect of the matter to which I will just refer. It is to be noted that the conditions of engagement relating to the new tenant under the provisions of para. (g) do not contemplate or require an engagement of any particular duration. In other words, the person engaged, for whom the house is obtained, might, as events turn out, give notice a day after the order for possession has been made. The employees of the type contemplated would be those engaged on a weekly contract, and the legislature must have realised that it might happen (and I have no doubt in many cases it does happen) that a landlord would get possession under this section, and then for some reason, perhaps a day, perhaps a week, perhaps a month afterwards, the contract of employment would come to an end and the house would no longer be required for that tenant. If the condition of engagement had been that it was to last for not less than six months, or something of the kind, then one would have something much more solid, but once one comes to the conclusion, as one must, that this provision applies whether the engagement is a weekly engagement or one for six months or a year, the right of the landlord to obtain possession is not to be taken away because the very next day the contract of engagement may be brought to an end. In the present case I think this court is bound by the position as it existed at the date of the hearing.

In the result, the appeal must be allowed, and an order made for possession, but we ought to consider to what extent and subject to what conditions we will make an order, remembering the provisions of the relevant section of the principal Rent Act, the Act of 1920, s. 5, which provides that at the time of making an order "(2) . . . the court may . . . suspend execution on any such order or judgment, or postpone the date of possession, for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent. . ." The conclusion to which I have come is that the landlords are entitled to their order, but in view of the facts existing at this moment I think that this court is entitled to consider whether or not any terms should be attached to it. Whether or not the landlord has a new employee ready to move in, I do not know. It may be he has; it may be he has not. What seems to me to be the proper form of order to make is an order for possession within one month, with a right to either party to apply to the county court judge for an extension of the time. What I am saying now is in no sense to deprive the county court judge of his discretion, but it might be that, if the month comes to an end and the landlords have not a new employee to put in, the tenant may say: "Would it not be reasonable to give me longer time?" On the other hand, the landlords may have engaged a man who will be ready to move in at the end of the month, which means the landlords could say that the month ought not to be extended. That is the sort of point—not the only sort of point—which might come up for the consideration of the county court judge if either party were to apply under the order which I propose.

WROTTESELEY, L.J.: I agree.

EVERSHED, L.J.: I agree. As we are differing from the careful judgment of the county court judge I will add a few sentences of my own. The learned county court judge, as my Lord has pointed out, read the observations in the *Benninga* case (1) as compelling him to conclude that the landlords must fail because their servant, Wilson, was, though under contract, not actually working at the material date, namely, the date of the hearing. For my part I do not think that the observations of MACKINNON, L.J., and MORTON, L.J., lead to any such view of the construction of the material terms of para. (g). In any case, in my judgment, Wilson, was, according to the ordinary acceptation of the English language, in fact at the material time engaged in the whole-time employment of the landlords. He was then under an existing obligation by contract to work whole-time for the landlords, though he was not able to work owing to illness. In my judgment, the latter fact does not negative the view that he was engaged at that time in the whole-time employment of the landlords, just as much as he would have been if on the material date he had happened to be away on a holiday. It seems to me that, if one asks the question, say, of a postal worker whether he is engaged in the whole-time employment of the Crown, the answer cannot be in the negative merely because on the day on which one asks the question the worker happens to be away ill or on his holiday. I venture to think that the learned county court judge misread the language which he cited, though it is, no doubt, true that one sentence particularly, in MACKINNON, L.J.'s judgment, might have led at first sight to the other conclusion.

On the other matter I confess that I have myself felt some difficulty in regard to the exact extent of the obligation imposed on this court by s. 3 (1) of the Act of 1933 on an appeal by a landlord. It has been said many times that proof of the relevant facts under para. (g), or under the other paragraphs of sched. I to that Act, is necessary in order to give the court jurisdiction to make an order, but that the court, in making an order, has in addition to satisfy itself that it is reasonable to make that order. However, in my judgment, the order proposed by the MASTER OF THE ROLLS is, in the circumstances of this case, the order the court ought to make, and I say that, having particular regard to the finding of the learned county court judge that at the date of the hearing it was reasonable to make an order for possession as asked for by the landlord.

Appeal allowed with costs in both courts.

Solicitor: Wilfrid R. Lush (for the landlords).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BALDWIN v. GURNSEY.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), June 9, 1948.]

Housing—Registration of living accommodation—Exclusion of Rent Restrictions Acts—Householder not in physical occupation of premises at date of registration—Relative dates of letting and registration—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927) (as amended by S.R. & O., 1945, No. 1452, and S.R. & O., 1945, No. 1622), reg. 68CB (1), (6).

On Feb. 14, 1946, the owner of premises, who was contemplating going abroad, made a provisional agreement, which was not intended to be binding until she received an appointment to employment abroad, to let a part of her premises to the tenant for occupation as a dwelling-house. On Feb. 22, 1946, the owner registered that part of the premises with the local housing authority, under the Defence (General) Regulations, 1939, reg. 68CB (added by S.R. & O., 1945, No. 1452), as living accommodation available for occupation by tenants or lodgers. At that date the only physical occupation which the owner had of the premises was that the rooms other than those registered contained her furniture. Subsequently, she obtained her appointment, and the tenant went into occupation of the rooms. The owner, having served a valid notice to quit, now sought possession of the part of the premises so let, but the tenant claimed the protection of the Rent Restrictions Acts. Regulation 68CB provides: "(1) Where a local housing authority have established a register for the purposes of this regulation, any person having in any dwelling in the area of the authority occupied by him living accommodation which he is willing to make available . . . for occupation by tenants or lodgers, may apply to the authority for registration of the accommodation . . . (6) No accommodation registered for the purposes of this regulation which has been let in accordance with the registered terms and conditions shall, as respects that letting, be treated as a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, apply. . ."

HELD: (i) at the time of the registration the owner had a sufficient occupation of the premises to allow of registration under reg. 68CB, for the word "occupied" in para. (1) of the regulation related to the kind of occupation which was required for rating purposes and not to the physical occupation which was required in the case of a tenant claiming the protection of the Rent Restrictions Acts.

(ii) since the binding agreement for letting (as distinct from the provisional agreement of Feb. 14, 1946) took place after the registration under the regulation, para. (6) had effect, the premises let were not a dwelling-house to which the Rent Restrictions Acts applied, and the owner was entitled to possession.

Per COHEN, L.J.: So long as a registration under reg. 68CB (1) remains in force, para. (6) of that regulation has effect.

Quære: whether, if premises were registered, the validity of the registration could be challenged in proceedings for possession.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 68CB., see HALSBURY'S STATUTES, Vol. 39, pp. 1045-1046].

APPEAL by the tenant from an order of His Honour JUDGE TEMPLE MORRIS, K.C., at Swansea County Court, dated Nov. 10, 1947.

In an action for possession of part of a dwelling-house which had been registered under the Defence (General) Regulations, 1939, reg. 68CB (added by S.R. & O., 1945, No. 1452), the tenant claimed the protection of the Rent Restrictions Acts on the grounds (a) that the registration was not good because the landlord was not in occupation of the premises at the time of the registration, within the meaning of para. (1) of the regulation, and (b) that the registration was subsequent to the letting. The county court judge held that there was no binding agreement to let until after the registration, and that the landlord was in occupation of the premises at the date of the registration within the meaning of the regulation, and he made an order for possession. On an appeal by the tenant, the Court of Appeal now upheld the decision of the county court judge and dismissed the appeal. The facts appear in the judgment.

V. Ruston (for Stephen Benson) for the tenant.
C. A. Morgan Blake for the landlord.

TUCKER, L.J.: This is an appeal from a decision of His Honour JUDGE TEMPLE MORRIS whereby he made an order for possession of part of certain premises to take effect within 28 days. The part of the premises which were let consisted of a kitchen and bedroom together with the general use of the scullery. Notice to quit was duly given and no question arises with regard to that. The whole question is whether or not these premises are taken out of the protection of the Rent Restrictions Acts by reason of the fact that they were registered under the Defence (General) Regulations, 1939, reg. 68CB, (which was added as from Nov. 16, 1945, by S.R. & O., 1945, No. 1452). The facts as found by the learned judge were these. The landlord was contemplating going abroad to Germany where she hoped to get a position under the United Nations Relief and Rehabilitation Association, and, therefore, she was willing for a short period of time to let part of the dwelling-house of which she was the owner. Accordingly, she availed herself of the provisions of reg. 68CB and registered the rooms under that regulation. Before she registered the rooms, she had come to an arrangement with the tenant which the learned judge describes in these words:

I accept the evidence of the plaintiff [the landlord] and I find the following facts—that on Feb. 14, 1946, she agreed to let to the defendant the accommodation now occupied by the defendant, but it was an agreement to let subject to the plaintiff receiving an appointment with U.N.R.R.A. which she subsequently received, and, when she received her appointment, she confirmed and made the agreement which she had provisionally agreed to do when she went abroad. The plaintiff registered the premises on Feb. 22, 1946. The rooms subsequently let to the defendant were unoccupied on February 23, 1946. The plaintiff went abroad in March, 1946. The defendant went into occupation on Mar. 8, 1946.

Before dealing further with the case, it is necessary to refer to the Defence (General) Regulations, 1939, reg. 68CB:

(1) Where a local housing authority have established a register for the purposes of this regulation, any person having in any dwelling in the area of the authority occupied by him living accommodation which he is willing to make available, whether with or without furniture for use therein, for occupation by tenants or lodgers, may apply to the authority for registration of the accommodation and of the terms on which the householder is willing to make it available as aforesaid. (2) On application being made under the last foregoing paragraph the local housing authority shall, if they are satisfied that the accommodation is, or will be rendered, suitable for occupation as aforesaid and approve the said terms, enter the accommodation and terms in the register, together with any conditions as to the number of persons to occupy the accommodation, the use of furniture or other facilities or otherwise as the authority may think requisite: Provided that the authority shall not be required to register any accommodation, and may cancel the registration of any accommodation, if it appears to them that it would be likely to be made available for occupation as aforesaid without being registered under this regulation.

Paragraph (3) contains a provision with regard to cancellation of the registration:

... on the application of the person for the time being entitled, subject to the rights over the accommodation of any tenant or lodger, to occupy the dwelling in which it is comprised.

Then there are other provisions in paras. (4) and (5) which are not material to the present appeal and we come to para. (6):

No accommodation registered for the purposes of this regulation which has been let in accordance with the registered terms and conditions shall, as respects that letting, be treated as a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, apply; and in determining for the purposes of those Acts the standard rent of any dwelling-house no regard shall be had to any such letting of such accommodation.

The first point made by counsel for the tenant is that, at the time when these premises were registered by the landlord, she was not in occupation of them, because the evidence showed that the only occupation she had then was that the rooms in the premises other than the rooms subsequently let to the tenant contained her furniture. It is said by counsel for the tenant that the procedure for registration under reg. 68CB can only properly take place when the person

seeking to register is physically in occupation of the premises. In my view, that argument is not open to the tenant so long as the registration, which has, in fact, taken place, subsists and has not been cancelled. I think para. (6) of reg. 68CB applies so long as there is in force a registration, and the only way to get rid of a registration, if it is not properly made, is to take the requisite proceedings under the regulation to get it cancelled, but, however that may be, I think that the presence of the landlord's furniture in the other rooms of the house would, for the purposes of the regulation, amount to an occupation within the meaning of para. (1). I do not think that the kind of occupation envisaged by reg. 68CB is the physical occupation which is required in the case of a tenant who is claiming the protection of the Rent Restrictions Acts. This is a regulation speaking of "householders" and giving certain powers to the local authority. I think that the meaning of the word "occupied" is similar to the kind of occupation which is required for rating purposes and is not confined to the physical occupation of the applicant.

The next point made by counsel for the tenant is that, in any event, on its proper construction para. (6) of reg. 68CB only succeeds in excluding the Rent Restrictions Acts if the letting in question is subsequent to the registration, and, on the true view of this case, the landlord let these premises before she registered them. If that were so, I think that counsel for the tenant would succeed, but the difficulty is that the "letting" depends entirely on the evidence of the landlord and the tenant with regard to the conversations which had taken place between them, and there is nothing in writing. Having heard the evidence, the learned judge found certain facts. I have already cited the passage in which he set out his finding and I merely re-read it for the purpose of emphasising the fact that he has found what the agreement was :

... on Feb. 14, 1946, she agreed to let to the defendant the accommodation now occupied by the defendant, but it was an agreement to let subject to the plaintiff receiving an appointment with U.N.R.R.A. which she subsequently received, and, when she received her appointment, she confirmed and made the agreement which she had provisionally agreed to do when she went abroad.

This finding of fact that there was on Feb. 14 a provisional agreement only and that it was made subject to the landlord obtaining an appointment puts counsel for the tenant out of court on that point. For these reasons, I think that the appeal fails.

SOMERVELL, L.J. : I agree. I would like to base my conclusion solely on the ground that the premises were occupied by the landlord within the meaning of reg. 68CB (1). **TUCKER, L.J.,** referred to the argument whether, if the premises are, as a matter of writing, on the register, the registration can be disputed in *inter partes* proceedings such as these. I express no opinion on that. I would like to reserve the question whether, if it could be shown by proper evidence that the registration was irregular, the tenant might be able to make that point in proceedings of this kind or whether he would have to take other proceedings to get the premises removed from the register.

COHEN, L.J. : I prefer to base my reason for rejecting the argument of counsel for the tenant solely on the ground that, in my view, so long as the registration remains in force, one cannot get away from the effect of para. (6) of reg. 68CB. I am not dissenting in the least from the view my brothers have formed, but I have not come to a conclusion on it and prefer to reserve my views on that subject until the time comes when it is necessary for me to come to a conclusion. So far as the second point is concerned, I only desire to add that the only fair reading of the learned judge's judgment is that he took the view that no binding agreement was intended to be made between the parties before the registration. The landlord stated plainly that she told the tenant that she was registering the rooms with the local authority. If she did that, it is wholly inconsistent with any binding agreement before she had done so. For these reasons I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors : *Rhys Roberts & Co.*, agents for *Myer Cohen & Co.*, Cardiff (for the tenant) ; *John B. Purchase & Clark*, agents for *D. O. Thomas & Co.*, Swansea (for the landlord).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

SHAW v. ROOTES SECURITIES, LTD.

[COURT OF APPEAL (Tucker and Somervell, L.JJ., and Romer, J.), May 28, June 15, 1948.]

Workmen's Compensation—Compensation—Calculation of weekly payments—Change in rates of remuneration—Alteration in working hours—Same wage paid for 44 hours week as previously paid for 47 hours week, with same rates of overtime as before—Workmen's Compensation Act, 1943 (c. 6), s. 6 (1).

By the Workmen's Compensation Act, 1943, s. 6 (1): "For the purpose of calculating—(a) any weekly payment payable under the Workmen's Compensation Acts, 1925 to 1943 . . . the average weekly earnings of the workman before the accident shall, if and whenever a change occurs after the date of the accident in the rates of remuneration obtaining in the class of employment in which the workman was employed during the relevant period before the accident, be deemed, so long as the changed rates obtain without further change, to be the average weekly earnings which he would have earned during that period if the changed rates had obtained throughout that period."

In 1943 a workman employed in engineering was injured in an accident arising out of and in the course of her employment. Her pre-accident average weekly earnings were £3 10s. based on an average of 57 hours worked a week, and in 1946, on proceedings to review under s. 6 of the Act of 1943, they were fixed by agreement at £4 2s. 6d. By an industrial arbitration award made in June, 1946, to take effect from Jan. 1, 1947, the pay for women workers in engineering was fixed at 62s. 6d. for a 44 hours week, instead of 62s. 6d. for a 47 hours week. Overtime remained payable at time and a third for the first 2 hours and time and a half thereafter. On an application by the workman for a further re-adjustment in her weekly payment, it was contended by the employers that the basic weekly wage rate had remained unchanged at 62s. 6d. and the rates for overtime were as before, and, therefore, there was merely an alteration in working hours resulting in an increase in the remuneration actually received in respect of the same number of total hours worked, and no change in the "rates of remuneration," within the meaning of s. 6 (1) of the Act:—

HELD [SOMERVELL, L.J., *dissenting*]: the alteration in the hours required to be worked in order to earn the weekly wage of 62s. 6d., with the consequent payment at overtime rates for the 45th, 46th and 47th hours worked [*i.e.*, time and a third for the 45th and 46th hours and time and a half for the 47th hour] and the increase in the overtime rate from time and a third to time and a half for the 48th and 49th hours, constituted a change in the rates of remuneration obtaining in the class of employment in which the workman was employed during the relevant period, within the meaning of s. 6 (1) of the Act of 1943.

[AS TO FLUCTUATION OF WAGE RATES, see HALSBURY, 1947 Supplement, Workmen's Compensation, para. 1306.]

FOR THE WORKMEN'S COMPENSATION ACT, 1943, s. 6, see HALSBURY'S STATUTES, Vol. 36, pp. 189, 190.]

Cases referred to:

- (1) *Hill v. Wolverhampton Corrugated Iron Co., Ltd.*, [1939] 3 All E.R. 72; [1939] 2 K.B. 469; 108 L.J.K.B. 536; 161 L.T. 6; 32 B.W.C.C. 129; Digest Supp.
- (2) *Trawlers (Grimsby), Ltd. v. Crouchen*, [1943] 1 All E.R. 253; 36 B.W.C.C. 22; 2nd Digest Supp.
- (3) *Paterson v. William Beardmore & Co., Ltd.*, [1948] W.N. 175.

APPEAL by the employers from an award of His Honour JUDGE TUCKER, made at Hanley and Stoke-on-Trent County Court, and dated Feb. 20, 1948.

The workman, who was entitled to compensation under the Workmen's Compensation Acts, claimed a re-adjustment of her weekly payments under s. 6 of the Act of 1943, on the ground that there had been a change in the rates of remuneration in the class of employment in which she had been employed by reason of an industrial arbitration award whereby the weekly wage of 62s. 6d. was to be payable for a 44 hours week instead of for a 47 hours week and the overtime rates were to remain as they were. The employers contended that there

had been no change in the rates of remuneration within the meaning of s. 6, but the county court judge made his award in favour of the workman. The employers appealed, but their appeal was now dismissed by the Court of Appeal (SOMERVELL, L.J., dissenting). The facts appear in the judgment of TUCKER, L.J.

Beney, K.C., Neil Lawson and Garrard for the employers.

M. E. Holdsworth for the workman.

Cur. adv. vult.

June 15. The following judgments were read.

TUCKER, L.J.: This appeal from an award of His Honour JUDGE TUCKER, sitting as an arbitrator under the Workmen's Compensation Acts, raises a question as to the construction of the Workmen's Compensation Act, 1943, s. 6. The relevant parts of this section are as follows:

(1) For the purpose of calculating—(a) any weekly payment payable under the Workmen's Compensation Acts, 1925 to 1943 . . . the average weekly earnings of the workman before the accident shall, if and whenever a change occurs after the date of the accident in the rates of remuneration obtaining in the class of employment in which the workman was employed during the relevant period before the accident, be deemed, so long as the changed rates obtain without further change, to be the average weekly earnings which he would have earned during that period if the changed rates had obtained throughout that period.

On Feb. 23, 1943, the workman, the applicant in the arbitration proceedings, was injured in an accident arising out of and in the course of her employment as a machine worker with the employers (the present appellants) whereby she lost the second, third and fourth fingers of her right hand. Her pre-accident average weekly earnings were £3 10s. based on an average of 57 hours worked a week. She was paid full compensation on this basis until April, 1946, when she obtained employment with Woolworths, Ltd., at £2 10s. a week. She then received compensation at the rate of half the difference. Thereafter there were a series of rises in her wages which reduced her compensation, and on Sept. 28, 1947, her wages became £3 10s. Meanwhile, her pre-accident wages had been twice re-adjusted as a result of proceedings to review under s. 6 of the Act of 1943—in April and May of 1946, on which latter occasion they were fixed by agreement at £4 2s. 6d. In the present proceedings she claimed a further re-adjustment as from Jan. 1, 1947, consequent on an industrial arbitration award whereby it was alleged that there had been a change in the rate of remuneration obtaining in the class of employment in which she was employed during the relevant period before the accident, bringing the revised pre-accident average earnings to £4 8s. 6d. The change effected by the award was that the pay for women workers in engineering was fixed at 62s. 6d. for a 44 hours week, instead of 62s. 6d. for a 47 hours week, and overtime remained payable at the rate of one and a third for the first two hours and time and a half thereafter, with double time for Sunday work. The question is whether this alteration in the hours required to be worked in order to earn the weekly wage of 62s. 6d., with the consequent payment at overtime rates for the 45th, 46th and 47th hours worked and the increase in the overtime rate from one and a third to one and a half for the 48th and 49th hours, constitutes a change in the rates of remuneration obtaining in the class of employment in which the workman was employed during the relevant period. The learned county court judge has answered this question in the affirmative, and, in my opinion, he was right.

The argument for the employers is that the basic weekly wage rate has remained unchanged at 62s. 6d. and the rates of overtime for the first two and the subsequent hours remain at one and a third and one and a half as before, and all that has happened is that there has been an alteration in working hours which has resulted in an increase in the remuneration actually received in respect of the same number of total hours worked as distinct from a change resulting from the alteration of a previously fixed "rate" of remuneration, which means the *quantum* per unit of time. I think that the words "rates of remuneration" in s. 6 of the Act of 1943 should be construed broadly and given the meaning which they would naturally convey to a worker or employer in industry. If a man receives 62s. 6d. for working 44 hours instead of 47 and

is paid at overtime rates for the extra 3 hours, I think that both he and his employer would naturally refer to the change as an alteration in working hours which has produced a change in the rates of remuneration, and that it would be putting too narrow and legalistic an interpretation on the language to say that there was no rate per hour for the extra three hours when they were included in the normal working week because the contract between the parties provided for a week's work at a weekly wage and, therefore, there has been no change. With regard to the 48th and 49th hours the position appears reasonably clear. Here there has been a change in the overtime rate from one and a third to one and a half, and it seems to me no answer to say: "Yes, but the rate fixed for the first two and subsequent hours of overtime remain unchanged." When you come to apply the formula to the two hours in question, the result is a change in the rate of remuneration applicable to those two hours which have always been overtime hours. I would agree that a mere change in the hours of a working week where no question of overtime is involved would not constitute a change in the rate of remuneration. It is, however, essential in the present case to remember that we are bound to apply the change to the average 57 hours per week in fact worked by the workman before her accident, and this necessarily involves applying overtime rates to hours which did not previously carry overtime rates.

We were referred to three authorities, namely, *Hill v. Wolverhampton Corrugated Iron Co., Ltd.* (1), *Trawlers (Grimsby), Ltd. v. Crouchen* (2) and *Paterson v. William Beardmore & Co., Ltd.* (3), a recent decision of the House of Lords in a Scottish case. The first two of these cases were decisions under the Workmen's Compensation Act, 1925, s. 11 (3), now repealed and replaced by s. 6 of the Act of 1943, and the recent House of Lords case was a decision approving the two earlier English decisions of the Court of Appeal in so far as they were applicable to that case, which fell to be dealt with under s. 6 of the Act of 1943. I do not think it is necessary to refer to these authorities as they do not seem to me to touch the point which calls for decision in the present appeal. For these reasons, I think this appeal fails and should be dismissed.

SOMERVELL, L.J.: In this case the words that have to be construed are the words in the Workmen's Compensation Act, 1943, s. 6:

... whenever a change occurs after the date of the accident in the rates of remuneration obtaining in the class of employment in which the workman was employed ...

If the remuneration for a particular piece of work is put up from 1s. 6d. to 2s. 6d., or if, the working week remaining unaltered, wages are raised from £3 to £4 or lowered from £4 to £3, there is clearly a change in the rates of remuneration. Suppose, however, a working week is reduced from 48 hours to 42, the wages being reduced from 96s. to 84s., is there such a change? The workman is still getting 2s. per hour, but he is getting 12s. less per week. In the present case, the normal working week was reduced from 47 hours to 44, the same wage £3 2s. 6d. being paid for the 44 hours as were paid for the 47. Is this a change in the rates of remuneration? The answer seems to me to depend on whether the rate of remuneration is properly expressed as a rate for a week or for so many hours in a week. If the former, then I think a reduction of working hours, though it gives the workman more spare time, leaves unaffected his rate of remuneration which is a weekly rate. In a case such as this, where the wage was clearly a weekly wage, this seems to me to be the natural and ordinary meaning of the words. An agricultural worker paid on a weekly basis works longer hours in summer than in winter for the same wage. I would not have said that there is a change in his rate of remuneration as between summer and winter. I would have said his rate of wages is the same, but he works shorter hours in winter. A domestic servant is engaged on the basis of having so much "time off" in the week. The employer increases the amount of time off, the wages, which I am assuming are expressed on a weekly or monthly basis, remaining unchanged. I would say there was no change in the servant's rate of remuneration. Suppose, on the other hand, the rate was a rate per hour. If the number of hours the man is to work are reduced, the rate remaining the same, there would be no change

in the rate though less would be earned in the course of the day. If the reduction was accompanied by an increase in the rate, then there would be a change, although he might at the end of each day or week draw exactly the same sum as he did before the reduction.

I have so far considered the issue without regard to the question of overtime. In the present case, the workman before the accident worked 10 hours overtime in addition to the 47 hours week. The overtime rates have not been altered, but under the present arrangement anyone who works more than 44 hours moves into the overtime scale. Here again, I would have said that there is no change in the rate of remuneration for overtime. There is a change, but not a change in the rate. The overtime rates become applicable after a shorter working week.

If one takes the simple cases cited at the beginning of this judgment, the section produces a logical result. If the man had not been injured, he could at the relevant date be earning those higher rates. The consequent loss is a result of his injury. If, however, one takes the case of the reduction of a working week, it does not in the least follow that the workman, if uninjured, would be working an amount of overtime which would bring him up to the old hours, but the effect of the construction put forward on behalf of the workman would necessitate this assumption. The point is not an easy one, and, having regard to the conclusions come to by my brethren, I need not say that I have doubts as to the correctness of my own opinion. If it had been intended to cover reductions of the working week by the words used, I would have expected this to be stated expressly as, in my opinion, it falls outside the ordinary meaning of the words. The learned county court judge based his conclusion on the fact that after the change a person was paid the same sum for 44 hours as previously for 47 hours, and this was a change in the rate of remuneration. This is, as it seems to me, to treat a weekly wage as if it was a wage payable weekly per hour worked. It is possible so to regard it, but I do not think, for the reasons I have given, that this is its natural sense.

In the two cases to which we were referred, *Hill v. Wolverhampton Corrugated Iron Co., Ltd.* (1) and *Trawlers (Grimsby), Ltd. v. Crouchen* (2), emphasis is laid on the fact that a change in weekly earnings is not necessarily a change in the rates of remuneration. I do not think that they assist in solving the present problem. For these reasons I would allow the appeal.

ROMER, J.: The question in the appeal is whether, by reason of the industrial arbitration award of June, 1946, a change occurred in the rates of remuneration obtaining among female machine workers. If no such change occurred, it follows that the rates of remuneration remained the same. Were, then, the rates of remuneration obtaining among female machine workers the same after the award became operative as those that had obtained before? In my opinion, a comparison between the two rates shows that they were not the same. Before the award, an operative was paid 62s. 6d. for 47 hours of work in a week. Overtime was not paid until the 48th hour of work had been reached, and, accordingly, was not earned by any worker who thought that, if she worked for the standard week, then she had worked enough. To those of more industrious inclinations time and a third was payable for the 48th and 49th hours, and time and a half for the 50th and subsequent hours. After the award, the worker who had considered that 47 hours a week of work was enough found that, without in any way revising that view, or working any longer, she was earning as much as had previously been earned by a fellow operative whose weekly hours of work had averaged 50. Is, then, 62s. 6d. for 47 hours' work a week, and overtime for subsequent hours, the same "rate of remuneration" as 62s. 6d. for 44 hours' work, and overtime for subsequent hours? I should have thought myself that it was not the same rate at all, but that it was, on the contrary, a change in the rates of remuneration payable to the worker, and none the less because it resulted from an alteration in her working hours.

As a result of the award two alterations occurred, one irrelevant to present purposes, the other relevant. The irrelevant alteration was that a workwoman who now works only 44 hours would not, as formerly, be breaking her contract with her employers. The relevant alteration relates to the remuneration payable to her (a) if she works her contractual 44 hours, and (b) if she works

for more than the 44 hours. Taking (b) first, it seems to me reasonably plain that there has been a change in the rate of remuneration for the first 5 excess hours which she works, for she is paid more money, and on a different basis of remuneration, in respect of each of them than she was paid before. The case of (a) is more doubtful, but I think the result is the same, for a reward of 62s. 6d. for 44 hours' work is, in my view, a different "rate of remuneration" from a reward of 62s. 6d. for 47 hours' work. In order to see the position rightly on the facts of the present case one has to consider two factors, namely, the remuneration paid and the work by which it is earned. To describe the latter as a week's work, or work for a week, is, as I think, no description at all. The term week, or working week, is meaningless unless one knows of what the week, or working week, consists, and, unless one does know that, there is nothing that can be related to the other factor, the remuneration which is paid, for any purpose at all—whether for inquiry (irrelevant on this appeal) whether the remuneration is adequate or inadequate, or whether (and this is what concerns us) a change in the remuneration has occurred. A

It is for this reason that I cannot accept the employers' argument to the effect that, as there has been no change either in the remuneration for "the week," or in the *quantum* of remuneration for overtime work, therefore no change has occurred for the purposes of s. 6 of the Act of 1943. The argument is founded on a view which is, I think, erroneous, namely, that, because there has been no change in the standard time rate per week, the change in the standard time itself must, therefore, be regarded as irrelevant. To my mind, the duration of the standard time per week is just as relevant to the solution of the present problem as the *quantum* of the remuneration which is paid in respect of it. *Prima facie*, a reduction of a weekly wage by one-tenth would amount to a change in the rate of remuneration within s. 6. If, however, inquiry reveals that the working time for the week had been reduced in the same proportion, it would follow that no such change had occurred. For the above reasons, I am in favour of dismissing the appeal. B

Appeal dismissed with costs.

Solicitors: *Berrymans*, agents for *T. Haynes Duffell & Son*, Birmingham (for the employers); *Preston, Lane-Claypon & O'Kelly*, agents for *Hollinshead & Moody*, Tunstall, Staffs. (for the workman). C

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.] D E

DYDE v. NATIONAL COAL BOARD (STAFFORD COLLIERY UNIT).

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), May 31, June 15, 1948.] F

Workmen's Compensation—Award—Appeal—"Decision" on question of law—Finding of arbitrator forming the basis of an award—Workman's notional pre-accident average weekly earnings—Workmen's Compensation Act, 1925 (c. 84), sched I, para. 4.

Workmen's Compensation—Compensation—Calculation of weekly payments—Change in rates of remuneration—Miner paid a rate per shift—Normal working week reduced from 6 shifts, paid at rate of 25s. per shift, to 5 consecutive shifts, paid at rate of 25s. per shift, with a bonus of 25s. if full qualifying 5 shifts worked—Workmen's Compensation Act, 1943 (c. 6), s. 6 (1). G

A workman employed as a coal cutter gave up work on Oct. 28, 1945, on account of illness, and on July 21, 1947, he was certified by a medical board as partially disabled by pneumoconiosis, an industrial disease within the Workmen's Compensation Act, 1925, s. 43. Before his notional accident, he had been paid at the rate of 25s. a shift, the normal working week consisting at that time of 6 shifts. By an agreement, dated Apr. 18, 1947, and made between the National Coal Board and the National Union of Mineworkers, a 5 days week was introduced into the coal mining industry as from May 5, 1947, and the normal working week was to consist of 5 consecutive shifts, paid at the same rate as before, with a bonus for H

those who worked the full qualifying 5 shifts. The result of the agreement was that the workman would have received 25s. per shift for 5 shifts, plus a further 25s. by way of bonus, which would have resulted in a rate of 30s. per shift, *i.e.*, a total of £7 10s. for 5 shifts actually worked. In making his award under the Workmen's Compensation Acts, the arbitrator found that the agreement of Apr. 18, 1947, had resulted in a change in the rate of the workman's remuneration, within s. 6 (1) of the Workmen's Compensation Act, 1943, and that, as a result of the agreement, the workman's revised or notional pre-accident average weekly earnings were £8 4s. 6d. a week. The employers appealed from the finding which was the basis of the award, but did not appeal from the actual order whereby the arbitrator ordered them to pay certain sums to the workman.

By sched. I, para. 4, to the Workmen's Compensation Act, 1925: "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal . . ."

HELD: (i) the arbitrator's finding that the workman's revised or notional pre-accident average weekly earnings were £8 4s. 6d. was a "decision" within the meaning of the Workmen's Compensation Act, 1925, sched. 1, para. 4, and formed part of his award, and, accordingly, an appeal lay from the decision.

(ii) the agreement of Apr. 18, 1947, as applied to the shifts worked by the workman, resulted in a change in the rate of his remuneration, within the meaning of s. 6 (1) of the Act of 1943.

Shaw v. Rootes Securities, Ltd. (ante p. 168) distinguished by SOMERVELL, L.J.

[AS TO FLUCTUATION OF WAGE RATES, see HALSBURY, 1947 Supplement, Workmen's Compensation, para. 1306.

FOR THE WORKMEN'S COMPENSATION ACT, 1943, s. 6, see HALSBURY'S STATUTES, Vol. 36, pp. 189, 190.]

Case referred to:

(1) *Shaw v. Rootes Securities, Ltd.*, ante p. 168.

APPEAL by the employers from an award of His Honour JUDGE TUCKER, made at Hanley and Stoke-upon-Trent County Court, and dated Jan. 8, 1948.

In making an award under the Workmen's Compensation Acts, the county court judge based the award on a finding that there had been a change in the rate of the workman's remuneration within the meaning of s 6 of the Act of 1943 as a result of an agreement, dated Apr. 18, 1947, and made between the National Coal Board and the National Union of Mineworkers whereby the normal working week was reduced from 6 shifts to 5 shifts, paid at the same rate a shift as before, but with a bonus for those who worked the full qualifying 5 shifts. The employers appealed from this finding of the judge, but not from the actual order to pay the workman the sums set out in the award, and a preliminary point was taken whether an appeal lay from a finding which was the basis of an award. The Court of Appeal now held that an appeal lay, and confirmed the decision of the county court judge. The facts appear in the judgment of TUCKER, L.J.

Beney, K.C., *G. F. Sunderland* and *Neil Lawson* for the employers.

Paull, K.C., and *Henry Burton* for the workman.

Cur. adv. vult.
June 15. The following judgments were read.

TUCKER, L.J.: This appeal involves a similar question to that which arose in *Shaw v. Rootes Securities, Ltd.* (1), in which we have just delivered judgment. Before dealing with the main issue, it is necessary to refer shortly to a preliminary point, which counsel for the workman brought to our notice, to the effect that the matter complained of in the appeal formed no part of the arbitrator's award, and that, as there is no appeal from his actual order whereby he ordered the employers to pay to the workman the sums set out in

paras. 1 and 2 of his award, the appeal relates to matters which do not at present arise, and that, consequently, this court might not think it right to embark on an appeal which is really hypothetical.

The award begins as follows :

Having duly considered the matter submitted to me, I do hereby make my award as follows : Whereas I find the applicant's revised or notional pre-accident average weekly earnings (pursuant to the Workmen's Compensation Act, 1943) are £8 4s. 6d. per week. And whereas I find the applicant's earning capacity in the open labour market as from June 19, 1947, was, and is, £3 10s. (1) I order that the [employers] . . .

The Workmen's Compensation Act, 1925, sched. I, para. 4, dealing with appeals, provides :

The Arbitration Act, 1889, shall not apply to any arbitration under this Act ; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal . . .

We were of opinion that the arbitrator's finding that the workman's revised or notional pre-accident average weekly earnings are £8 4s. 6d. was a "decision" within the meaning of para. 4 of the schedule and formed part of his award, and was not merely a recital, and, consequently, that an appeal lies from that decision. We, accordingly, held that we could properly proceed with the appeal.

The facts in this case were as follows. In 1945 the workman was employed as a coal cutter chargeman, working underground in the Fenton Pit of the Stafford Coal & Iron Co., Ltd. He had worked in mining for 25 years. On Oct. 28, 1945, he gave up work on account of illness. On Feb. 11, 1946, he was suspended from further work by a medical board and on July 21, 1947, he was certified by a medical board as partially disabled by pneumoconiosis, an industrial disease within s. 43 of the Workmen's Compensation Act, 1925, as from June 19, 1947. It is admitted that he has a good claim to compensation on the basis of partial disablement as from that date. As a result of an agreement, dated Apr. 18, 1947, between the National Coal Board (the successors to the Stafford Coal & Iron Co., Ltd.) and the National Union of Mineworkers, a five days week was introduced into the coal mining industry as from May 5, 1947. The uncontradicted evidence was that, under the arrangements in force prior to the workman's notional accident, he had been remunerated at the rate of 25s. a shift. The normal working week then consisted of 6 shifts which were paid for at the rate of 25s. per shift. Under the agreement of Apr. 18, 1947, the normal working week consists of 5 consecutive shifts with a bonus for those who work the full qualifying 5 shifts. The material provisions are contained in paras. 1, 5, 18 and 20 of the schedule to the agreement :

(1) The normal working week for underground workers shall be one of 5 consecutive shifts of 7½ hours plus one winding time. (5) A workman who works 5 full qualifying shifts in any week shall be paid a bonus calculated as provided in cl. 18. A workman's qualifying shifts are his 5 normal shifts or alternatively one or more full overtime shifts worked at the request of the management between his first and fifth normal shift together with such number of his normal shifts as makes a total of five. Save as provided in cll. 6 and 7 a workman who fails in any week to satisfy the conditions mentioned in this clause shall not be paid a bonus. (18) The amount of the bonus payment referred to in cll. 5 and 7 shall be : (a) for a day wage man qualifying under cl. 5 his average day wage rate for the week in question including the war addition and the skilled shilling (if payable) but excluding other allowances. (b) for a day wage man qualifying under cl. 7 the same proportion of the bonus which he would have received under (a) as the number of qualifying shifts worked or deemed to have been worked by him in that week bears to 5. (c) for a piece-worker (whether qualifying under cl. 5 or cl. 7) 16 per cent. of his aggregate earnings (excluding overtime) in respect of his qualifying shifts in that week with a minimum of £1 (or the appropriate proportion of £1 where he qualifies for bonus in respect of less than five shifts). (20) Subject to the authorisation of the National Reference Tribunal sub-para. (1) and (2) of the fifth award shall be amended as follows : (1) Payment for week-end work and overtime shall be at the rate of double and one and one half times the

normal rates respectively. (2) Week-end work shall comprise all work done during a period beginning with the commencement of the Saturday afternoon shift and ending with the commencement of the Sunday night shift.

The effect of this agreement on the workman would have been that he would have got 25s. per shift for 5 shifts, namely, £6 5s., plus a further 25s. by way of bonus, making a total of £7 10s. for 5 shifts actually worked, which results in a rate of 30s. per shift. Under the former system, if he worked the full week, he would have received the same total of £7 10s., but he would have had to work 6 shifts, with the result that his rate per shift would have worked out at 25s. per shift. For any less number of shifts he would still receive 25s. per shift. There is no dispute as to figures and it is conceded that, if there had been a "change in the rates of remuneration," then, as applied to shifts actually worked by the applicant, his revised pre-accident average weekly earnings were rightly fixed by the learned county court judge at £8 4s. 6d.

The workman relies on the Workmen's Compensation Act, 1943, s. 6, which provides :

(1) For the purpose of calculating—(a) any weekly payment payable under the Workmen's Compensation Acts, 1925 to 1943 . . . the average weekly earnings of the workman before the accident shall, if and whenever a change occurs after the date of the accident in the rates of remuneration obtaining in the class of employment in which the workman was employed during the relevant period before the accident, be deemed, so long as the changed rates obtain without further change, to be the average weekly earnings which he would have earned during that period if the changed rates had obtained throughout that period.

The workman contends that the introduction of the 5 days week under the terms of the agreement of Apr. 18, 1947, has resulted in a change in the rate of his remuneration per shift. For the employers it is said that the rate of remuneration per shift remains unaltered, but that a workman now receives a new additional kind of remuneration in the form of a bonus payable in a certain event at the end of the week. It is a short point which does not call for elaboration. In my view, this is a clearer case than *Shaw v. Rootes Securities, Ltd.* (1), and I think that the workman's contention, which was accepted by the county court judge, is correct. The new agreement as applied to the shifts worked by the applicant results, in my view, in a change in the rate of his remuneration which was, and still remains, a rate per shift. For these reasons, I think that this appeal fails.

SOMERVELL, L.J. : I agree, but, as I differed from the other members of the court in *Shaw v. Rootes Securities, Ltd.* (1), I will state my reasons for thinking that this case is to be distinguished. The question here is whether a "change in the rates of remuneration," within s. 6 of the Workmen's Compensation Act, 1943, was effected by the agreement between the National Coal Board and the National Union of Mineworkers on Apr. 18, 1947. In considering whether it effected a change, the first matter to investigate is the basis of remuneration at the date of the accident, in this case a notional accident. The only evidence as to this is in the applicant's evidence, the judge's note being as follows: "For 12 months before ceased work doing work of coal cutter chargeman. Paid at rate of 25s. shift." The rate, therefore, was a rate per shift. The relevant provisions of the Act and of the agreement have already been read, and I will not repeat them. The rate per shift apart from the bonus remains as it was at the time of the accident, 25s. If, however, the workman works five shifts, he gets a further 25s., bringing up the amount per shift worked to 30s. Does this provision as to bonus alter the "rates of remuneration"? I think it does. I will assume that the workman is under no contractual liability to work five shifts. It is, I think, relevant that this is agreed to be the normal working week. If, therefore, a man works the normal working week, he gets 30s. per shift now, whereas at the time of the accident he only got 25s. per shift. This seems to me to be a change in the rates of remuneration, and this is not affected by the fact that his rate of remuneration is unaltered if he does not work the five qualifying shifts. Counsel for the employers submitted that the bonus must be disregarded, and regard had only to the primary rate per shift. This, I think, is to disregard the effect of the agreement. The agreement of Apr. 18, 1947, goes

some way towards changing from a shift basis to a weekly basis of remuneration. There is no evidence that at the time of the accident there was anything but a rate per shift. If what had happened had been to change a normal working week of 6 shifts into one of 5 shifts, the remuneration for the 5 shifts being the same as the old remuneration for 6 shifts, a more difficult question would have arisen on which I should desire to reserve my opinion.

COHEN, L.J. : I agree. It is plain that before the accident the rate of remuneration of the applicant workman was fixed as a rate per shift, not a weekly rate. The rate as fixed was 25s. per shift. The question is whether a change in that rate was effected by the agreement of Apr. 18, 1947, between the National Coal Board and the National Union of Mineworkers. The primary object of that agreement was to deal with hours, not with wages. It made no direct alteration in the rate per shift, but it cut down the normal working week to one of 5 consecutive shifts and it provided in cl. 5 for the payment of a bonus to a workman who works 5 full qualifying shifts in any week or who, though he has not worked 5 full shifts, fulfils the conditions specified in cl. 5 or cl. 7. The necessary consequence of these provisions is that a workman, instead of being entitled to 25s. per shift, is entitled to 25s. per shift plus X. The unknown quantity X may be 5s. per shift or a proportionate part thereof under cl. 7, or it may be *nil* if in any week the workman has not worked 5 shifts and does not fulfil the conditions specified in cl. 5 or cl. 7. Despite this last possibility, it seems to me impossible to say that no change in the rate of remuneration has been effected by the agreement of Apr. 18, 1947. For these reasons, I agree with the learned county court judge and with my brothers that there has been a change in the rate of remuneration within the meaning of s. 6 of the Act of 1943. Accordingly, the appeal, in my opinion, fails.

Appeal dismissed with costs.

Solicitors: *The Solicitor, National Coal Board* (for the employers); *Simmonds, Church Rackham & Co.*, agents for *McKnight & Ryder*, Hanley, Staffs. (for the workman).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

FISH v. KAPUR AND ANOTHER.

[KING'S BENCH DIVISION (Lynskey, J.), June 9, 10, 1948.]

Negligence—Res ipsa loquitur—Dentist—Extraction of tooth—Fracture of jaw.

In an action for damages for negligence against a dentist a patient proved that in extracting a wisdom tooth he had left part of the root of the tooth in her jaw and had fractured the jaw.

HELD : this fact alone was not sufficient evidence of negligence on the part of the dentist and the doctrine of *res ipsa loquitur* did not apply.

[As to DOCTRINE OF RES IPSA LOQUITUR, see HALSBURY, Hailsham Edn., Vol. 23, pp. 671-675, paras. 956-958; and FOR CASES, see DIGEST, Vol. 36, pp. 88-92, Nos. 539-607.]

Cases referred to :

(1) *Warner v. Payne*, unrep., Apr. 15, 1935.

(2) *Edwards v. Mallan*, [1908] 1 K.B. 1002; 77 L.J.K.B. 608; 98 L.T. 824; 13 Digest 484, 341.

ACTION by the plaintiff, Mrs. Winifred May Fish, claiming damages from the defendants, dental surgeons, on the ground that the second defendant had been negligent in extracting one of her teeth as a result of which part of the root of the tooth was left in and her jaw was fractured. **LYNSKEY, J.**, held that the doctrine of *res ipsa loquitur* did not apply and that there was no evidence of negligence. The facts appear in the judgment.

Charles Burke (Solley with him) for the plaintiff.

N. G. L. Richards for the defendants.

LYNSKEY, J. : The plaintiff claims damages for negligence and breach of duty against Mr. S. K. Kapur, a dental surgeon, and also against Mr. I. K. Kapur, who, I gather (although I have had no direct evidence about the matter) was also a dental surgeon. Mr. S. K. Kapur practices his profession at Lloyds Bank Chambers, Grays, Essex, and Mrs. Fish resides at Brookman Avenue, Grays. On May 1, 1946, a wisdom tooth was troubling her and she

A went to the premises occupied by Mr. S. K. Kapur and asked him to remove the tooth. She saw a nurse who took her into the surgery and placed her in the dentist's chair. The dentist, Mr. I. K. Kapur, came in, and, according to her evidence, she was immediately given an anaesthetic without the dentist making any previous examination. Whether he examined the tooth after she was under the anaesthetic she, of course, does not know. I should have thought that obviously he must have done so before he extracted the tooth. In the extraction he left part of the root of the tooth in the jaw, and, by some means unexplained, the jaw was fractured. The plaintiff came out of the anaesthetic and was given a mouthwash then and there and a mouthwash to take home. That night she was in considerable pain. Next day her mouth was so painful and the weather so bad that she decided not to go and see the dentist, but she went on May 3, and, according to her, Mr. I. K. Kapur said that the bruising and swelling was the result of having the tooth out. On May 6 she consulted her doctor, Dr. Headon. He examined her face and he saw it was swollen, but, according to his view, there was nothing to suggest that there had not been a perfectly normal extraction or that the plaintiff had a fracture of the jaw. On May 10 the plaintiff again saw Mr. I. K. Kapur and pointed out that her face was still swollen and that she could not open her mouth properly. Apparently, she was suffering from some spasm affection of the muscles of the mouth which had probably been caused as a result of one of the nerves or muscles being involved in the fracture or being separated in the fracture. The technical name given to it is "trismus." At that time she said that the dentist referred to her jaw and asked: "Do your teeth feel numb?" and her reply was "Yes." He again looked into the mouth and said: "It will be all right in about a week." He did not take an X-ray, did not tell her that part of the tooth was remaining in the jaw, and did not refer her to a doctor or hospital. On May 17 she went to a hospital, where they X-rayed her and found that the jaw was fractured. They sent her to the Oldchurch County Hospital at Romford for treatment. At that hospital she was examined and X-rayed again. The fracture of the jaw was confirmed, but it was found to be healing and uniting in good alignment, so that no treatment was necessary. No support was given to the jaw, either by wearing a plate or otherwise, and the jaw was allowed to heal of its own accord. She could not have the root of the tooth removed until the fracture had completely united, but she had it out in April, 1947.

E No suggestion has been made, either by the plaintiff herself or by any of the medical or dental witnesses called for her, of any improper act on the part of the defendant. He has chosen, through his counsel, to submit that there is no evidence of negligence and to stand on that submission, with the result that I have not seen him in the witness box and he has not given any explanation of what took place. All I have in the shape of evidence of negligence in the operation of extracting the tooth, if I have anything at all, is that, after the extraction there was a fracture of the jaw. I am asked by the plaintiff's counsel to say that, where you have a qualified dentist who extracts a tooth and, after that extraction, the jaw is found to be fractured, that of itself is *prima facie* evidence of negligence on the part of the dentist. In other words, it is sought to apply to a case of that sort the doctrine of *res ipsa loquitur*. 2

G There have been many cases in which actions have been brought against dentists, or claims made against them, for fractures occasioned in the course of the extraction of teeth. Counsel for the plaintiff has not been able to refer me to any authority where any court has held that the fact that a fracture of the jaw is found after a tooth has been extracted is of itself *prima facie* evidence of negligence. Counsel for the defendants has referred me to *Warner v. Payne* (1) where one of the questions which arose was whether the fact that a fracture of the jaw had occurred in the course of the extraction of a tooth was *prima facie* evidence of negligence. The learned judge, giving judgment, said:

H I think that both the plaintiff and her husband had in mind all along that, provided they could prove that there was a fracture or that the fracture was caused in the extraction of the tooth, they had good ground for complaint about the dentist. I should certainly not hold that the mere fact that the jaw was fractured in the course of an extraction would be of itself any evidence of negligence against the dentist at all.

In my view, that statement of the law is correct, but I am not depending on that in the present case, because the plaintiff has called a Dr. Devas and also a Mr. Siggers, Dr. Devas being a doctor of medicine and Mr. Siggers being a dental surgeon. Dr. Devas said in evidence that it is possible to fracture a jaw during an extraction without any negligence, and, apparently, Mr. Siggers took the same view, because he said that when one is extracting teeth fractures may occur without fault on the part of the dentist and equally one may leave the root of the tooth in without any blame attaching to him. He said: "I would not consider myself negligent in leaving the root of a tooth behind." A
In the face of that evidence I cannot hold that the fact that this fracture was caused in the process of extraction of the tooth was in itself any evidence of negligence. The result is that I have nothing left on which I can base any finding of negligence on the part of the defendants which resulted in the fracture, and, so far as that part of the case is concerned, the plaintiff's case must fail. B

It is, however, said, further, that there was negligence on the part of the defendant, I. K. Kapur, in not diagnosing the existence of a fracture when he saw the plaintiff on May 10. According to her, at that time her face was swollen, she had this trismus, and, in addition, she says that Mr. Kapur asked her if her teeth were numb and she said: "Yes." According to Mr. Siggers, one may have trismus, although it is unusual, and swelling where a tooth has been extracted, even where there is no fracture, and in those circumstances the swelling and the trismus will clear up after a short while, but, he says, if numbness is present that is evidence that there may be a fracture because of the severance of the nerve or the muscles or their involvement in the fracture. The plaintiff complains that Mr. Kapur did not tell her that she had a fracture and did not recommend her to go to a hospital or to a doctor, but merely said she would be all right in a week's time. In those circumstances, she says, apart from anything as to the actual fracture, that was lack of care in diagnosis on his part. If, however, Mr. Kapur had found a fracture at that time, what would have been the position? I asked Dr. Devas what he would have done if he had seen that there was a fracture before May 10, and he said: "I might have supported her jaw for her. I do not know if I would. It may have eased the pain or discomfort, or it might not." I have also the fact that when she went to the hospital on May 17 they found that the fracture was already healing in good alignment and there was no necessity for any treatment in the shape of a support or otherwise. All that they gave her was mouth wash, as, indeed, Mr. Kapur had done in the earlier stages. I can see, therefore, no evidence which indicates that the plaintiff sustained any further or additional pain or discomfort as a result of the defendant's failure to diagnose on May 10. C D E

As Mr. Burke has pointed out to me, having regard to a decision in *Edwards v. Mallan* (2) an action of this sort is an action in tort and not an action in contract. Being an action in tort of this nature, breach of duty does not avail a plaintiff unless it results in damage. The result is that, as there is no proof of any damage following on that failure to diagnose—if there was a failure, which I do not know—it means that the plaintiff cannot succeed in respect of possible neglect which took place on May 10 in failing to diagnose the existence of the fractured jaw. The result must be judgment for the defendants. F G

Judgment for defendants, with costs.

Solicitors: *Harold Miller & Fraser* (for the plaintiff); *Le Brasseur & Oakley* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re BORTHWICK (deceased). BORTHWICK AND ANOTHER v. BEAUVAIS AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), June 15, 1948.]

Discovery—Originating summons—Application under Inheritance (Family Provision) Act, 1938—R.S.C., Ord. 54F, rr. 1, 14.

Family Provision—Discovery of documents—Practice—R.S.C., Ord. 54F, rr. 1, 14.

A R.S.C., Ord. 54F, dealing with applications under the Inheritance (Family Provision) Act, 1938, provides by r. 1 that an application to the court under s. 1 of the Act shall be made in the Chancery Division by originating summons *inter partes*, and r. 14 provides that the ordinary practice and rules in the Chancery Division, in so far as they are not inconsistent with the Act or R.S.C., Ord. 54F, shall apply to proceedings under the Order.

B The widow and infant child of the testator had issued an originating summons under the Act and applied for discovery of various documents relating *inter alia* to the net value of the estate.

C HELD : a plaintiff on an originating summons is not entitled as of right to discovery, but the court has jurisdiction to order discovery. The cases in which the jurisdiction ought to be exercised are, however, rare, and, in such exceptional cases, the plaintiff's proper course is to make a special application, supported by affidavit, showing the particular special circumstances in which the application is made. In this case no special circumstances had been disclosed justifying the making of an order for discovery.

[FOR R.S.C., ORD. 54F, see THE YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 1096-1099.]

D PROCEDURE SUMMONS by the plaintiffs, the widow and an infant child of a testator, applying for discovery of documents on an originating summons under the Inheritance (Family Provision) Act, 1938. The plaintiffs had filed an affidavit in support of their application, but ROXBURGH, J., held that this affidavit did not disclose special circumstances justifying the making of an order for discovery, and refused the application.

Lightman for the plaintiffs.

A. C. Nesbitt for the executors.

E *Parbury* for certain beneficiaries.

Danckwerts for the Attorney-General.

ROXBURGH, J.: This application, which raises a matter of some general importance, is made in an originating summons in the matter of the Inheritance (Family Provision) Act, 1938. The summons asks that :

F . . . such provision as the court may think fit may be ordered to be made out of the estate of the above-named testator for the maintenance of the plaintiffs and each of them.

G The plaintiffs are the widow of the deceased and an infant daughter. The application is an application, not for unlimited discovery, but for discovery limited in the manner which I will indicate by reading the affidavit filed in support of the application. The affidavit, which is by H. C. R. Burley, a managing clerk in the employment of the plaintiffs' solicitors, says, in para. 2: "On Apr. 26, 1948, my principals wrote and despatched" to the solicitors for some of the defendants, the executors of the testator, "a letter a copy of which is now produced and shown to me." That letter is from the plaintiffs' solicitors to the solicitors for the defendant executors and is as follows :

H With further reference to our complaint about your clients' failure to disclose all relevant documents, which was repeated before the learned master on Feb. 19 last, we must now give you notice that we require : (a) Inspection of all proofs, pleadings and instructions to counsel, and his opinions relating to the claim by Mary Elizabeth Borthwick to be entitled to the chattels and other property of the deceased. (b) Inspection of all correspondence and other documents in the possession of or passing between the executors and/or their solicitors with the Estate Duty Office concerning the value of the shares. (c) Inspection of all cases to counsel and the opinions of counsel of and concerning the value of the shares in Auzlene, Ltd., Ridgmount, Ltd. and other companies in which the deceased held shares and copies of the respective memoranda and articles of association of the said companies. Will you please let us know within the next 3 days whether you are prepared to let us have a list of these

documents and give us an opportunity of inspecting the same and taking up copies of such of the said documents as we may require. Please let us know within the time we have limited whether you are now prepared to concede our right to the inspection and copies as set out above, so as to save the costs which will be incurred by a further summons.

The affidavit of Mr. Burley continues :

The defendant executors have the documents referred to in the said letter in their possession or power, all of which relate to the matters in issue herein, but refuse to disclose the same. I am advised by counsel and verily believe that the plaintiffs cannot safely proceed to trial without having access to the said documents.

Counsel for the plaintiffs submitted two propositions. His first was that in every application under the Inheritance (Family Provision) Act, 1938, in which net estate is material (and net estate is material in all of them by reason of the form of the Act), the applicant is entitled as of right to discovery relating to all documents bearing on the value of the net estate. His second proposition was that, in every case under the Act where the value of the net estate is not agreed, the court ordinarily ought to order such discovery as may enable the applicant to advance his or her own case as to the value of the net estate. Applications under the Inheritance (Family Provision) Act, 1938, are governed by R.S.C., Ord. 54F. Rule 9 says :

The court or a judge may require evidence in regard to any matter which the court or a judge considers to be relevant to the application and may direct any party to the proceedings or any person on whom notice of the proceedings has been served to attend on the hearing of the application and give evidence orally or to be cross-examined on any affidavit made by him.

The application which is now before me was not made under that rule. There is no other material rule under R.S.C., Ord. 54F, except r. 14, which says :

The ordinary practice and rules in the Chancery Division in so far as they are not inconsistent with the Act or this Order shall apply to proceedings under this Order.

Under R.S.C., Ord. 54F, r. 1, proceedings under the Inheritance (Family Provision) Act, 1938, have to be made in the Chancery Division by originating summons, and, therefore, it seems reasonably plain that the practice of the Chancery Division to which I ought to refer in order to apply r. 14 is the practice of the Chancery Division in relation to originating summonses.

As counsel for the plaintiffs did not support his first proposition with any authority, I reject it without hesitation. No plaintiff has a right to have discovery when the proceedings are by originating summons. On the other hand, I am satisfied that the court has jurisdiction to order discovery when the proceedings are by originating summons. However, that jurisdiction is very rarely exercised, and I am satisfied that I ought not to accede to the submission of counsel for the plaintiffs that the court ordinarily ought to order discovery in every case where the value of the net estate is not agreed. On an originating summons where there are no points of claim, the cases in which any such jurisdiction ought to be exercised must be, in my judgment, rare. If a plaintiff seeks to ask the court to order discovery on an originating summons, in which there are no points of claim, I am sure that he is not entitled to bring to the court all the evidence which has been filed on the originating summons and ask the court to peruse it, or so much thereof as counsel thinks fit to refer to, in order to decide whether there ought to be discovery or not. The proper course, in my judgment, in such an exceptional case is to make a special application, supported by an affidavit, showing the particular special circumstances in which the application is made. To some extent Mr. Burley's affidavit seems to be directed to that end, and, in so far as it is so directed, I am satisfied that no such special circumstances are disclosed therein as would justify me in making an order for discovery in this particular case.

Application refused. Plaintiffs to pay party and party costs of defendants other than those who did not ask for costs.

Solicitors : *Steavenson & Couldwell*, agents for *Gosschalk & Austin*, Hull (for the plaintiffs and certain beneficiaries) ; *Atkey & Son* (for the executors) ; *Treasury Solicitor* (for the Attorney-General).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

BOWNESS v. O'DWYER.

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley and Evershed, L.J.J.),
June 3, 4, 7, 8, 15, 1948.]

Rent Restriction—Furnished letting—Rent of furniture substantial portion of whole—Date when comparison to be made—Rent reduced by rent tribunal—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2) (i) (as amended by the Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 10 (1))—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (2) (b).

In 1946 the landlord let a dwelling-house, together with the use of certain furniture, on a weekly tenancy at a rent of 30s. a week, of which sum 3s. 6d. was agreed to be at all material times the sum attributable to the use of the furniture. It was also conceded that that sum was not a substantial portion of the contractual rent. In 1947 the rent was reduced by a rent tribunal set up under the Furnished Houses (Rent Control) Act, 1946, to 8s. a week, and, subsequently, in proceedings brought by the tenant under s. 9, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the county court judge held that the "normal profit" in respect of the premises (including the use of the furniture) was 13s. 6d. a week and the landlord was ordered to repay payments made in excess of that sum. The contractual tenancy having been determined by a valid notice to quit, the landlord claimed in an action for recovery of possession that, having regard to the order of the rent tribunal or, alternatively, to the decision of the county court judge, the weekly amount attributable to the use of the furniture at the date of service or the expiry of the notice was a substantial portion of the whole rent within the meaning of s. 10 of the Rent and Mortgage Interest Restrictions Act, 1923, and that, consequently, the premises were excluded from the general protection of the Acts by virtue of proviso (i) to s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, or of s. 3 (2) (b) of the Rent and Mortgage Interest Restrictions Act, 1939 :—

Held: the relevant date on which to compare the part of the rent attributable to the use of furniture with the whole rent was the time when the original contract of tenancy was made, and nothing subsequently done by the tenant disentitled him from asserting that the rent of the premises in question was 30s. a week at any material date.

Joswiak v. Hierowski, ([1948] 2 All E.R. 9), followed.

Stone (J. & F.) Lighting & Radio, Ltd. v. Levitt ([1946] 2 All E.R. 653), distinguished.

Per cur. : An order made under s. 9 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, does not have the effect of substituting some other figure for the figure of rent provided by the contract.

[AS TO PREMISES LET AT A RENT INCLUDING PAYMENT FOR USE OF FURNITURE, see HALSBURY, Halsham Edn., Vol. 20, p. 314, para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 560, 561, Nos. 7078-7084.]

Cases referred to :

- (1) *Lambert v. Keating and Another*, [1947] L.J.N. C.C.R. 149.
- (2) *Palser v. Grinling*, [1946] 2 All E.R. 287; [1946] K.B. 631; [1947] L.J.R. 97; 175 L.T. 204; 2nd Digest Supp.; *affd.* H.L. [1948] 1 All E.R. 1.
- (3) *Joswiak v. Hierowski*, [1948] 2 All E.R. 9.
- (4) *Property Holding Co., Ltd. v. Mischeff*, [1946] 2 All E.R. 294; [1946] K.B. 645; 115 L.J.K.B. 484; 175 L.T. 192; 2nd Digest Supp.; *affd.* H.L. [1948] 1 All E.R. 1.
- (5) *Stone (J. & F.) Lighting & Radio, Ltd. v. Levitt*, [1946] 2 All E.R. 653; [1947] A.C. 209; [1947] L.J.R. 65; 176 L.T. 1; 2nd Digest Supp.

APPEAL, by the landlord, from an order of His Honour JUDGE EARENGEY, K.C., made at Clerkenwell County Court, and dated Oct. 28, 1947, refusing possession of premises let to the tenant with the use of furniture, on the ground that the rent attributable to the use of the furniture did not form a substantial portion of the whole rent at the relevant date, namely, the date of the original contract of tenancy. The appeal was dismissed. The facts appear in the judgment of the court.

Heathcote-Williams and H. I. Spence for the landlord.
Samuel Magnus for the tenant.

Cur. adv. vult.

June 15. **EVERSHED, L.J.**, read the following judgment of the court. The plaintiff is the landlord of a dwelling consisting of a single room situate at 54, Highbury Grove, London. At some time early in 1946 the landlord let the premises, together with the use of certain furniture, to the tenant. The tenancy was weekly and the rent agreed on for the premises, including the use of the furniture, was 30s. per week. We have not been told the details of the furniture, but it has been agreed before us by both the landlord and the tenant that the proper weekly sum attributable to the use of the furniture is and was at all material times 3s. 6d., being the figure fixed by the county court judge in certain proceedings later mentioned. It has, accordingly, been conceded by the landlord that the portion of the contractual rent, namely, 30s. per week, which was attributable to the use of the furniture was not a "substantial portion of" this whole rent within the terms of s. 10 of the Rent and Mortgage Interest Restrictions Act, 1923, so that the premises were not, on these facts, excluded from the general protection of the Rent Acts by virtue of the first proviso to s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, or of s. 3 (2) (b) of the Rent and Mortgage Interest Restrictions Act, 1939.

In the beginning of the year 1947 the tenant applied to the Hackney, Islington and Stoke Newington Rent Tribunal, established under the Furnished Houses (Rent Control) Act, 1946, for a reduction of the rent pursuant to the Act. It is to be observed that by s. 2 (1) of the Act of 1946 its provisions appear to apply to any contract of letting in respect of premises in a district to which the Act applies (as it did in this case) where the rent payable includes payment for the use of furniture, notwithstanding that the portion of the whole rent attributable to the use of the furniture is not sufficiently substantial to exclude the premises from the general protection of the Rent Acts. The Hackney, Islington and Stoke Newington Rent Tribunal, on the tenant's application, exercised its powers under s. 2 (2) of the Act of 1946 by reducing "the rent payable under the contract" to 8s. per week. It has been assumed (though not proved) that the local authority duly entered in the register required to be kept by s. 3 of the Act of 1946 the particulars required by that section, including the reduced rent of the premises as fixed by the tribunal, and on that footing it became thereafter unlawful for the landlord to demand for the premises any rent in excess of 8s. per week. There is, however, no power in the Act of 1946 for the tribunal to order repayment of past payments of rent in excess of the figure fixed by it. In other words, the scheme of the Act appears to be that the tribunal has power to alter the existing contract for the future, but not retrospectively, by reducing the rent payable under the contract.

Not content with his performance before the Hackney, Islington and Stoke Newington Rent Tribunal, the tenant then proceeded to apply to the county court under s. 9 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended by sched. I to the Act of 1939). The material words of sub-s. 1 of this section, as amended, are as follows:—

Where any person lets . . . any dwelling-house to which this Act applies, or any part thereof, at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the lessee that the rent charged is yielding or will yield to the lessor a profit in excess of the normal profit as hereinafter defined, the court may order that the rent, so far as it exceeds such sum as would yield such normal profit shall be irrecoverable, and that the amount of any payment of rent in excess of such sum which may have been made in respect of any period after the passing of this Act shall be repaid to the lessee.

The landlord (who had previously served a notice to quit on the tenant) counterclaimed for possession. On this application (which is not the subject of the present appeal and in respect of which there was, in fact, no appeal) the county court judge, purporting to exercise the powers conferred by s. 9 of the Act of 1920 (as amended), held that "normal profit" in respect of the premises (including the use of the furniture) was 13s. 6d., and ordered, accordingly, that all sums previously paid by the tenant for rent in excess

of that sum (which amounted to £46 odd) should be paid by the landlord to the tenant. On the counterclaim the learned judge held that the landlord's notice to quit was invalid, so that the counterclaim failed on that ground, but he also went on to decide that, 3s. 6d. per week being the amount properly attributable to the use of the furniture, this figure must (in accordance with a previous decision of his own in *Lambert v. Keating* (1)) be related for the purposes of s. 10 of the Act of 1923, not to the reduced rent of 8s. per week fixed by the Hackney, Islington and Stoke Newington Rent Tribunal nor to the figure of normal profit (namely, 13s. 6d. per week) which he had himself determined, but to the original contractual rent of 30s. per week, and that, accordingly, the premises were not excluded from the general protection of the Rent Acts by virtue of proviso (1) to s. 12 (2) of the Act of 1920 or by s. 3 (2) (b) of the Act of 1939.

As I have said, there was no appeal from this decision and the landlord in fact repaid, or accounted to the tenant for, the full sum of £46 odd which the county court judge held to be repayable by her to the tenant. The landlord, however, served on the tenant a fresh notice to quit, admittedly, on this occasion, valid and effectual to determine the contractual tenancy, and then proceeded to bring a second action for possession before the same county court judge alleging that, in the circumstances above narrated, the premises were, at the date of the service or expiry of such notice, outside the protection of the Rent Acts. In these proceedings the landlord alleged that, having regard to the order of the Hackney, Islington and Stoke Newington Rent Tribunal reducing the rent payable under the original contract of tenancy to 8s. per week or (alternatively) to the decision of the county court judge fixing the "normal profit" of the premises at 13s. 6d. per week, the weekly amount attributable to the use of the furniture (namely, 3s. 6d. per week) was a substantial portion of the rent payable at the date of the service or expiry of the notice, and, accordingly, that the premises were outside the protection of the Rent Acts under the provisions of those Acts already quoted. The learned county court judge, however, in his judgment delivered on Oct. 28, 1947, following his previous decision in the earlier action between the same parties and following also the judgments of this court in *Palser v. Grinling* (2), adhered to his view that the weekly sum attributable to use of the furniture had to be related to the original contractual rent of 30s. per week, and that, accordingly, the premises were not shown to be excluded from the general protection of the Rent Acts. It is from this decision that the landlord has appealed to this court.

We have been informed that since the date of this judgment the landlord has, in fact, accepted rent from the tenant at the figure of 8s. per week, and counsel for the tenant has argued that this fact is, in any event, fatal to the appeal on the ground that, by so accepting rent, the landlord must either have affirmed the existence of a contractual tenancy between herself and the tenant, or be taken to have assented to the tenant's claim to be a statutory tenant of the premises—both alternatives being wholly inconsistent with the landlord's contention that the tenant is a trespasser in respect of the premises in question. On the view that we take it is unnecessary to express any opinion on this point.

A number of other interesting questions have been argued before us by counsel for the landlord, but on many of them it is also unnecessary to express any opinion. It is, in our judgment, sufficient to say that the learned county court judge was correct in the view that he took of the proper date at which it is necessary to relate the weekly amount attributable to the use of the furniture (that is, admittedly, 3s. 6d.) to the total rent payable. It is to be observed that the proviso to s. 12 (2) of the Act of 1920 (and equally s. 3 (2) (b) of the Act of 1939) refers to premises "*bona fide* let at a rent which includes payments in respect of . . . furniture." Now, the formula "*bona fide* let," etc., seems to us *prima facie* to import a test as to the state of mind (at least) of the landlord and the only time at which such an inquiry can usefully be made is the time when the contract of letting was made. Further, by s. 10 of the Act of 1923 it is necessary to take into account the value of the furniture *to the tenant* in estimating the sum fairly attributable to the use of the furniture. It is obvious that changes in the identity and the circumstances of the tenant

no less than the effect of the passage of time on the furniture itself may cause, from time to time, considerable fluctuations in the "value to the tenant" of the furniture, and it would, therefore, appear that, unless the ratio of the value of the furniture to the total amount of the rent is fixed once and for all at the time when the contract of tenancy is made, the application from time to time of the Act to any premises which have been let together with the use of furniture must be subject to great uncertainty.

But, in any case, our task on this question has been much simplified for us by the recent decision of this court in *Jozwiak v. Hierowski* (3). In that case the same point arose and in the course of delivering the judgment of the court ASQUITH, L.J., said ([1948] 2 All E.R. 9, 10):

We are further of opinion that the relevant date on which to compare the part of the rent attributable to the use of furniture with the whole rent is the time when the original contract of tenancy is made. In *Property Holding Co., Ltd. v. Mischeff* (4) in the Court of Appeal, where the rent was raised from £275 to £375 in the last 6 months of the tenancy, that court assumed (and on this point was not questioned by the House of Lords) that the original figure was the material one, though it happened that for the purpose of that case it did not matter which. To take any other date would create serious inconvenience and uncertainty.

Then the learned Lord Justice takes an example as to which, as has been pointed out, there may have been a slip in the language used. It is true that the general rule under the Rent Acts is that the status of any premises, for the purpose of the Acts, should be determined at the date when the landlord seeks to enforce his rights. In this connection counsel for the landlord strongly relied on the decision of the House of Lords in *Stone (J. & F.) Lighting & Radio, Ltd. v. Levitt* (5). In that case, so far as material, the question was at what date the application should be considered of s. 12 (7) of the Act of 1920 in order to determine whether or not the rent payable in respect of the premises in question was less than two-thirds of their rateable value and the House of Lords held the answer to be "at the time when the landlord sought to enforce his rights." This case does not appear in fact to have been cited in this court in *Jozwiak v. Hierowski* (3) though it is clear that the decision of the House of Lords was published some time before the argument in the former case was heard. In our judgment, however, the opinions in the *Stone (J. & F.) Lighting & Radio, Ltd.* case (5), which related to the provisions of s. 12 (7) of the Act of 1920, cannot, in any event, be regarded as authority on the proper construction of the very different language of s. 12 (2) of the same Act. Moreover, to say that the status of the premises must be determined at the time when the landlord seeks to enforce his rights is, in any event, not to answer the argument in favour of counsel for the landlord, for it does not follow that the status of the premises at that date, as regards the proportion of the value of the furniture to the total rent, is not to be determined by reference to the time when the tenancy was created. In any case, *Jozwiak v. Hierowski* (3) is an authority which binds this court and which we are bound to follow. We add that, even were this not so, it seems to us that the landlord would be faced with a serious difficulty under the terms of s. 12 (6) of the Act of 1920, but in the circumstances we express no view on the effect of this somewhat enigmatic provision.

Counsel for the landlord finally sought to escape from the effects of *Jozwiak v. Hierowski* (3) by arguing that, having regard to what occurred on the previous hearing before the county court judge, the tenant was disentitled to assert that the rent of the premises in question was in fact 30s. per week at any material date. To make good this point counsel contended either that the earlier judgment (assuming it to have been valid and effectual) substituted for all purposes the rent of 13s. 6d. per week for the original figure of 30s. per week, or that (assuming the judgment to have been pronounced without jurisdiction) the parties had so acted that the tenant was now estopped from asserting that the rent had at any time been 30s. per week. As regards the first part of the argument, it is, in our judgment, clear from the terms of s. 9 of the Act of 1920 (which we have quoted above) that an order made thereunder does not have the effect of substituting some other figure for the figure of rent provided by the contract. At most so much of the contractual rent as exceeds the "normal profit" is held to be irrecoverable. As regards the second branch of the argument, it is unnecessary to express a final opinion on the question

whether the county court judge had, in fact, jurisdiction to make the order which he did under this section. It was forcibly argued that on the general scheme of the Acts s. 9 was only intended to apply to premises let at a rent which includes payment in respect of the use of furniture where the effect of such a letting is (by virtue of the proviso to s. 12 (2) of the Act of 1920, as amended by s. 10 of the Act of 1923) to exclude them from the general protection of the Acts, for, unless this is so, it is difficult to see how the provisions of s. 9 of the Act of 1920 as regards normal profit can be made to fit into the provisions of the same Act as to standard rent. We express no final opinion on this point, but, in any case, once there had been a registration (as we assume there has been in the present case) pursuant to the Furnished Houses (Rent Control) Act, 1946, in respect of any premises the rent payable in respect whereof has been reduced under that Act, s. 7 of that Act excludes the application of s. 9 of the Act of 1920 as regards the rent of those premises in respect of any period after the registration. We may add that the latter part of s. 7 of the 1946 Act lends no little support (as argued by counsel for the tenant) to the view that an order made under that Act reducing the rent payable under a contract of letting cannot have the effect of taking outside the general protection of the Rent Acts premises which prior to the making of the order had been within such protection. The language referred to in s. 7 is this: "but save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939."

Assuming however (without deciding) that the previous order of the county court judge was made without jurisdiction, it is, nevertheless, impossible, in our judgment, to say that what the parties did pursuant to the judgment gives rise to any estoppel against the tenant. By acting in accordance with the judge's directions it is possible that (following in this respect *Stone (J. & F.) Lighting & Radio, Ltd. v. Levitt* (5) already referred to) landlord and tenant might have been held to have made a new contract on the terms implicit in those directions, but in the present case such a conclusion is negatived by the fact that the rent paid and received after the judgment was not the sum which the county court judge specified as the normal profit but the figure of 8s. per week which the Hackney, Islington and Stoke Newington Rent Tribunal had previously fixed. In any case we cannot see in anything which the landlord or the tenant did following the judgment any of those elements necessary to establish an estoppel—any representation made by the tenant to the landlord and acted upon by the landlord which would disentitle the tenant from proving as a fact the truth that the rent fixed originally by the contract was the sum of 30s. per week. We may add with regard to our general conclusion that a contrary view would mean that the tenant of a furnished dwelling within the Act of 1946 is being invited to apply for a reduction in his rent under that Act and the tribunal is being empowered to grant it without either of them being warned by the legislature that the result may be the destruction of the tenant's security of tenure under the Rent Acts. In our judgment, therefore, the learned county court judge was right and this appeal fails.

Appeal dismissed with costs.

Solicitors: *Markham Thorp & Co.* (for the landlord); *J. S. I. Rabin* (for the tenant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MEDITERRANEAN AND EASTERN EXPORT CO., LTD. v.
FORTRESS FABRICS (MANCHESTER), LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), June 9, 11, 1948.]

Arbitration—Award—Validity—Damages—Mercantile contract—Expert evidence—Duty to hear—Arbitrator with special knowledge of subject-matter.

Buyers of textile goods refused to accept them on the ground that they were not up to sample, but were unmerchantable and unfit for the purpose for which they were supplied. The dispute was referred to arbitration in accordance with the rules of a chamber of commerce which provided for the determination of such disputes "by commercial men of experience and special knowledge of the subject-matter." The parties submitted statements to the arbitrator in accordance with the rules, but neither of them called expert evidence or had professional representation at the hearing. The sellers claimed that there had been a breach of contract and asked for an award of £2,455 2s. 6d., the price of the goods, plus interest. The arbitrator found for the sellers and, as the property in the goods had not passed to the buyers, awarded £796 13s. 11d. damages.

HELD: (i) the arbitrator, having had all disputes referred to him and having found for the seller, had jurisdiction to award the damages properly recoverable notwithstanding the wrong basis of the sellers' claim.

(ii) the arbitrator, having been appointed because of his knowledge and experience of the trade, was entitled to fix the damages without hearing expert evidence thereon.

Dicta of LORD ESHER, M.R., and LOPES, L.J., in Wright v. Howson (1888) (4 T.L.R. 386, 387), LORD CRANWORTH, L.C., in Eads v. Williams (1854) (4 De G. M. & G. 674, 687), and of BRANSON, J., in Jordsen & Co. v. Stora etc. Aktiebolag (1931) (41 Lloyd's L.R. 201, 203), applied.

Owen v. Nicholl, ([1948] 1 All E.R. 707), distinguished.

[AS TO DUTY TO HEAR WITNESSES AND VALIDITY OF AWARD, see HALSBURY, Hailsham Edn., Vol. 1, pp. 653, 663, paras. 1105, 1118; and FOR CASES, see DIGEST, Vol. 2, pp. 441-445, 471-513, Nos. 991-937, 1155-1519.]

Cases referred to:

- (1) *Wright v. Howson*, (1888), 4 T.L.R. 386, C.A.; 2 Digest 455, 1024.
- (2) *Eads v. Williams*, (1854), 4 De G.M. & G. 674; 3 Eq. Rep. 244; 24 L.J.Ch. 531; 24 L.T.O.S. 162; 2 Digest 442, 920.
- (3) *Jordsen & Co. v. Stora, etc., Aktiebolag*, (1931), 41 Lloyd L.R. 201.
- (4) *Owen v. Nicholl*, [1948] 1 All E.R. 707.

MOTION to set aside award.

The buyers rejected a quantity of textile goods which they had bought from the sellers on the ground that they were not up to sample, but were unmerchantable and unfit for their intended purpose. The dispute was referred to arbitration, and the arbitrator found that there had been a breach of contract on the part of the buyers and awarded the sellers £796 13s. 11d. damages and costs. The buyers applied to have the award set aside on the ground that the sellers had claimed only the price of the goods and that no expert evidence had been called on either side on which the arbitrator could arrive at the amount of the damages. The court upheld the award.

Heathcote-Williams and Glyn for the buyers.

C. P. Harvey for the sellers.

Cur. adv. vult.

June 11. LORD GODDARD, C.J., read the following judgment. By a contract dated Oct. 16, 1946, Fortress Fabrics (Manchester), Ltd., agreed to sell to the Mediterranean and Eastern Export Co., Ltd., a quantity of textile goods which subsequently the buyers refused to accept, alleging that the goods were not up to sample, but were unmerchantable and unfit for the purpose for which they were supplied, namely, export to South Africa. It appears that the sellers had a quota entitling them to export goods to that country, part of which they allocated to the buyers, which would enable them to sell those goods in that market to the extent of the quota transferred to them. In consequence of the refusal to accept, the parties agreed to arbitration in accordance with the rules of the Manchester Chamber of Commerce, and, by a submission

dated Aug. 16, 1947, it was agreed that the dispute should be referred to arbitration by that Chamber whose decision should be final and binding on both parties, and, in accordance with the rules of the Chamber, Mr. G. W. Armitage was appointed sole arbitrator under the rules. Rule 1 states :

The object of the tribunal of arbitration shall be the determination and settlement by commercial men of experience and special knowledge of the subject-matter in dispute or difference of any dispute or difference relating to trade, manufactures and commerce (including customs of trade) by whomsoever submitted.

It is obvious, therefore, that parties who submit their disputes to the Chamber's tribunal intend and expect that they will have the benefit of arbitration before a person well acquainted with the class of business in which they are engaged, because he is selected for his knowledge and experience of the trade.

The parties submitted statements to the arbitrator in accordance with the rules. The sellers' document, which was prepared without professional assistance, set out the contract, such letters as were admitted to be material, and certain facts to which I need not refer, and asked for an award of £2,455 2s. 6d., the price of the goods plus interest at 5 per cent. per annum. The buyers' statement set out their case and contentions, alleging that they were justified in rejecting the goods. In claiming the price of the goods the sellers, no doubt, fell into an error, often made in such circumstances, of asking for the price on the footing that the property had passed, whereas, in fact, as it was a sale of future goods, the property had not passed, and what they were entitled to was not the price, but damages for non-acceptance. The arbitrator held a meeting at which both parties attended without professional representation, nor did they or either of them seek to call expert evidence. The reason for this is obvious. They had the advantage of an arbitrator who himself was an expert and he would be in a position as good as or better than expert witnesses to come to a decision on his own knowledge, which was the reason why he had been appointed. The arbitrator decided the questions submitted to him in favour of the sellers and, by his award, dated Feb. 26, 1948, found (i) that the goods delivered by the sellers were of merchantable quality and in accordance with the contract, and (ii) that, in refusing to accept delivery of the same, the buyers had committed a breach of contract by reason of which the sellers had suffered damage to the extent of £796 13s. 11d., which sum he awarded to the sellers together with the costs of the arbitration.

The buyers now seek to set aside the award, and the first point which was taken by their counsel was that because the sellers had claimed the value, by which they obviously meant the price of the goods, the arbitrator had no jurisdiction to award damages. In my opinion, that contention clearly fails. The arbitrator was obviously right in forming the opinion that no property had passed, and, therefore, the price, as such, was not recoverable, but, as all disputes had been referred to him, and, as he had awarded in favour of the sellers on the merits and found a breach of contract on the part of the buyers, it was, in my opinion, clearly within his jurisdiction, while not awarding the price, to award damages, otherwise the matter would be left undecided as to what his finding entitled the sellers to recover. Because the sellers put forward a claim on a wrong basis it seems to me impossible to say that the arbitrator is not entitled to award compensation on the true basis, *i.e.*, damages instead of price.

The more serious question that was argued was that neither side had tendered evidence with regard to damage and, therefore, the arbitrator had no material before him on which he could fix the amount which the sellers were entitled to receive. This would be a formidable, and, indeed, fatal, objection in some arbitrations. If, for instance, a lawyer was called on to act as arbitrator on a commercial contract he would not be entitled, unless the terms of the submission clearly gave him power so to do, to come to a conclusion as to the amount of damages that should be paid without having evidence before him as to the rise or fall of the market, as the case may be, or as to other facts enabling him to apply the correct measure of damage, but, in my opinion, the case is different where the parties select an arbitrator, or agree to arbitrate under the rules of a chamber of commerce under which the arbitrator is appointed for them, and the arbitrator is chosen or appointed because of his knowledge and experience of the trade. There can be no doubt that with regard to questions of quality and matters of

that description an arbitrator of this character can always act on his own knowledge. As LORD ESHER, M.R., said in *Wright v. Howson* (1), where it was suggested that the umpire ought to have received evidence from experts (4 T.L.R. 386, 387):

What would this experienced manufacturer care for the opinion of the weaver? He was selected and appointed on account of his own superior experience.

LOPES, L.J., said (*ibid.*):

Such a man is selected for the very purpose of deciding according to his own experience and examination.

It is well known in the experience of the courts that many trades have their own tribunals of arbitration—the Corn Trade, the Produce Brokers' Association, the Oil and Fat Trades Association are instances—and no one has doubted—certainly not in modern times—that it is open to an arbitrator skilled in the trade to use his own knowledge and experience on many matters, such as quality, without having witnesses called before him. One of the reasons why commercial men like to go to arbitration before arbitrators of this description is because it saves the expense of calling witnesses and having the conflicting views of experts thrashed out and decided on. The parties are content and intend to accept the judgment of a man in their own trade on whose judgment they know they can rely.

This, indeed, I think, has long been the law. An early illustration is *Eads v. Williams* (2). The arbitrators were there appointed to settle the amount to be paid as the rent of a coal mine and LORD CRANWORTH, L.C., said (22 L.T.O.S. 162, 163):

I do not agree in the suggestion that it was incumbent upon those parties to examine witnesses; I do not think that is the meaning when a matter is referred to a surveyor, and people of skill to value, and settle what the value of the property to be bought or let is . . . they are entrusted, from their experience and from their observation, to form a judgment which the parties referring to them agree shall be satisfactory; therefore I do not think that there was anything of importance in their not examining witnesses, provided *bona fide* they meant to say, "We know sufficiently of the subject to decide properly without examining witnesses."

There are other decisions to a like effect and I would only mention *Jordeson & Co. v. Stora, etc., Aktiebolag* (3) to which counsel for the sellers called my attention. BRANSON, J., in giving judgment, said (41 Lloyd L.R. 201, 203):

Now, I think that the fact that this umpire was an expert in the timber trade and was appointed because he was such an expert must not be lost sight of. I think the parties must be taken to have assented to his using the knowledge which they chose him for possessing; I do not mean to say knowledge of special facts relating to a special or particular case, but that general knowledge of the timber trade which a man in his position would be bound to acquire.

I can see no reason why this principle should not be applied to a question of damages just as much as to a question of quality. Counsel for the buyers relied on *Owen v. Nicholl* (4) which seems to me to fall within the other class of case to which I have referred of a lawyer acting as arbitrator. That was a case in which an action had been referred under the County Courts Act, 1934, and the registrar of the county court had been appointed the arbitrator. It was an arbitration to decide whether or not the parties were in partnership and the registrar had used his own knowledge of the contents of a bankruptcy file to which neither of the parties referred. The Court of Appeal held that, as he had used knowledge which he had acquired in his capacity as registrar of the Bankruptcy Court and not in his capacity as referee, the award could not stand. In my opinion, that case has no relevance or application to an arbitration where the parties have chosen the arbitrator because of his special knowledge of their own trade. A man in the trade who is selected for his experience would be likely to know, and, indeed, would be expected to know, the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case, according to the affidavit of the sellers, they did take the point before the arbitrator that the South African market has "slumped." Whether the buyers contested that statement does not appear, but an experienced arbitrator would know, or have the means of knowing, whether that was so or not and to what extent, and I see no reason why

in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken, I think, that, in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the courts looked with jealousy on the jurisdiction of arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the courts should be slow indeed to set aside his award.

In my opinion, the arbitrator did act in this case within the submission, and I think also he has acted as the parties intended he should act and I see no reason for interfering with his award. This motion fails and must be dismissed with costs.

Motion dismissed with costs.

Solicitors: *D. H. Geller & Co.* (for the applicants); *Kenneth Brown, Baker, Baker*, agents for *Walker, Dean & Marshall*, Manchester (for the respondents).
Reported by F. A. AMIES, Esq., Barrister-at-Law.

Applied. WIMBUSH v. CIBULIA. [1949]
 2 All E.R. 432.

Followed. WIMBUSH v.
 CIBULIA.
 [1949] 2 K. B. 564

CURL v. ANGELO AND ANOTHER.

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley and Evershed, L.JJ.),
 June 10, 11, 1948.]

Rent Restriction—"Separate dwelling"—*Rooms let for extra bedroom accommodation for adjoining hotel*—*Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2).*

The landlord claimed possession of two rooms let to the tenant for use as extra bedroom accommodation for the hotel which the tenant conducted on adjoining premises. The rooms were usually occupied by guests, but also on occasion by members of the tenant's family or staff.

HELD: the rooms were not let as a "separate dwelling" within the meaning of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the landlord was entitled to an order for possession.

Vickery v. Martin ([1944] 2 All E.R. 167), *distinguished.*

Richmond (Duke) v. Dewar (1921) (38 T.L.R. 151), *criticised.*

[AS TO SEPARATE DWELLING, see HALSBURY, Hailsham Edn., Vol. 20, p. 312, para. 369; and FOR CASES, see DIGEST, Vol. 31, p. 557, Nos. 7044-7046.]

Cases referred to:

- (1) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; Digest Supp.
- (2) *Vickery v. Martin*, [1944] 2 All E.R. 167; [1944] K.B. 679; 113 L.J.K.B. 552; 171 L.T. 89; 2nd Digest Supp.
- (3) *Richmond (Duke) v. Dewar & Cadogan Hotel Co., Ltd.*, (1921), 38 T.L.R. 151; 31 Digest 558, 7058.
- (4) *Wright v. Howell*, (1947), 204 L.T. Jo. 299.

APPEAL, by the landlord, from an order of His Honour JUDGE ALLSEBROOK, made at Kendal County Court, and dated Nov. 18, 1947, refusing possession of two rooms in his house let by the landlord to one of the defendants for use as extra bedroom accommodation for the tenants' adjoining hotel. The appeal was allowed. The facts appear in the judgment of LORD GREENE, M.R.

Heathcote-Williams for the landlord.

Shorrocks for the tenants.

LORD GREENE, M.R.: The question raised by this appeal is one which must be decided with reference to the particular facts as found by the county court judge, remembering always that a variation in such facts in a different case might lead to a different conclusion of law.

The plaintiff (the landlord) is the owner of a house two rooms of which were let to a neighbour, Mrs. Angelo, by his father on his behalf while he was absent on war service. He now seeks to recover possession of those two rooms. Both Mr. and Mrs. Angelo are defendants, but I understand that the actual

lessee was Mrs. Angelo, who was the proprietress of a hotel next door called Webbs' Commercial Hotel. The county court judge held that Mrs. Angelo was entitled to rely on the Rent Restrictions Acts, and dismissed the claim.

It is important to go straight to the facts as found by the judge without any comment at the moment. He says this :

The [landlord's] father as his agent lawfully let to the [tenants] two upstairs rooms for extra accommodation as bedrooms for the [tenants'] Webbs' Commercial Hotel . . . A partition had been erected shutting off the premises let from the [landlord's] premises . . . The rooms were let and taken for the purpose of increasing the [tenants'] bedroom accommodation in their business of proprietors of the unlicensed hotel known as Webbs' Commercial Hotel, and the rooms were used for that purpose. At first one room was used for a guest for two or three years. The other room was at first used as a store room. Some six months after the letting this latter room was used as a bedroom. Later on the male [tenant] used it as a bedroom, and both rooms were used as bedrooms for guests, or the [tenants], or members of their family or staff, up till now. All these uses were within the terms of the letting and the [tenants] had the right to use the two rooms for any or all of the purposes to which they put them.

The substantial question in the case may be thus formulated. On those facts are the two rooms in question within the provisions of the Act which lay down the class of tenement to which the Act is to apply ? The relevant provision is s. 12 (2) of the Act of 1920, which provides : " This Act shall apply to a house or a part of a house let as a separate dwelling . . . " Can it be said that the two rooms in question were let as a separate dwelling ? As I have said, whether or not a particular case falls within those words must depend on the facts of that case, and it may be that some comparatively small difference in fact may tip the scales one way or the other. The question we have to decide is as to the applicability of that language to the facts as found in this case. The first thing that may be said is that a certain amount of common sense has to be brought to the consideration of these Acts. The courts have had to consider what the overriding purpose and intention of the Acts are, and I cannot put it in a more clear or authoritative way than by using the words of SCRUTTON, L.J., in *Skinner v. Geary* (1) ([1931] 2 K.B. 546, 560), that the object was to protect the person residing in a dwelling-house from being turned out of his home. That is a common-sense conception, but one that cannot always be easily applied to the facts of any individual case.

On the facts as found by the judge can it be said, as a matter of fair and reasonable construction of simple words in the English language, that these premises were the " home " of anybody ? They were a mere annexe or overflow of the hotel. They were taken to enable the accommodation of the hotel to be extended, by way either of finding additional rooms for guests or of accommodating the proprietress herself and her husband or their servants. The people who used them were normally resident in the hotel in the sense that the bulk of their living activities were concerned with the hotel. To comply with s. 12 (2) of the Act there must be a letting " as a separate dwelling " ; and the first question that suggests itself to my mind is : Were these rooms let as a dwelling ? That prompts the question at once : Dwelling for whom, and what is meant by a " dwelling " ? It was argued by counsel for the tenants that, provided the particular activity, if it can be so called, of sleeping is conducted on premises, that is in itself sufficient to make those premises properly to be described as a " dwelling." Curiously enough, he confined his argument to the one case of sleeping. Other activities which are normally carried on in a dwelling, such as cooking and eating, he said would not be enough, but I do not know why. As I followed his argument, if these two rooms had been let off and used, not for the purpose of bedrooms, but for the purpose of kitchens or sitting rooms for the hotel, he would not have argued that they were dwellings. There is something (according to his argument) of particular value and importance in sleeping, and when a room is used as a bedroom it immediately becomes a dwelling. It must not be thought for a moment that I am throwing any doubt on the proposition that where there is a letting to a man of one room which is the only place where he moves and has his being, that circumstance will prevent the room being a " dwelling " within the meaning of the Act, but here one has the activities connected with the dwelling of all these people divided between two tenements. Their main

activities of living are conducted in the hotel. They go out to sleep in these rooms—sometimes the guests, sometimes the servants, and so on. Where is the “dwelling”? It seems to me clear that this annexe or accretion to the accommodation of the hotel cannot be regarded as a “dwelling,” much less as a “separate dwelling.”

The argument would, it seems to me, lead to the extraordinary conclusion that, if a person took three different rooms from three different landlords in three different buildings, perhaps in three different streets, and slept in one and cooked in another and spent the day sitting and reading or having his meals in the third one, there would be three separate dwellings. That is what the argument must lead to, unless the theory that sleeping is the decisive test is accepted. In truth and in fact, the dwelling of the tenant who is to be protected under the Act would, in the case assumed, be distributed over those three tenements and one could not predicate of any one of them that it was let as a dwelling or occupied as a dwelling. That is a totally different case, of course, from the case where the only premises demised consist of one room and that is the only place where the tenant moves and has his being.

Looking at it broadly and as a pure matter of common-sense, again it seems to me impossible to say that rooms let in the circumstances of this case can be regarded as separate dwellings. The learned county court judge took the view that they were protected by the Act, and I find some little difficulty in following his reasoning. He says at the end of his judgment :

As I find that the two rooms in question are a dwelling-house within the meaning of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, it appears to me, upon consideration, that the present case is governed by the decision of the Court of Appeal in *Vickery v. Martin* (2).

Section 3 (3) of the Act of 1939 deals with a case where part of the premises demised is used for business purposes, and it provides that in such a case that is not to prevent the premises being a dwelling-house. With all respect to the learned judge, I do not see the applicability of that sub-section to the present facts. We are not talking here of two rooms, part of which are used for one purpose and part of which are used for another. We are dealing with two rooms which are at various times occupied by the proprietor of the hotel and at various times by his guests. The sub-section relates to cases where physically part of the premises is used for business purposes and part for dwelling purposes. The facts in *Vickery v. Martin* (2) were quite different from the facts in this case. There what was demised was a dwelling-house, but the tenant, who was carrying on a boarding-house business, used part of it to accommodate her guests and part of it for her own purposes as a dwelling-house, and the question was whether the premises were taken out of the category of a dwelling-house because, although she normally occupied certain rooms she moved on occasion from room to room on the premises in order to provide proper accommodation for her guests. It was argued that that prevented it being said that any part of it was being used by her as a dwelling-house, but this court took the view that such temporary and periodical migration in the house did not prevent the house being in part used as a dwelling-house—in other words, that in those circumstances it was not necessary to pin the tenant down to a specific room in which she kept throughout. It seems to me that that case has nothing to do with the present.

Certain other authorities were referred to, and the one I must mention first is a decision of the Divisional Court in *Duke of Richmond v. Dewar* (3). The facts in that case are not very fully explained, but the point appears to have been whether or not, on the facts, what, apparently, nobody was disputing was a dwelling ought to be regarded as having ceased to be a dwelling because it was also used for business purposes. I do not find that the court was directing its mind to the problem with which we have to deal here. The question was whether, having regard to the expiration of the section of the Act of 1920 which had protected business premises, the premises ought to be considered as business premises not protected by the Act. Two rooms and a studio had been taken by the Cadogan Hotel Co. to be used as sleeping apartments for their staff, and the court, on the facts, treated those rooms as not having been put out of the category of “dwelling-house” because they were used for business purposes. The passage which was particularly relied

on was a sentence from the judgment of SCRUTTON, L.J., in which he is reported as having said (38 T.L.R. 151, 152) that "he thought that the use of a house for sleeping apartments was one of the main characteristics of a dwelling-house." Relying on that, counsel for the tenants says: "Here are rooms that are used as sleeping apartments. A sleeping apartment is one of the main characteristics of a dwelling-house. *Ergo*, these rooms are dwelling-houses." If SCRUTTON, L.J.'s words are to be construed in the sense that a room which is slept in is always a dwelling-house, I would dissent from that proposition. In certain cases obviously that must be so, but in the present case the rooms are merely used as overflows from the normal occupation of an adjoining hotel. To say on these facts that the mere use of a room for sleeping constitutes it a dwelling-house is, in my opinion, to carry the matter much too far. I do not regard that authority as in any way concluding the present question, and I may also say that it has generally been thought to be inconsistent with the views expressed in later cases as to the true scope and operation of the Act. It has been criticised on the ground that the tenants there were a limited company who could not themselves occupy and the position of limited companies under tenancy agreements has been considered in many subsequent cases, but I think it is open to criticism on another ground. It would appear to involve giving a protection extending beyond what is now accepted as the real fundamental object of the Act which I have already quoted—protecting a tenant from being turned out of his home. How can it be said that the owner of a hotel who takes two rooms in a neighbouring house and puts his guests or his servants or himself in them, as occasion makes it convenient, can be said to be turned out of his home when he is forced to give up those two rooms and has still his hotel? The rooms are not his "home" at all, I should have thought. Therefore, quite apart from the question of the position of a company, the observations in that case, if they bear the meaning that counsel here would attribute to them, cannot really be regarded nowadays as authoritative—at any rate for the purpose of deciding such a question as we have here.

On the other hand, similar questions to the one that we have here have been considered: *Wright v. Howell* (4), a decision of this court, related to an unfurnished room in a flat of a landlord. The tenant had living in the same building his parents-in-law who had a flat on the upper floor. The tenant took the room in question as a bedroom. Later, he installed an electric cooker, having previously taken his meals with his wife in her parents' flat. He and his wife used the flat for all normal purposes and when she had a baby he and his wife went back and again slept in his parents-in-law's flat. The landlord claimed possession, and this court affirmed the county court judge, who made an order for possession. The finding of the court is thus reported (204 L.T. Jo. 299, 300):

HELD: that, as the room, when let to the tenant, was devoid of cooking arrangements and water supply, and as the word "dwelling" on its true construction included all the major activities of life, particularly sleeping, cooking and feeding, and as one of those activities, sleeping, was at all relevant times no longer being carried on there, the room was not a dwelling and the tenancy was not protected.

It must not, I think, be taken that the words there used are to be applied literally and verbally to every set of facts where only one of those major activities is carried on. I have already said, and I wish to make it clear (and I do not think the court in *Wright v. Howell* (4) intended to assert the contrary) that it is possible to have one room let and occupied as a dwelling. Whether or not the letting satisfies that description must depend on the facts of each case. What I am saying is that on the facts of *Wright v. Howell* (4) and on the facts of the present case one cannot attribute the character of a dwelling to a room where the tenant carries on one only of his many home activities, while he carries on others in a different tenement altogether. On the facts of this case, the county court judge ought, in my opinion, to have decided in favour of the landlord, and, accordingly, there must be an order for possession.

WROTTESELEY, L.J.: I agree with all that has fallen from the MASTER OF THE ROLLS, and with his reasons. Since the county court judge purported to base his decision on *Vickery v. Martin* (2) I would add that that case could

only apply to the present case had the premises let been, not, as in this case, two rooms which were let as an adjunct to the hotel next door, but the hotel next door together with these two rooms. Those are not the facts in this case, and, therefore, *Vickery v. Martin* (2) is of no assistance whatever.

EVERSHED, L.J.: I also agree.

Appeal allowed with costs in both courts on Scale "A."

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. Rhodes*, Kendal (for the plaintiff); *Gibson & Weldon*, agents for *Leslie G. Powell*, Kendal (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re STEELE'S WILL TRUSTS, NATIONAL PROVINCIAL BANK, LTD. v. STEELE.

[CHANCERY DIVISION (Wynn-Parry, J.), June 10, 1948.]

Will—Construction—Heir-loom—Rule in Shelley's case—"To be held by him and by his eldest son on his decease and to descend to the eldest son of such eldest son and so on to the eldest son of his descendants and I request my son to do all in his power by his will or otherwise to give effect to this my wish."

By her will, dated Dec. 14, 1903, a testatrix, who died on Nov. 19, 1929, gave her diamond necklace to her son C. "to go and be held as an heir-loom by him and by his eldest son on his decease and to go and descend to the eldest son of such eldest son and so to the eldest son of his descendants as far as the rules of law and equity will permit (and I request my said son to do all in his power by his will or otherwise to give effect to this my wish)." On Apr. 28, 1945, C. died, having provided by his will: "I give my diamond necklace to my trustees upon trust for my son R. during his life and after his death for his eldest son absolutely." On the date of this summons R. had a son D. living, who himself had a son born on July 24, 1947. It was argued that *Shelley v. Shelley* (1868) (L.R. 6 Eq. 540) was not now authoritative and that the necklace had been vested in C. absolutely:—

HELD: notwithstanding the trend of modern decisions towards holding precatory trusts non-binding, there was no reason to treat *Shelley v. Shelley* as wrongly decided; the rule in that case should be applied in the construction of the testatrix's will, and, therefore, the necklace should have been held on trust for C. for life, and thereafter for R. for life, and thereafter for D. for life, and after the death of the survivor of them on trust for the eldest son or grandson of D. and otherwise in the manner decided in *Shelley v. Shelley* including the ultimate trust (in default of any male issue of D. taking an absolutely vested interest) in favour of C. absolutely.

Shelley v. Shelley (1868) (L.R. 6 Eq. 540) rule applied.

[AS TO EXECUTORY TRUSTS, see HALSBURY, Hailsham Edn., Vol. 33, pp. 107-109, paras. 184-189; and FOR CASES, see DIGEST, Vol. 43, pp. 608-612, Nos. 530-557.]

Cases referred to:

- (1) *Shelley v. Shelley*, (1868), L.R. 6 Eq. 540; 37 L.J.Ch. 357; 16 W.R. 1036; 44 Digest 950, 8034.
- (2) *Re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. 370; 64 L.J.Ch. 799; 43 W.R. 577; 39 Sol. Jo. 524; 12 R. 355; *sub nom. Re Hamilton, Re Ashtown, Trench v. Hamilton*, 72 L.T. 748, C.A.; 43 Digest 588, 376.
- (3) *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12; 66 L.J.Ch. 485; 76 L.T. 600; 45 W.R. 519; 41 Sol. Jo. 452, C.A.; 43 Digest 552, 17.
- (4) *Re Hill, Hill v. Hill*, [1902] 1 Ch. 537; 71 L.J.Ch. 222; 86 L.T. 146; *affd.*, [1902] 1 Ch. 807, C.A.; 44 Digest 951, 8037.
- (5) *Re Adams & Kensington Vestry*, (1884), 27 Ch.D. 394; 54 L.J.Ch. 87; 51 L.T. 382; 32 W.R. 883, C.A.; 43 Digest 581, 296.

ADJOURNED SUMMONS to determine the construction of a will in which the gift of a necklace was couched in similar terms to those construed in *Shelley v. Shelley* (1868) (L.R. 6 Eq. 540). It was submitted that *Shelley v. Shelley* was no longer binding because the precatory trust, in keeping with modern tendencies, should be disregarded, with the result that there was an

absolute gift to the first named beneficiary. WYNN-PARRY, J., held that the rule in *Shelley v. Shelley* ought to be applied, and made an order following, *mutatis mutandis*, the minutes in that case. The facts appear in the judgment.

Rink for the plaintiffs (the executor of the will of the son of the testatrix, and the grandson, and great-grandson of the testatrix).

P. W. E. Taylor for the first defendant (the surviving executor of the will of the testatrix).

E. J. T. G. Bagshawe for the second defendant (the great-great-grandson of the testatrix).

WYNN-PARRY, J. : By her will, dated Dec. 14, 1903, the testatrix, Mrs. Adelaide Sherrif Steele, provided, by cl. 2 :

I give my diamond necklace to my son Charles Steele to go and be held as an heirloom by him and by his eldest son on his decease and to go and descend to the eldest son of such eldest son and so to the eldest son of his descendants as far as the rules of law and equity will permit (and I request my said son to do all in his power by his will or otherwise to give effect to this my wish).

The son, Charles Steele, died on Apr. 28, 1945, having made a will dated Dec. 22, 1930, in which, by cl. 3, he said :

I give my diamond necklace to my trustees upon trust for my son Charles Ronald Steele during his life and after his death for his eldest son absolutely.

Charles Ronald Steele, mentioned in that clause, is the second plaintiff to this summons and his eldest son is the third plaintiff, David Steele. David Steele has a son born on July 24, 1947, after the death of the testatrix.

The question which arises is whether, on the true construction of the passage in cl. 2 of the will of the testatrix which I have read, the necklace became vested in the testatrix's son, Charles Steele, absolutely, or, whether it was held on trust for Charles Steele for his life and after his death for his son, Charles Ronald Steele, for his life, and after his death for David Steele for his life, and after the death of the survivor on trust for the eldest son or grandson of the third plaintiff, David Steele, and otherwise in the manner decided in *Shelley v. Shelley* (1), including the ultimate trust (in default of any male issue of David Steele who takes an absolutely vested interest) in favour of Charles Steele absolutely. In *Shelley v. Shelley* (1) the testatrix by her will made the following bequest (L.R. 6 Eq. 540) :

I give my best long string of pearl earrings, bracelets with diamond snaps, and my pearl necklace and earrings, and all my rings with pearls, diamonds, and emeralds mixed, and all the rest of my pearls and emeralds [and other jewels] to my nephew, John Shelley, to go and be held as heir-looms by him, and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on, to the eldest son of his descendants, as far as the rules of law or equity will permit. And I request my said nephew to do all in his power, by his will or otherwise, to give effect to this my wish as to these things so directed to go as heir-looms as aforesaid.

With the exception of the latter words "as to these things so directed to go as heir-looms as aforesaid" the relevant provision in the will which I have to construe in terms *mutatis mutandis* exactly corresponds with those in the will which fell to be construed in *Shelley v. Shelley* (1). In that case it was held that on the true construction of that provision a valid executory trust was created for John Shelley for life with remainder to his eldest son for his life and on the death of that eldest son in trust for his eldest son to be a vested interest in him when he should attain 21, but if he should die in his father's lifetime or after his death without having attained 21, leaving an eldest son born before his father's death, in trust for such last-mentioned eldest son to be a vested interest when he should attain 21, and, subject to these limitations, the jewels vested in John Shelley absolutely and passed by his will. The basis of the decision was this. SIR W. PAGE WOOD, V.-C., held that the words of the gift to John Shelley "to go and be held as heir-looms by him and by his eldest son on his decease," if they stood alone, would have been a gift to the first taker for life and on his death would have gone to the next taker absolutely. He continues (*ibid.*, 543) :

But these are not the only words, as the testatrix goes on to say : "And to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants as far as the rules of law or equity will permit," and further, there is a request

to the nephew "to do all in his power, by his will or otherwise, to give effect to this my will as to these things so directed to go as heir-looms as aforesaid."

The VICE-CHANCELLOR held that the addition of those words prevented the first taker from receiving the gift absolutely. The order in *Shelley v. Shelley* (1) was (*ibid.*, 549):

... that a good executory trust was created by the will and codicil of the testatrix, Helen Parker, of the jewels and jewellery thereby respectively bequeathed as heir-looms, and that such trust ought to have been executed by the late John Shelley, the nephew of the said testatrix, and that defendant Elizabeth Shelley, the widow and executrix of the said John Shelley, is now bound to execute such trust . . . that under such trust the said John Shelley was entitled to the enjoyment of such jewels and jewellery during his life, and that plaintiff Edward Shelley, the eldest son of the said John Shelley, is entitled to the enjoyment thereof during his life, and that upon the death of the said plaintiff the same will be held in trust for the eldest son of the said Edward Shelley, if living at the decease of the said Edward Shelley, the same to become a vested interest in such son when he shall attain the age of 21 years, but if he shall die in the lifetime of the said plaintiff Edward Shelley, or after him under the age of 21 years, leaving an eldest son born before the plaintiff's decease, then in trust for such last-mentioned eldest son, to be a vested interest when he shall attain the age of 21 years; and in case the said jewels shall not become absolutely vested in any person under the limitations aforesaid, then (subject to the life interest of the said Edward Shelley) in trust for the said John Shelley absolutely.

It is, therefore, clear that, if *Shelley v. Shelley* (1) governs the present case, there is complete machinery for working out the trust on which this necklace ought to be held. The attack is made on the basis that, in view of the modern trend of decisions as regards precatory trusts, *Shelley v. Shelley* (1) should not be followed. I do not propose to embark on a detailed review of the authorities, but will content myself with observing that it appears to me from a review of the later authorities to which I was referred—*Re Hamilton deceased* (2), *Re Williams deceased* (3), and *Re Hill deceased* (4)—that there is no ground for regarding the authority of *Shelley v. Shelley* (1) as being no longer binding although it is clear that there is now a strong tendency to recognise what LINDLEY, L.J., in *Re Williams deceased* (3) described as "this sensible rule," namely, that which was said by LORD ST. LEONARDS in his work on the LAW OF PROPERTY published in 1849, p. 375:

The law as to the operation of words of recommendation, confidence, request, or the like, attached to an absolute gift, has in late times varied from the earlier authorities. In nearly every recent case, the gift has been held to be uncontrolled by the request or recommendation made, or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule, that if a testator really mean his recommendation to be imperative, he should express his intention in a mandatory form; but this conclusion was not arrived at without a considerable struggle.

It is said in JARMAN ON WILLS, 7th ed., vol. 2, p. 845, after references to *Shelley v. Shelley* (1) and other cases:

Owing to the change in the principles of construction applicable to precatory trusts, many of the cases above referred to would probably not be followed at the present day. On the other hand, in the present edition of THEOBALD ON WILLS, 10th ed., there are two references, at pp. 339 and 514, to *Shelley v. Shelley* (1) in which no suggestion is made by the learned editor that the authority of that case has been in any way impaired. The manner in which the modern view has evolved is, I think, simply that the courts have indicated that there is established in the older authorities no binding or overriding rule of construction which would disentitle one to look at each will and to extract from that will what was the true intention of the particular testator or testatrix. Indeed, in *Re Hamilton deceased* (2), LINDLEY, L.J., quoted ([1895] 2 Ch. 373) with approval the words of COTTON, L.J., in *Re Adams and Kensington Vestry* (5) (27 Ch.D. 410):

I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shows that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe, and if the confidence is that she will do what is right as regards the disposal of the property, I cannot say that that is, on the true construction of the will, a trust imposed upon her. Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have

to see what is their true effect, and what was the intention of the testator as expressed in his will.

In the later case of *Re Hill* (4), *Shelley v. Shelley* (1) was considered by SWINFEN EADY, J., who said ([1902] 1 Ch. 541):

In *Shelley v. Shelley* (1) the testatrix gave certain jewellery "to my nephew John Shelley, to go and be held as heirlooms by him, and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law or equity will permit." I stop there, omitting the subsequent direction in that will, because there is nothing equivalent to it in the present case. WOOD, V.-C., held in substance that the words which I have read, if they had stood alone and unqualified by the subsequent direction, would have created an absolute interest in the nephew John.

That case, therefore, is no authority for casting any doubt on the correctness of the decision in *Shelley v. Shelley* (1) or on its validity today.

Shelley v. Shelley (1) has stood for eighty years and I have before me a will which, as I have already observed, is, as regards the relevant passage, couched in the same language *mutatis mutandis* as that which was considered by WOOD, V.-C., in *Shelley v. Shelley* (1). That appears to me to afford the strongest indication that the testatrix by this will, which appears clearly on the face of it to have been prepared with professional aid, intended that the diamond necklace in question should devolve in the same manner as the jewellery in *Shelley v. Shelley* (1) was directed to devolve by the order made therein. Having regard to the nature of this indication of intention and to the circumstances, I cannot see any good reason why, notwithstanding the admitted trend of modern decisions, I should treat *Shelley v. Shelley* (1) as wrongly decided, and, therefore, a case which I ought not to follow.

I come to the conclusion that I must declare that, on the true construction of the will of the testatrix, the diamond necklace should have been held on trust for Charles Steele for his life, and after his death for the second plaintiff, Charles Ronald Steele, for his life, and after his death for David Steele, the third plaintiff, for his life, and after the death of the survivor of them on trust for the eldest son or grandson of the third plaintiff, David Steele, and otherwise in the manner decided in *Shelley v. Shelley* (1) including the ultimate trust (in default of any male issue of David Steele who take an absolutely vested interest) in favour of Charles Steele absolutely and that the order in this case will follow *mutatis mutandis* the minutes which appear in the case of *Shelley v. Shelley* (1).

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the estate of Charles Steele.

Solicitors: *Collyer-Bristow & Co.*, agents for *Hett, Davy & Stubbs*, Scunthorpe (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

MORGAN AND SON, LTD.*v. S. MARTIN JOHNSON & CO., LTD.
[COURT OF APPEAL (Tucker and Cohen, L.JJ.), June 3, 1948.]

Practice—Summary judgment—Leave to defend—Set-off and counterclaim—Equitable set-off—R.S.C., Ord. 14.

The plaintiffs issued a writ under R.S.C., Ord. 14, claiming against the defendants charges for storage of vehicles and for telephone calls. The defendants admitted the claim, but contended that the plaintiffs had broken the terms of the contract of storage by delivering up a vehicle to someone otherwise than in accordance with the contract, or, alternatively, that the plaintiffs had acted in breach of their duty as bailees by keeping so inefficient a watch on the vehicle that it was stolen. The defendants, accordingly, claimed a set-off to the extent of the whole of the plaintiffs' claim, and a counterclaim to the extent to which the damages for breach of contract or for negligence exceeded the amount of the plaintiffs' claim. The master ordered that the plaintiffs should be at liberty to sign final judgment on the claim, with a stay of execution pending the trial of the set-off and counterclaim, and this order was confirmed by the judge in chambers with a variation allowing stay of execution until trial of the counterclaim or further order. From this order the defendants appealed.

HELD: since the defendants' set-off and counterclaim disclosed an equitable set-off, which, by virtue of the Judicature Act, 1925, would constitute a good defence to the action, the proper order was that the defendants should have unconditional leave to defend and not that there should be judgment for the plaintiffs with a stay of execution.

[AS TO LEAVE TO ENTER JUDGMENT AND UNCONDITIONAL LEAVE TO DEFEND, see HALSBURY, Hailsham Edn., Vol. 26, pp. 49, 50, paras. 77, 78; and FOR CASES, see DIGEST, Practice, pp. 283-287, Nos. 164-199.]

Cases referred to:

- (1) *Banks v. Jarvis*, [1903] 1 K.B. 549; 72 L.J.K.B. 267; 88 L.T. 20; 40 Digest 420, 416.
- (2) *Agra and Masterman's Bank v. Leighton*, (1866), L.R. 2 Exch. 56; 4 H. & C. 656; 36 L.J.Ex. 33; 43 Digest 796, 2336.
- (3) *Young v. Kitchin*, (1878), 3 Ex.D. 127; 47 L.J.Q.B. 579; 40 Digest 380, 115.
- (4) *Rawson v. Samuel*, (1841), Cr. & Ph. 161; 10 L.J.Ch. 214; 40 Digest 379, 105.
- (5) *Williams v. Davies*, (1833), 1 Cr. & M. 464; 1 Dowl. 647; 3 Tyr. 383; 2 L.J.Ex. 102; 40 Digest 422, 429.
- (6) *Beasley v. Darcy*, (1800), 2 Sch. & Lef. 403 n; 31 Digest 482, 6308 vii.
- (7) *O'Connor v. Spaight*, (1804), 1 Sch. & Lef. 305; 31 Digest 483, e.
- (8) *Ex p. Stephens*, (1805), 11 Ves. 24; 4 Digest 390, 3572.
- (9) *Piggot v. Williams*, (1821), 6 Madd. 95; 42 Digest 230, 2028.
- (10) *Cawdor (Lord) v. Lewis*, (1835), 1 Y. & C. Ex. 427; 4 L.J. Ex. Eq. 59; 1 Digest 456, 1442.

INTERLOCUTORY APPEAL by the defendants from an order of LYNSEY, J., dated Apr. 30, 1948, confirming with variations the order of the master whereby it was ordered that the plaintiffs should be at liberty to sign final judgment on their claim under R.S.C., Ord. 14, with a stay of execution until trial of the counterclaim or further order. The appeal was allowed. The facts appear in the judgment of TUCKER, L.J.

Hale for the plaintiffs.

H. C. Leon for the defendants.

TUCKER, L.J.: The action in which this is an appeal was brought by the plaintiffs against the defendants under Ord. 14. By their statement of claim the plaintiffs claimed £353 3s. 0d., being as to £352 17s. 0d. their charges for open storage accommodation provided by them pursuant to their letter to the defendants of May 15, 1947, and as to 6s. 0d. for the use of the plaintiffs' telephone by the defendants or their servants. The defendants opposed the claim and put in an affidavit by their secretary, Mr. Ernest Weinfeld, in the following terms:

The claim by the plaintiffs is made in respect of the storage by the plaintiffs of vehicles for the defendants, and I say that it was an express or implied term of the agreement by the plaintiffs to store such vehicles that they would store them with due care and that they would not deliver them up to anyone except against the signature on a letter dated May 12, 1947, from the defendants to the plaintiffs, or against a collection order issued by Reo Motors, Ltd.

The affidavit continues:

I admit that the plaintiffs stored vehicles for the defendants and that, but for the matters hereinafter referred to, the sum of £353 3s. 0d. would be due from the defendants to the plaintiffs, but I say that the plaintiffs in breach of the terms of the said contract and further or alternatively in breach of their duty as bailees of the defendants of a certain Dodge vehicle . . . either delivered up the said vehicle to someone without the authority of the defendants and without either the signature or the collection order referred to in the said letter dated May 12, 1947, or alternatively kept so inefficient a watch on the said vehicle that it was stolen. In consequence the said vehicle has been wholly lost to the defendants and the value thereof is approximately £375 . . .

It is conceded that the defendants' claim had been put forward some time before the writ was served and that it was a *bona fide* claim which had to be investigated. Questions will arise at the trial as to the nature of the duty owed, the circumstances in which the motor car disappeared, and whether or not the plaintiffs are liable, but the defendants' claim was clearly *bona fide* and arising out of the subject-matter of the plaintiffs' claim and closely interwoven with it. The effect of the order which the judge made, one often made in cases of this kind, was to give the plaintiffs judgment for the amount of the claim, but to stay execution pending the trial of the defendants' counter-

claim. Ordinarily speaking, such an order will adequately protect the defendants in a case of this kind, and I find it a little difficult to follow the precise reasons which counsel for the defendants has advanced for his clients' objection to this order. None the less, if it was a wrong order, he is entitled to take the point. Any litigant is entitled to say: "I prefer not to have a judgment against me even if I am adequately protected against there being any premature enforcement of that judgment."

In my view, it all comes down to this. In circumstances such as the present, would a court of equity have granted relief by way of equitable set-off in proceedings where both claim and what I call counterclaim for convenience were pending before that court? It is not necessary to consider, as I thought at one time it might be, what the position would have been in a court of equity where the counterclaim was proceeding in a court of equity and the claim was proceeding in the King's Bench Division, or what course a court of equity would have taken for the protection of the plaintiff in the action in chancery with regard to the proceedings that might be going on in the other Division. It is sufficient for this case to ascertain what a court of equity would have done where both claims were pending before the Chancery Court. It is conceded by counsel for the plaintiffs, on the authorities which have been relied on and cited by counsel for the defendants that he cannot contend that in circumstances such as the present a court of equity would not have allowed the defendants' claim by way of equitable set-off. Since the Judicature Act, of course, all courts have to give effect to the equitable relief which would have been given by a court of equity. Sections 38, 39, and 40 of the Supreme Court of Judicature (Consolidation) Act, 1925, are the relevant sections. Section 38 provides:

If a defendant claims to be entitled to any equitable estate or right, or to relief on any equitable ground against any deed, instrument or contract, or against any right, title or claim asserted by any plaintiff or petitioner in the cause or matter, or alleges any ground of equitable defence to any such claim of the plaintiff or petitioner, the court or judge shall give to every equitable estate, right or ground of relief so claimed, and to every equitable defence so alleged, the same effect by way of defence against the claim of the plaintiff or petitioner, as the Court of Chancery ought formerly to have given if the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the like purpose.

Section 39 provides:

(1) The court or judge shall have power to grant to any defendant in respect of any equitable estate or right or other matter or equity, and also in respect of any legal estate, right or title claimed or asserted by him (a) all such relief against any plaintiff or petitioner as the defendant has properly claimed by his pleading, and as the court or judge might have granted in any suit instituted for that purpose by that defendant against the same plaintiff or petitioner.

By s. 40:

The court or judge shall take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would formerly have taken notice of those matters in any suit or proceeding duly instituted therein.

I might also read the first part of s. 41:

No cause or proceeding at any time pending in the High Court or the Court of Appeal shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might formerly have been obtained, whether unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided that (a) Nothing in this Act shall disable either of the said courts, if it thinks fit so to do, from directing a stay of proceedings in any cause or matter pending before it . . .

That indicates that, although before the Judicature Act, a matter might have been dealt with by way of injunction, it now becomes a matter of defence.

I do not think it is necessary, in view of the admission of counsel for the plaintiffs as to the effect of the authorities, to refer to many of the cases cited by counsel for the defendants, but I think it is necessary to refer to one or two. *Bankes v. Jarvis* (1) was an action to recover a debt due to the plaintiff as a trustee, and it was held that the defendant was entitled to set up as a defence that the *cestui que trust* was indebted to him in a sum for unliquidated

A damages exceeding the amount of the claim. The facts were that a man named Bankes had carried on a practice as a veterinary surgeon and before going abroad he gave to the plaintiff, his mother, authority in writing to sell the practice. That she did, together with the goodwill, fixtures and fittings, to the defendant for the sum of £100, payable in two instalments. The action was brought for the second instalment under that agreement. The claim was not disputed, but the defendant counterclaimed £51 as damages for breach by Bankes of his covenant to indemnify the defendant, being £21 for rent which the defendant had been compelled to pay through the default of Bankes and £30 paid by the defendant in settlement of a claim for damages for breach by Bankes of a covenant to repair. LORD ALVERSTONE, C.J., in giving judgment, said ([1903] 1 K.B. 551) :

B The action was, however, brought by the mother as agent or trustee for her son, and the case, therefore, raises the simple question whether the defendant can set up as a defence the claim for unliquidated damages which he has against the son in the same way as he could have set off a debt due from the son if it had been a liquidated amount. In my opinion the case is covered by the sections of the Judicature Act and the rule which have been referred to. I think that it was intended by s. 24 (2) and (3), of the Judicature Act to give to a defendant the right to set up a defence, such as is relied on here, in the same way as he might have raised an equitable defence before the Judicature Act. If grounds exist which formerly would have entitled a defendant to file a bill in Chancery to restrain the plaintiff from proceeding with his action, I think a defendant is now enabled to rely on those grounds as a defence to the action. If in the present case there had been a claim by the defendant to set off a liquidated sum of £50 due to him from the son, the defendant would clearly have been entitled to rely on that set-off as a defence to the action . . . A plaintiff suing as trustee cannot be in a better position than an assignee for value suing in his own name, against whom all equitable defences can be relied on.

D CHANNELL, J., said (*ibid*, 553) :

E I think that this counterclaim ought to have been allowed as a set-off—that is to say, it is a good defence to the extent of the plaintiff's claim ; it could not, of course, stand as a counterclaim for the full amount. The case of *Agra and Masterman's Bank v. Leighton* (2) is clear authority that before the Judicature Act a liquidated amount owing to the defendant by the plaintiff's son could have been set off by the defendant against the claim of the plaintiff suing as trustee for her son. Then the Judicature Act, and more especially the rules, distinctly put an unliquidated claim on the same footing as a liquidated claim for the purpose of set-off ; and consequently the defendant's claim against the plaintiff's son, which, if liquidated, could have been pleaded before the Judicature Act as a set-off to the plaintiff's claim, can now, although unliquidated, be relied on as a defence to the extent of the claim.

F I should, perhaps, before reading that case, have referred to *Young v. Kitchin* (3) at p. 127. That again was a case of assignment in which, according to the headnote :

G The statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded, by way of set-off and counterclaim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor ; HELD, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor ; and that the form of the defence must be amended accordingly.

H It is to be observed in that case that the defence alleged not only defects in the work, but also contained a claim by way of set-off and counterclaim. The sixth paragraph set out that there had been a breach of that part of the agreement whereby the plaintiff had promised to complete and deliver the buildings in August and September, "that the works were to be paid for by the defendant on the architect's certificate as they proceeded, and that defects (if any) were to be remedied or allowed for by Downs & Co.", the contractors. The seventh paragraph alleged that Downs & Co. did not deliver up the buildings until November, "whereby the defendants was unable to let the buildings for the reception of hops, for which purpose they were erected." The eighth paragraph alleged defects in the buildings when delivered up. I have drawn attention to those paragraphs to show that part of the set-off

and counterclaim related to failure to deliver up buildings completed at the contract date and it was not confined solely to claims relating to defects in the performance of the work. In those circumstances, *CLEASBY, B.*, said ((1878) 3 Ex. D. 130) in giving judgment on this part of the case :

There are two objections taken to the defence—one of substance and the other of form. In substance I think the defendant is entitled to the benefit of this defence in reduction of the plaintiff's claim. The Judicature Act, 1873, s. 25 (6) says that the assignment of a debt or other legal chose in action shall be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed," that is, subject to all equities which would be enforced in a court of equity. I think this is a case where, in equity, the whole matter might be dealt with and the plaintiff's claim settled, after deducting all that ought to be deducted in respect of the failure to complete and deliver the buildings. That is my opinion on the general merits ; but on the question of form I will consider the pleadings.

We were also referred, and I think it might be helpful just to mention it on this question of equitable set-off, to *Rawson v. Samuel* (4) and to the passage in the judgment of LORD COTTENHAM, L.C. (Cr. & Ph. 179), where he refers to some of the previous authorities. He said :

Several cases were cited in support of the injunction ; but in every one of them, except *Williams v. Davies* (5), it will be found that the equity of the bill impeached the title to the legal demand. In *Beasley v. Darcy* (6) the tenant was entitled to redeem his lease upon payment of the rent due ; and in ascertaining the amount of such rent, a sum was deducted which was due to the tenant from the landlord for damage done in cutting timber. Both were ascertained sums, and the equity against the landlord was that he ought not to recover possession of the farm for non-payment of rent, whilst he owed to the tenant a sum for damage to that same farm. In *O'Connor v. Spaight* (7) the rent paid formed part of a complicated account ; and it was impossible, without taking the account, to ascertain what sum the tenant was to pay to redeem his lease. In *Ex parte Stephens* (8) the term equitable set-off is used ; but the note having been given under a misrepresentation, and a concealment of the fact that the party to whom it was given was at the time largely indebted to the party who gave it, the note was ordered to be delivered up as paid. In *Piggott v. Williams* (9) the complaint against the solicitor for negligence went directly to impeach the demand he was attempting to enforce. In *Lord Cawdor v. Lewis* (10) the proposition is too largely stated in the marginal note ; for, in the case, the action for mesne profits was brought against the plaintiff, who was held, as against the defendant, to be, in equity, entitled to the land. None of these cases furnish any grounds for the injunction in the case before me.

Those cases to which he referred do, however, indicate the kind of circumstances in which the Courts of Chancery give this equitable relief. The case most in point was that of *Piggott v. Williams* (9), where there was a charge against a solicitor of negligence which went directly to impeach the demand for payment which he was making.

In view of those authorities, I think that the present case is one where, on the facts set out in the affidavit, the Court of Chancery would have clearly allowed the defendants' claim as an equitable set-off against the plaintiffs' claim. In those circumstances, although I think the point is, perhaps, rather an academic one, strictly speaking, I think, the proper order that should be made in a case of this kind is that the defendants should have unconditional leave to defend and not that there should be judgment for the plaintiffs with a stay of execution. I have confined my observations to cases, such as the present, where it is quite clear that the court of equity would have given relief by way of equitable set-off. What the position may be with regard to other kinds of counterclaims it is not necessary to consider. Therefore, although orders of this kind have, in cases very like the present, often been made, I think the point taken by counsel for the defendants is unanswerable and that he is entitled to succeed in his appeal.

COHEN, L.J. : I agree so entirely with what has fallen from my Lord that I wish to add very few words in stating my reasons for considering that the order made below must be varied. Once counsel for the plaintiffs conceded—as, in my view, he was constrained by the authorities to which we were referred, and, in particular, by the decision in *Piggott v. Williams* (9) to concede—that the facts alleged in Mr. Weinfeld's affidavit, if proved at the trial, would establish a good equitable set-off, it followed that the appeal

must succeed. Before the Supreme Court of Judicature Act, 1875, such claims were often enforced by injunction, but it is plain from s. 41 of the Act of 1925 that an injunction would not now be the appropriate way of giving effect to a set-off and that under s. 38 effect should be given to it as an equitable defence if so pleaded. That being so, it seems to me to follow that the matter must be dealt with as in *Young v. Kitchen* (3). CLEASBY, B., indicated that equity would deal with the matter by deducting from the claim of the plaintiff all that ought to be deducted in respect of the failure, if failure be proved, to deliver the lorry that the plaintiff received from the defendant. I only desire to add one word. Counsel for the defendants was tempted in the course of the argument to suggest that such a set-off would arise if, for instance, in an action for failure to deliver goods, there was a counterclaim for libel. It is unnecessary for us to decide that, but I think that argument was inconsistent with the observations of LORD COTTENHAM, L.C., in *Rawson v. Samuel* (4). *Appeal allowed. Plaintiffs to pay defendants' costs of the appeal, and the costs before the master and the judge to be costs in the cause.*

Solicitors: *Braby & Waller* (for the plaintiffs); *Buckeridge & Braune* (for the defendants).

orted by C. N. BEATTIE, Esq., *Barrister-at-Law.*]

Distinguished. PYRAH v. DONCASTER CORPN. [1949] 1 All E.R. 883.

ROBERTS v. DOROTHEA SLATE QUARRIES CO., LTD.

[HOUSE OF LORDS (Lord Porter, Lord Simonds, Lord du Parc, Lord Normand and Lord Oaksey), April 29, 30, May 3, June 23, 1948.]

Workmen's Compensation—Injury by accident—Silicosis—Slate worker—Injury to lungs by inhalation of dust—Continuous process extending over a period of time—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

From 1921 to 1941 a workman was employed in slate quarries as a slate splitter, working in closed sheds in which the air was impregnated with dust on account of the work done there. The slate contained particles of silica which were inhaled by the workman and produced silicosis. In November, 1941, the workman's health broke down and he had been completely incapacitated since 1942. On Jan. 22, 1946, a medical board, constituted under the Silicosis and Asbestosis (Medical Arrangements) Schemes, 1931 to 1943, certified that he was totally disabled by silicosis as from Nov. 6, 1945. Silicosis is not an industrial disease within s. 43 of the Workmen's Compensation Act, 1925, but by s. 47 power is given to the Secretary of State to make schemes in regard to the payment of compensation by employers to workmen in specified industries involving exposure to silica dust. Schemes had been made in pursuance of this power, but the workman was not entitled to compensation under them. He claimed compensation under s. 1 (1) of the Act of 1925 on the ground that the disease was an "injury by accident" within the meaning of the sub-section, because the incapacity for work was caused by the final clotting of the lungs by the particles of silica and was due either to one final accident or to a number of successive accidents:—

HELD: the incapacity caused by silicosis was the result of a continuous process going on substantially from day to day over a period of years and could not be said to be the result of an accident or a series of accidents, each one of which was specific and ascertainable, and, accordingly, on a true construction of the Act of 1925, silicosis was not an "injury by accident" within the meaning of s. 1 (1).

Williams v. Guest, Keen & Nettlefolds ([1926] 1 K.B. 497), approved.

[AS TO DISEASES CONTRACTED BY WORKMAN IN COURSE OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 819-822, paras. 1157, 1158; and FOR CASES, see DIGEST, Vol. 34, pp. 273-275, Nos. 2311-2324.]

Cases referred to:

- (1) *Trim Joint District School Board of Management v. Kelly*, [1914] A.C. 667; 83 L.J.P.C. 220; 111 L.T. 305; 7 B.W.C.C. 274; 34 Digest 270, 2300.
- (2) *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62; 83 L.J.K.B. 197; 109 L.T. 759; 7 B.W.C.C. 1; 34 Digest 288, 2415.

- (3) *Williams v. Guest, Keen & Nettlefolds*, [1926] 1 K.B. 497; 95 L.J.K.B. 676; 134 L.T. 459; 18 B.W.C.C. 535; 34 Digest 272, 2310.
- (4) *Brintons, Ltd. v. Turvey*, [1905] A.C. 230; 74 L.J.K.B. 474; 92 L.T. 578; 7 W.C.C. 1; *affg. S.C. sub nom. Higgins v. Campbell & Harrison, Ltd., Turvey v. Brintons, Ltd.*, [1904] 1 K.B. 328; 34 Digest 464, 3799.
- (5) *Fenton v. Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 5 W.C.C. 1; 34 Digest 266, 2264.
- (6) *Innes (or Grant) v. Kynoch*, [1919] A.C. 765; 88 L.J.P.C. 85; 121 L.T. 39; 12 B.W.C.C. 78; 34 Digest 272, 2308.
- (7) *Steel v. Cammell, Laird & Co., Ltd.*, [1905] 2 K.B. 232; 74 L.J.K.B. 610; 93 L.T. 357; 7 W.C.C. 9; 34 Digest 271, 2302.
- (8) *Burrell (Charles) & Sons, Ltd. v. Selvage*, (1921), 90 L.J.K.B. 1340; 126 L.T. 49; 14 B.W.C.C. 158; *affg. S.C. sub nom. Selvage v. Burrell (Charles) & Sons, Ltd.*, [1921] 1 K.B. 355; 34 Digest 272, 2309.
- (9) *Marshall v. East Holywell Coal Co., Gorley v. Backworth Collieries*, (1905), 93 L.T. 360; 7 W.C.C. 19; 34 Digest 271, 2303.
- (10) *Walker v. Hockney Brothers*, (1909), 2 B.W.C.C. 20; 34 Digest 273, 2311.
- (11) *Ormond v. Holmes & Co., Ltd.*, [1937] 2 All E.R. 795; 107 L.J.K.B. 21; 157 L.T. 56; 30 B.W.C.C. 254; Digest Supp.
- (12) *Fife Coal Co., Ltd. v. Young*, [1940] 2 All E.R. 85; [1940] A.C. 479; 109 L.J.P.C. 49; 162 L.T. 344; *sub nom. Young v. Fife Coal Co.*, 33 B.W.C.C. 107; 2nd Digest Supp.
- (13) *Walkinshaw v. Lochgelly Iron & Coal Co., Ltd.*, 1935 S.C. (H.L.) 36; *sub nom. Lochgelly Iron & Coal Co., Ltd. v. Walkinshaw*, 28 B.W.C.C. 230.

APPEAL by the workman from a decision of the Court of Appeal (SCOTT, MORTON and BUCKNILL, L.J.J.), dated Feb. 7, 1947.

The workman, who was certified by a medical board constituted under the Silicosis and Asbestosis (Medical Arrangements) Schemes, 1931 to 1943, as totally disabled by silicosis as from Nov. 6, 1945, claimed compensation from the employers (i) for injury by accident under the Workmen's Compensation Act, 1925, s. 1, and (ii) alternatively, under the Various Industries (Silicosis) Scheme, 1931. The county court judge held that there had been no injury by accident within the meaning of s. 1 of the Act of 1925, but that the workman was engaged in working with silica rock within the meaning of art. 2 (iv) of the Scheme of 1931, and he made an award in the workman's favour under the Scheme. The workman and the employers both appealed to the Court of Appeal, who dismissed the workman's appeal from the judge's decision on the claim under s. 1 of the Act, but allowed that of the employers from the award under the Scheme on the ground that the workman was not within the Scheme. The workman accepted the decision of the Court of Appeal refusing his claim under the Scheme, but appealed to the House of Lords on the question whether the disease was an injury by accident within s. 1 of the Act of 1925. The House of Lords held that it was not, and dismissed the appeal. The facts appear in the opinion of LORD PORTER.

Beney, K.C., and *Dare* for the workman.

Gerrard, K.C., and *F. Atkinson* for the employers.

The House took time for consideration.

June 23. The following opinions were read.

LORD PORTER: My Lords, this case raises the important question whether incapacity due to silicosis can be included within the category of "personal injury by accident" within the meaning of those words as used in s. 1 (1) of the Workmen's Compensation Act, 1925. No doubt, the exact question is whether the silicosis existing in a particular individual is within that category, but it was not suggested to your Lordships, nor do I think it could be maintained, that the case in question is in any way abnormal or differs in its features or symptoms from the general run of cases in which a workman suffers from silicosis.

The facts are short and are not in dispute. The workman, a man of 66, had worked in slate quarries for most of his life and for the respondents from 1921 until November, 1941, when his health broke down. Except for a period of some three weeks in April, 1942, he has been unable to work since then. He had been employed over these years as a slate splitter in closed sheds in which a large quantity of dust impregnated the air as a result of the work done there. The slate contains very fine granules of quartz throughout the material of which it is composed and these granules are inhaled by the workman, reach the lungs,

injure its smaller air passages and cells, are carried into the inner tissues and lymphatic system, and thus produce fibrosis. This process goes on for years causing the workman to be short of breath and finally incapacitating him. The workman first became aware of the shortness of breath a month or two before November, 1941, when he ceased work for the first time and on Jan. 22, 1946, a medical board constituted under the Silicosis and Asbestosis (Medical Arrangements) Schemes, 1931 to 1943, certified that he was totally disabled by silicosis and that this total disablement began on Nov. 6, 1945. In these circumstances the workman launched two alternative claims against his employers : (i) for injury by accident under s. 1 of the Act ; (ii) under the Various Industries (Silicosis) Scheme, 1931 (S.R. & O., 1931, No. 342). Both claims were heard together by the learned county court judge of Caernarvonshire. At the hearing the workman's doctor deposed, and the learned arbitrator accepted the evidence, that the workman suffered from and was incapacitated by silicosis and that his condition was directly due to the inhalation of the slate dust in the course of and as a result of his employment. On this evidence the learned county court judge held that there had been no injury by accident, but made an award under the Scheme. From his decisions both parties appealed to the Court of Appeal who dismissed the workman's appeal, but allowed that of the employers on the ground that the Scheme of 1931 only applied to persons employed in the process of (*inter alia*) cutting silica rock, and, since silica rock was defined under the Various Industries (Silicosis) Scheme, 1928 (for which the Scheme of 1931 was substituted) as excluding any rock containing less than 50 per cent. of free silica and as the material on which the workman had been working contained less than this percentage, the employers' appeal naturally succeeded. The workman's appeal, on the other hand, was dismissed on the ground that there was no injury by accident. The workman accepts the decision of the Court of Appeal refusing his claim under the Scheme, but appeals to your Lordships' House on the question of accident or no accident.

My Lords, in *Trim Joint District School Board of Management v. Kelly* (1) it was pointed out by LORD DUNEDIN ([1914] A.C. 667, 684, 685) that the expression "injury by accident" in the Act "must be interpreted according to the meaning of the words in ordinary popular language" and that this view had been accepted by your Lordships in a number of authoritative cases, as, indeed, it has both before and after that decision. No doubt, the ordinary meaning may include a wide range of incidents, but, apart from authority, I cannot think it would be thought to include the growth of incapacity by a continuing process extending over so long a period. It is true, indeed, that the words "injury by accident" have been held applicable to cases where disability has been developing over a number of years and then suddenly the injury causing the incapacity comes into being ; to other cases where a number of specific injuries contribute to that incapacity ; to others, again, where a microbe either alighting in a cut or itself finding its way through some organ of the body causes an illness ; but the difference between injury by accident and disease has always been recognised and some one incident or definite and distinct series of incidents have been required if the Act is to apply. I conclude that, apart from authority, the development of silicosis would not be described as injury by accident, but this view has to be checked by a consideration of the previous authorities, and, in particular, those decided in your Lordships' House. Their effect must, therefore, be weighed, but, in doing so, the words of LORD DUNEDIN in *Trim Joint District School Board of Management v. Kelly* (1) must always be borne in mind when he said (*ibid.*, 684) :

In the first place, as I had occasion to point out in the recent case of *Plumb v. Cobden Flour Mills Co., Ltd.* (2)—with the approval of those of your Lordships who took part in the judgment—the ultimate criterion must always be found in the words of the Act itself, and not in tests, explanations, or definitions given by judges, however eminent.

The argument on behalf of the workman, as I understood it, was that, whether the culminating illness be regarded as caused by the final clotting of the lungs so that the man can no longer work or is suspended, or whether one regards his condition as due to a numerous series of accidents caused by each particle of silica which reaches, injures and obstructs the lungs, the result is the same. There is either one final accident or a large number of successive accidents

culminating in total or partial incapacity for work. Undoubtedly, the number of matters held to come within the domain of the Workmen's Compensation Acts has gradually been increased, partly by decisions in the courts or in your Lordships' House and partly by statute. Industrial diseases are illustrations of statutory enlargement. They did not provide a claim for compensation until 1906 [Workmen's Compensation Act, 1906, s. 8] and, by the Act of 1925, silicosis, which is not an industrial disease, was brought within the purview of the Act by s. 47 and the schemes made under that section, but the question now engaging your Lordships' attention is not concerned with these statutory additions, nor do I think that the amendments of the Act which brought them within its mischief have any effect on the conclusion which your Lordships should reach.

It has been suggested that the necessity felt for providing compensation for silicosis by means of a scheme shows that without it that disease would not be covered. I do not think this result necessarily follows. Industrial diseases and those illnesses dealt with in the various Schemes made under s. 47 of the Act of 1925 are of slow and gradual growth, so that it is difficult or impossible to determine at what moment of time they must be considered to come within the ambit of this Act. Moreover, the employer responsible for the condition had to be determined. The disease might, at any rate in some cases, be the result of accident and, as LORD ATKIN, then ATKIN, L.J., pointed out ([1926] 1 K.B. 497, 505) in *Williams v. Guest, Keen & Nettlefolds* (3), anthrax is a scheduled disease, though, as in *Brintons, Ltd. v. Turvey* (4) it might result from an accident. It is with this latter aspect that your Lordships are concerned and, in dealing with it, I put aside arguments based on the fact that it has been thought desirable to deal specifically with certain diseases by means of the provisions of ss. 43 and 47 of the Act of 1925.

Nor do I think that it is necessary to decide whether some or all diseases may in certain circumstances be the result of an accident. In the earlier decisions it is clear that disease was considered to be outside the scope of the Acts. LORD MACNAGHTEN, for instance, in *Fenton v. Thorley & Co., Ltd.* (5) said ([1903] A.C. 443, 448):

The words "by accident" are, I think, introduced parenthetically as it were to qualify the word "injury," confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design.

But two years later in *Brintons, Ltd. v. Turvey* (4), anthrax caused by the entry of the bacillus into the eye of an employee engaged in working with wool was held to be injury by accident, though the moment of entry could not be determined. The EARL OF HALSBURY, L.C., thought that, though idiopathic disease was excluded, yet disease might be the consequential result of an injury, and LORD MACNAGHTEN found many incidents in the case which would properly be described as accident as, e.g., the presence of the bacillus, its escape in spite of the measures taken to protect the workman and its incursion into a penetrable part of his body, but the attack was recognised as one individual incident occurring at a particular though unascertainable time. Moreover, LORD LINDLEY was careful to assert that not all diseases caught in the course of the employment would be covered, and LORD ROBERTSON, taking the view that such a result might follow, thought no injury by accident established and expressed a dissenting opinion. In *Innes (or Grant) v. Kynoch* (6), however, LORD BIRKENHEAD, L.C., appears to have taken the view that, in consequence of the increased knowledge of the origin of diseases, almost any attack by a bacillus might be an accident and the subject of compensation, but that the employers' position was protected because in the normal case it would be difficult to prove that the attack arose out of and in the course of the employment. The actual illness which caused incapacity in that case was blood poisoning from bacilli in bone dust alighting on an abrasion on the workman's leg. Again, it was impossible to say with certainty when the infection occurred and, indeed, it may not have happened all at once, but may have been spread over a period of time, but LORD PARMOOR, while unable to draw any distinction between an accident which has been proved to have occurred at a particular hour or a particular day and an accident in reference to which the particular hour or day cannot be established, added ([1919] A.C. 765, 796) that it was one which certainly

was proved to have occurred within some narrow limitation of time. LORD WRENBURY said (*ibid.*, 800) :

... the date of the occurrence of the accident is reasonably fixed so as to connect the injury with the accident.

LORD BIRKENHEAD, L.C., himself said (*ibid.*, 772) :

That it should be some particular occurrence happening at some particular time is essential, otherwise it is not in the nature of an accident.

In the earlier cases under the Acts, as *e.g.*, in *Steel v. Cammell, Laird & Co., Ltd.* (7) the necessity of fixing a date on which the accident occurred was stressed, and the suggestion that in the case of lead poisoning a continuous absorption might be contemplated as a series of accidents was rejected [*per* COLLINS, M.R. ([1905] 2 K.B. 225, 237)] on the ground that in that case notice of the accident would be impossible. In *Burrell (Charles) & Sons, Ltd. v. Selvage* (8), however, in which blood poisoning followed a series of scratches, the difficulty as to notice did not bar the claim. In the Court of Appeal the question was asked whether the condition was less the result of an accident because, in addition to that accident, there were a number of previous accidents, all contributing to the septic condition of the patient which eventually resulted, and it was held that it was not. LORD WRENBURY in the House of Lords said (126 L.T. 49, 50) :

To my mind it is immaterial that the accidents, the scratches, were sustained over successive periods of time. The only question is whether when the injury resulted it resulted from the scratches which were suffered in the course of the employment.

The period was, in fact, four months and the injury the result of a limited number of scratches. LORD BUCKMASTER in the House of Lords noted this circumstance in referring (*ibid.*) to "a series of accidents, each one of which is specific and ascertainable though its actual influence on the resulting illness cannot be precisely fixed . . ."

This was the state of the authorities when the question whether incapacity from silicosis resulted from injury by accident came up for decision in *Williams v. Guest, Keen & Nettlefolds* (3). It was held that it did not so result, not because of the difficulty in giving notice, but because the illness was due, not to an accident as that word is used in the Act, or to a series of accidents, but was the result of a continuing process repeated from day to day. In arriving at that conclusion, POLLOCK, M.R., based his view on what he considered would in common language be described as an accident, and quoted the words set out above of LORD BIRKENHEAD, L.C., in *Grant's* case (6) and the observations of LORD BUCKMASTER ([1919] A.C. 765, 774) :

Death due to disease differs widely from death due to other injury in many obvious respects. The actual occurrence and onset of the illness cannot be stated with the same certainty: the possibility of infection from other sources than the source of infection present at work cannot be overlooked; and the difficulty of bringing these conditions within the common meaning of the phrase "accident" is in itself considerable. This outlook is not confined to cases of silicosis. *Marshall v. East Holywell Coal Co., Gorley v. Backworth Collieries* (9) (the "beat hand" and "beat knee" cases) are to the same effect, and so are *Walker v. Hockney Brothers* (10) (the case of cycling paralysis) and *Ormond v. Holmes & Co., Ltd.* (11) (the case of the blacksmith's striker).

In truth, two types of case have not always been sufficiently differentiated. In the one type, there is found a single accident followed by a resultant injury, as in *Brintons, Ltd. v. Turvey* (4), or a series of specific and ascertainable accidents followed by an injury which may be the consequence of any or all of them, as in *Burrell (Charles) & Sons, Ltd. v. Selvage* (8). In either case it is immaterial that the time at which the accident occurred cannot be located. In the other type, there is a continuous process going on substantially from day to day, though not necessarily from minute to minute or even from hour to hour, which gradually and over a period of years produces incapacity. In the first of these types, the resulting incapacity is held to be injury by accident. In the second it is not. In the case of silicosis it is, of course, possible to divide up the cause of the final collapse and say that each particle of silica striking upon and adhering to the lung is a separate accident, but, however analytically maintainable, the attribution of the resultant silicosis to an accidental cause is an unreal one. The distinction between accident and disease has been insisted on

throughout the authorities and is, I think, well founded. Counsel for the employers formulated the proposition on which he relied by suggesting that, where a physiological condition is produced progressively by a cumulative process consisting of a series of occurrences operating over a period of time, and the microscopical character of the occurrences and the period of time involved are such that in ordinary language that process would be called a continuous process, the condition is not produced by an accident or accidents within the Acts. I do not know, however, that any explicit formula can be adopted with safety. There must, nevertheless, come a time when the indefinite number of so-called accidents and the length of time over which they occur take away the element of accident and substitute that of process. In my opinion, disability from silicosis is one of such instances. It cannot be said to be the result of injury by accident. I would dismiss the appeal and put the liability for costs on the workman.

LORD SIMONDS: My Lords, the appellant workman, who, while he was in the employment of the respondent employers, contracted the disease known as silicosis, claims to be entitled to compensation under s. 1 of the Workmen's Compensation Act, 1925. He claims that while in their employment personal injury by accident arising out of and in the course of his employment was caused to him. Even, my Lords, if the Act had stopped at s. 1, I should have felt little doubt that the claim could not be sustained. It appears from the medical evidence adduced in this case that silicosis is caused by the inhalation of minute particles of free silica which, reaching the inner tissues of the lung, produce a fibrotic condition and interfere with its proper function. It is a slow and gradual process which may take many years to develop. To say that a workman who has contracted silicosis in the way that I have mentioned has suffered "personal injury by accident" is to legislate, not to interpret the statute. Your Lordships were properly confronted with decisions of this House which have gone a long way in placing what is inappropriately called a benevolent construction on the statute, and, if there was to be found in them any authority for the proposition that to contract silicosis is to suffer personal injury by accident, that would be an end of the matter. I am, however, satisfied that there is no such authority. To this question I will return.

The Act, however, does not stop at s. 1. Two other sections appear to me to be of vital importance in considering the scope of that section. They are ss. 43 and 47. They might as well for this purpose be ss. 2 and 3. Section 43, which in substance re-enacted s. 8 of the Workmen's Compensation Act, 1906, provides that the Act shall, subject to the prescribed conditions, apply to certain industrial diseases, so that a workman contracting such a disease becomes entitled to compensation as if it were a personal injury by accident arising out of and in the course of his employment. It is true that sub-s. (4) of that section provides that nothing therein contained shall affect the rights of a workman to recover compensation in respect of a disease to which the section does not apply, if it is a personal injury by accident within the meaning of the Act. In view of the decision in *Brintons, Ltd. v. Turvey* (4) (the "anthrax case"), which was shortly before the Act of 1906, it was, no doubt, necessary to insert some such provision as this, but the scheme of the Act so far seems to me clearly to differentiate between an injury by accident and a disease which gives to its victim a right to compensation as if it were an injury by accident. Silicosis, however, has never been an industrial disease within s. 43. On the contrary, and, as I think, very significantly for this purpose, that disease has been the subject of special legislation, first under the Workmen's Compensation (Silicosis) Acts, 1918 and 1924, and then under s. 47 of the Act of 1925. The latter section, re-enacting the relevant earlier Acts, provides:

(1) The Secretary of State may by scheme provide for the payment of compensation by the employers of workmen in any specified industry or process or group of industries or processes involving exposure to silica dust . . .

Under this section numerous schemes have been made, but, unfortunately for the workman, no scheme had at the relevant time been made which applied to the process or industry of slate making in which for the greater part of his working life he has been engaged. Therefore, he has sought to bring his case within s. 1, but, if silicosis which is the result of working in conditions that involve "exposure to silica dust" is "personal injury by accident" within

s. 1, there was no need for the Acts of 1918 and 1924, nor for s. 47 of the Act of 1925. It is, in effect, to make nonsense of the Act to read together first s. 1 (which on this view must run "personal injury by accident, including disease arising from exposure to silica dust") and then s. 47, which authorises the Secretary of State to make schemes in regard to that same disease. It can hardly, I think, be suggested that, in regard to silicosis contracted in particular industries, the Secretary of State may make provisions which override those applicable to injuries covered by s. 1, but that, in regard to silicosis contracted in industries for which he does not think fit to make a scheme, the sufferer may have recourse to s. 1. The result is that the opinion, which I should have reached on s. 1 standing by itself, is confirmed by a consideration of the scheme of the Act.

I must, however, briefly consider certain decisions which are said to be relevant. First there is *Williams v. Guest, Keen & Nettlefolds* (3). In this case the plaintiff, who was employed in the mining industry to which the Workmen's Compensation (Silicosis) Acts, 1918 and 1924, did not apply, claimed compensation for silicosis under the Act of 1906. The Court of Appeal (POLLOCK, M.R., and ATKIN and SARGANT, L.JJ.) rejected his claim. The court, and particularly ATKIN, L.J., thought that the earlier case of *Steel v. Cammell, Laird & Co., Ltd.* (7), to which I will next refer, was binding on them, but it is a valuable authority in that it is precisely in point and has not been adversely criticised in the twenty years that have passed since its decision. I would cite in aid of what I have said earlier in this opinion the concluding words of SARGANT, L.J. ([1926] 1 K.B. 497, 510):

... the whole introduction of s. 8 [*i.e.*, of the Act of 1906] and the language in which it is framed seem to me to be strong evidence that an injury arising by the gradual and cumulative effect of industrial conditions producing disease was not regarded by the framers of the Act as being within the ordinary sense of the word "accident," and therefore liable to be compensated for under any section other than s. 8 itself.

In *Steel's* case (7) the plaintiff, who suffered from partial paralysis due to lead-poisoning, claimed compensation for injury by accident under the earlier Act of 1897. His claim was rejected and, though some part of the reasoning of the court can no longer be regarded as valid, the decision was, as I have pointed out, regarded as binding in *Williams' case* (3) and has never been dissented from. It is to be observed that this case was decided on May 10, 1905, by a court consisting of COLLINS, M.R., and MATHEW and COZENS-HARDY, L.JJ., and that the same court in December, 1903, had decided the anthrax case (reported *sub nomine Higgins v. Campbell and Harrison, Ltd., Turvey v. Brintons, Ltd.* (4)) in favour of the workman, which decision had been affirmed in this House on Apr. 14, 1905. At about the same time, after the decision of the anthrax case, two other cases came before the Court of Appeal and I think it worth while to cite what VISCOUNT CALDECOTE, L.C., said about them in *Fife Coal Co., Ltd. v. Young* (12) as lately as Mar. 14, 1940. The LORD CHANCELLOR said ([1940] 2 All E.R. 85, 88):

The two cases, one of "beat hand" and the other of "beat knee," which came before the Court of Appeal very shortly after the decision of your Lordships' House in *Brintons, Ltd. v. Turvey* (4)—namely, *Marshall v. East Holywell Coal Co., Gorley v. Backworth Collieries* (9)—followed a different line. They were each decided in favour of the employer on the grounds that the injury was the inevitable result of work long continued, and was not anything which could be described as having happened on a particular duty. *Walker v. Hockney Brothers* (10), the case of the man who gradually over a period of 5 years acquired paralysis by riding a carrier bicycle, was another decision in favour of the employer. There is no reason to doubt the correctness of the decisions in the three cases I have last mentioned. In all of them the facts were such as to make it impossible to identify any event which could, however loosely, be called an accident. In these cases, the workman failed, not because a disease is outside the purview of the Workmen's Compensation Act altogether, but because the burden of proof that there had been an accident was not discharged.

It appears to me, my Lords, that these authoritative words are decisive of the present case. They occur in a case in which the decision was in favour of the workman whose claim was in respect of an injury known as "dropped foot," that is, a paralysis of the muscles of the leg caused by pressure on the peroneal nerve which prevents dorsiflexion of the foot. It is sufficient for my

purpose to cite one further passage from the opinion of VISCOUNT CALDECOTE, L.C., where, after referring to LORD TOMLIN's observations in *Walkinshaw v. Lochgelly Iron & Coal Co.* (13), he said (*ibid.*, 90) :

... I find it impossible to distinguish in principle the present case from the case I have last mentioned. The pressure on the peroneal nerve during a spell of work on Apr. 27 brought about the paralysis of the claimant's muscles which is described as dropped foot. I apply the test of LORD M'LAREN, often quoted, and always with approval. The claimant sustained a definite physiological injury in the reasonable performance of his duties, and as the result of the work he was engaged in at the time of the injury. The fact that, in the course of his work for a month before the day when he first suffered from dropped foot, he had felt some loss of the power of dorsiflexion of the right foot seems to me in no way to affect his right to compensation.

The passages that I have cited—to which I would add the pertinent observation of LORD ROMER ([1940] A.C. 479, 480) : "The question is, was there a physiological change for the worse in the respondent's condition on a particular occasion while he was at work?"—show that the *ratio decidendi* in *Fife Coal Co., Ltd. v. Young* (12) was that the workman could there point to a particular physiological change on a particular day. He could, indeed, point to the particular day—Apr. 27—a condition that, I think, need not always be satisfied in view of what was said by LORD BIRKENHEAD ([1919] A.C. 765, 772) in *Innes (or Grant) v. Kynoch* (6) and by LORD BUCKMASTER in *Burrell (Charles) & Sons, Ltd. v. Selvaige* (8). In the latter case a girl, after sustaining numerous cuts and scratches on her hands in the course of her work over a long period, ultimately became totally incapacitated as a result of blood poisoning. It was held (126 L.T. 49, 50) that she was not the less entitled to compensation because her disease was due :

... not to one specific and definite accident, but to a series of accidents, each one of which is specific and ascertainable though its actual influence on the resulting illness cannot be precisely fixed ...

It was on this case that counsel for the workman most strongly relied. It is, I think, the highwater mark, and it is just because I find it impossible to say of a sufferer from silicosis that his disease is due to "a series of accidents each one of which is specific and ascertainable," that I cannot admit his claim under s. 1 of the Workmen's Compensation Act, 1925. It was the same reason that led Parliament to supplement that section by other provisions for the benefit of workmen suffering from silicosis and similar diseases. I would dismiss this appeal.

LORD DU PARCQ : My Lords, I had the advantage of reading in advance the opinion which my noble and learned friend LORD SIMONDS has just delivered, and I find myself so completely in agreement with it that I wish to add only one general observation, and that, I fear, a trite one. Your Lordships are engaged in construing an Act of Parliament, and that duty is not to be performed by deducing from *dicta* contained in earlier judgments principles which may seem to follow from them. The pursuit of such a course of reasoning may take one on an interesting and attractive journey, but it is all too likely to lead to a destination far removed from any end contemplated by the legislature. Each step may be thought to justify a further advance, until at last the border-line is crossed which divides the reasonable interpretation of the statute from an unwarranted extension of its provisions. It is the duty of every tribunal to resist all temptation so to transgress. I am for dismissing this appeal.

LORD NORMAND : My Lords, I agree with the opinions which have been delivered by my noble and learned friends.

LORD PORTER : My Lords, my noble and learned friend, LORD OAKSEY, who is not able to be present, has asked me to say that he concurs in the opinions which have been expressed.

Appeal dismissed with costs.

Solicitors : *Shaen, Roscoe & Co.*, agents for *Elwyn Jones & Co.*, Bangor (for the workman) ; *Whitfield, Byrne & Dean*, agents for *Carter, Vincent & Co.*, Bangor (for the employers).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

Re WELLSTED'S WILL TRUSTS. WELLSTED *v.* HANSON.

[CHANCERY DIVISION (Vaisey, J.), June 3, 14, 1948.]

Trustee—Trustee for sale—Sale of realty—Power to re-invest in realty—Law of Property Act, 1925 (c. 20), s. 28 (1).

The Law of Property Act, 1925, s. 28 (1) provides: "Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925 . . . and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale."

By his will, dated Aug 18, 1915, a testator, who died on Dec 9, 1920, gave his residuary estate to trustees on trust for sale and conversion, with power to postpone such sale and conversion, and out of the proceeds thereof to pay his funeral and testamentary expenses, debts and certain legacies. He directed that the residue should be invested, with power to his trustees to vary such investments, and that his trustees should stand possessed of the said residue and the investments for the time being representing the same on certain trusts for his widow and issue. At the date of his death, the testator's residuary estate included real property to the value of £91,000. From time to time, both before and after Jan 1, 1926, part of the realty was sold and the proceeds invested in trustee securities. The trustees also had in hand at the date of this summons money being proceeds of the sale of realty awaiting investment and a sum received as value payments under the War Damage Act, 1943, in respect of damage to part of the real property. It was proposed to sell realty and re-invest in other realty, to realise some securities representing the proceeds of sale of realty and similarly re-invest in realty; and to expend the sums in hand in the purchase of realty.

HELD: while s 28 (1) permitted the acquisition of land by exchange or by purchase for the preservation or protection of unsold land held by the trustees, it did not permit land to be acquired as an investment, and, therefore, the trustees had no power to invest in the manner proposed.

Re Wakeman, National Provincial Bank, Ltd. v. Wakeman ([1945] 1 All E.R. 421), *Re Kempthorne, Charles v. Kempthorne* ([1930] 1 Ch. 268), *Re Stimpson's Trusts, Stimpson v. Stimpson* ([1931] 2 Ch. 77), considered.

[FOR THE LAW OF PROPERTY ACT, 1925, s. 28, see HALSBURY'S STATUTES, Vol. 15, pp. 203-207.]

Cases referred to:

- (1) *Re Wakeman, National Provincial Bank, Ltd. v. Wakeman*, [1945] 1 All E.R. 421; [1945] Ch. 177; 114 L.J.Ch. 145; 172 L.T. 226; 2nd. Digest Supp.
- (2) *Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 107; 142 L.T. 111, C.A.; Digest Supp.
- (3) *Re Stimpson's Trusts, Stimpson v. Stimpson*, [1931] 2 Ch. 77; 100 L.J.Ch. 312; 145 L.T. 249; Digest Supp.

ADJOURNED SUMMONS to determine whether, on the true construction of a will and of the Law of Property Act, 1925, s. 28, the trustees for sale of certain real property had power to re-invest in real property money and securities representing the proceeds of the sale of part of the realty and also money in hand representing compensation under the War Damage Act, 1943, for damage to the real property. VAISEY, J., held that they had no such power. The facts appear in the judgment.

Wilfrid Hunt for the plaintiffs (trustees under the will).

E. Milner Holland, K.C., and *Hesketh* for the first and second defendants (daughter and grandson of the testator interested in the residuary trust funds). *Jennings, K.C.*, and *Geoffrey Cross* for the third defendant (infant grandson of the testator interested in the residuary trust funds).

Cur. adv. vult.

June 14. VAISEY, J., read the following judgment. On this summons I have to consider what is the true effect of the Law of Property Act, 1925,

s. 28, in regard to a question which has been much discussed and controverted ever since the Act was passed, but which (rather surprisingly) has not hitherto been judicially determined.

The circumstances in which the question arises in the present case must first be stated. By his will, dated Aug. 18, 1915, the testator, William Henry Wellsted, appointed executors and trustees and gave the whole of his estate not thereby otherwise disposed of unto the trustees on trust for sale and conversion and directed that out of the proceeds thereof and his ready money his funeral and testamentary expenses, debts and legacies should be paid. He further directed that the residue of such moneys should be invested with power for his trustees from time to time to vary such investments and that his trustees should stand possessed of the said residuary trust moneys and the investments for the time being representing the same (which he defined as "the residuary trust fund") in trust to pay the income thereof to his wife during her life if she should so long continue his widow. Subject to the wife's interest the residuary trust funds were directed to be held on certain trusts for the benefit of the testator's children and their families of which it is only necessary to say that such trusts are still subsisting. The widow (as I was informed) survived the testator, but did not marry again, and she is now dead. The plaintiffs are the present trustees of the will. The first defendant is a daughter of the testator entitled to a life interest in a fourth share in the said residuary trust funds. The second defendant is an adult grandson of the testator entitled in remainder to part of another such fourth share. The third defendant is an infant grandson with a similar interest in remainder. There are provisions in the will empowering the trustees to postpone the sale and conversion of the testator's real and personal estate, or any part thereof, for so long as they should think fit, and so that in the meantime the rents, profits and income of such part of his estate as should for the time being remain unsold should be applied as income. There are further provisions empowering the trustees in their absolute discretion to allow the whole or any part of his estate to remain in the same condition or state of investment in which it should be at the time as that of his death.

On Jan. 4, 1917, the testator made a codicil to his will, and he died on Dec. 9, 1920. Shortly after his will and codicil were proved by the executors. The testator's residuary estate at his death comprised (in addition to personal property of considerable value) real estate of the value of £91,000, or thereabouts. Prior to Jan. 1, 1926, when the Law of Property Act, 1925, came into operation, real estate of the testator of the value of £16,000, or thereabouts, had been sold, and after part of the proceeds had been applied in the payment of duties there remained a sum of about £8,800 which was invested in trustee investments (neither the will nor the codicil prescribing any particular range of investments), and these are still held and can presumably be identified. From time to time after the said date further parts of such real estate have been sold, realising a total of £13,100, or thereabouts. The proceeds were placed in similar investments which are also still held, and can also, no doubt, be identified. A house forming part of the testator's estate has recently been sold, and the plaintiffs have in hand a sum of £574 7s. 0d., being the proceeds of sale still awaiting investment. They also have in hand sums amounting in all to £3,192 13s. 0d., received as value payments under the War Damage Act, 1943, in respect of freehold properties which formed and form part of the estate and had been injured by enemy action. Besides the investments and sums of money already mentioned (and other investments) the trustees still hold a considerable amount of real estate which belonged to the testator at his death and still remains unsold. Its value is said to be upwards of £40,000. The plaintiffs consider that it would be advisable that some part of it should be sold and the proceeds re-invested in the purchase of other real estate. Some, possibly all, of the adult beneficiaries, including the first and second defendants, concur in that opinion, and they have further suggested that the said sums of £574 7s. 0d. and £3,192 13s. 0d., and some of the before-mentioned investments representing the said sums of £8,800 and £13,100, might advantageously be invested or re-invested in the purchase of real estate.

The question is whether the plaintiffs have power to effect any, and, if so, which, of these projected transactions. That, admittedly, depends on what

the true meaning and effect of s. 28 of the Act may be. When the summons first came before me, I directed it to stand over in order that the third defendant should be added as a party and that his guardian *ad litem* should assist the court by submitting on his behalf an argument that the course which the beneficiaries generally desired to be open to the plaintiffs to follow at their discretion was not, in effect, open to them at all. At the adjourned hearing this was done, and I am greatly indebted to all the counsel for the help they have given to me.

I must now turn to s. 28, which is certainly a puzzling piece of legislation. It is not made any easier to follow by the insertion by an amending Act into the middle of sub-s. (1), on which the question mostly turns, of some words which have no bearing whatsoever on the present problem, and are a mere parenthesis awkwardly dividing the relevant words at the beginning of the section from the relevant words at the end of it. I accept the suggestion of counsel that I should consider and deal with the section in its original form, that is, with the parenthesis omitted. Section 28 provides :

“(1) Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority: . . . and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale. All land acquired under this sub-section shall be conveyed to the trustees on trust for sale. The power conferred by this sub-section shall be exercised with such consents (if any) as would have been required on a sale under the trust for sale, and when exercised shall operate to over-reach any equitable interests or powers which are by virtue of this Act or otherwise made to attach to the net proceeds of sale as if created by a trust affecting those proceeds . . . (5) This section applies to dispositions on trust for sale coming into operation either before or after the commencement or by virtue of this Act.

Neither sub-s. (3) nor sub-s. (4) appear to throw any light on the matter.

The problem which now presents itself came near to solution in *Re Wakeman* (1). There, however, the only land held by the testator had already been sold and the proceeds had been invested in authorised investments which were readily distinguishable from other parts of his estate. Three points were raised in argument: first, that the reference to proceeds of sale in the sub-section did not give to trustees for sale the powers of investment given by the Settled Land Act, 1925, s. 73, because such powers are not really powers but are imperative trusts. That point, of course, arises here. Secondly, that the proceeds of sale cannot, after being invested in something else, be re-invested in land because, even if there is a power of investment, there is no power of re-investment. That point also arises here. Thirdly, that after all the land had been sold the powers no longer exist because the trustees are no longer “trustees for sale” within the meaning of the Act which, by s. 205 (xxix), defines that expression as meaning “persons (including a personal representative) holding land on trust for sale.” It was only on that third point, which does not arise in the present case, that UTHWATT, J., based his decision. He said ([1945] 1 All E.R. 422) :

The language of the definition is clear and does not in my view allow one to put on the phrase “trustees holding land on trust for sale” a gloss which would make it include “trustees who have held, but no longer hold, land on trust for sale.” The question remains whether in s. 28 the context requires a different meaning to be given to the expression “trustees for sale.” The suggestion is that the phrase here includes trustees who, while not holding any land on trust for sale, have under their control proceeds of sale resulting from an exercise in the past of a trust for sale. In my view, neither the language used in the section nor the subject-matter to which the section is addressed suggest any such extended meaning. The language used is clear. As regards subject-matter the main point of the section is not to encourage dealings *in* land but to facilitate dealings *with* land, and to that end powers are given which may be duly exercised if circumstances so require. There is no reason in the nature of things why trustees who have sold all land at any time held by them should remain endowed with powers which find their origin and meaning in land holding and which could if existing be used only as respects proceeds of sale. It was argued that the construction which I place on the phrase “trustees for sale” in s. 28 would produce

whimsical results. On that construction the retention by trustees of any land—however minute in quantity—would keep alive the powers given by the section as regards the proceeds of sale of all land theretofore sold by them: with the sale of that land all those powers would disappear. That, it was argued, could not have been intended. Again, it was said that on the same construction the powers applicable as regards proceeds of sale of land are under the 1925 legislation, less than the powers formerly exercisable under the Settled Land Acts, 1882-1890, and that this fact was a reason for its rejection. No doubt it is right, where there is used in a statute language which is capable of more than one construction, to consider and to take into account the consequences of alternative constructions and also to take into consideration previous legislation on the same topic. But here the language used is clear and unambiguous and the statute must, therefore, be left to speak for itself. It would be out of place to deal in any detail with the substance of the statements involved in the two contentions. I would only say upon the first of these contentions that some easily workable definition of "trustees for sale" was desirable and is given, and, conceding the accuracy of the statements contained in the contention, its weight disappears when the general point of the section is borne in mind; and upon the second of them, that I do not think that it is accurate in fact and that the prior legislation as regards lands held on trust for sale proceeds upon a footing entirely different from that adopted in the 1925 legislation. I accordingly hold that the bank are not trustees for sale within the meaning of the Act, and, as trustees of the testator's will, do not possess any power to buy land.

There are two passages in that judgment of UTHWATT, J.'s, to which (although they are more *obiter dicta*) I ought, I think, to pay great attention. One is where that learned judge says:

As regards subject-matter the main point of the section is not to encourage dealings in land but to facilitate dealings with land, and to that end powers are given which may be duly exercised if circumstances so require.

The other passage is this:

No doubt it is right, where there is used in a statute language which is capable of more than one construction, to consider and to take into account the consequences of alternative constructions and also to take into consideration previous legislation on the same topic.

The section has to some extent been considered and observed on in two other reported cases to which I will now refer. The first is *Re Kempthorne* (2) in which two points were involved. The facts, so far as relevant, may be taken from the headnote ([1930] 1 Ch. 268):

By his will dated Dec. 2, 1911, a testator devised to his brother Charles "all my freehold and copyhold property," and gave all his leasehold property and personal estate and effects, subject to payment of his funeral and testamentary expenses, debts and legacies upon trust for division amongst his brothers and sisters as therein mentioned. The testator died on Aug. 15, 1928, and was at his death entitled (subject to the effect of the provisions of the Law of Property Act, 1925) to two equal ninth shares of certain freehold property comprised in his father's residuary estate, and to one equal fourth part of certain freehold minerals purchased by him. He also owned the entirety of certain other freehold property. The residuary gift of personalty lapsed as regards three equal seventh parts owing to the death of two legatees in the testator's lifetime:—HELD, (1) that as the land held in undivided shares was by the Law of Property Act, 1925, sched. I, pt. IV, para. 1, and s. 35, subjected to a trust for sale as from Jan. 1, 1926, the testator's interest in undivided shares of freehold property was then converted into personal property and passed on his death under the gift of personal property.

In the course of his judgment MAUGHAM, J., said (*ibid.*, 273):

Prima facie, therefore, at the date of the death of the testator and as a result of s. 24 of the Wills Act, the undivided shares were of the nature of land held upon the statutory trusts for sale. It is, however, asserted that, as a result of s. 28 of the Law of Property Act, 1925, the persons who are trustees and who hold the land on the statutory trusts are in such a position that any moneys arising from the sale became capital moneys and are applicable in the same way as if the money arose under the Settled Land Act, 1925. If that were the true effect of s. 28, s. 75 (5) of the Settled Land Act, 1925, would apply, and there would accordingly be an equitable re-conversion of the land, so that the effect of the legislation of 1925 would not be to deprive the devisee of these undivided shares. That, I may add, appears to be the view taken by the learned editor of WOLSTENHOLME and CHERRY'S CONVEYANCING STATUTES (see vol. ii, 11th ed., p. 202), and appended as a note to s. 75 (5); and see p. 276, where the learned editor writes: "There can be undivided shares in proceeds of sale, *i.e.*, equitable interests in land which become capital money (Law of Property

Act, 1925, s. 28), and so can be treated as land." In support of that he refers to s. 75 (5) of the Settled Land Act, 1925, and he adds: "Thus although a trust for sale operates to convert the land into personalty there is an immediate re-conversion." There are no doubt difficulties in accepting that view on the true construction of s. 28 of the Law of Property Act, 1925, for the section does not say that capital money arising from the exercise of a trust for sale shall be applicable as if it were capital money arising under the Settled Land Act: and it may be that there is some difficulty, on the language, in holding that s. 28 has the effect contended for before me and the effect mentioned in the passage from *WOLSTENHOLME*.

In the Court of Appeal LORD HANWORTH, M.R., after referring to the Law of Property Act, 1925, s. 35, proceeded (*ibid.*, 287):

But it is said that in other sections there are indications that the proceeds of sale under the statutory trusts are to be treated as realty. As an illustration of this, reference is made to s. 28, which deals with the powers of management conferred on trustees for sale. That section has been amended, and our attention was called to the amendment, which confers enlarged powers of management in certain cases. It is said that powers conferred by s. 28 are to operate upon the proceeds of sale and prevent conversion. But it appears to me that s. 28 is passed *alio intuitu*. It has no reference to revoking or altering the natural effect in law of a trust for sale which operates to effect conversion.

LAWRENCE, L.J., pointed out (*ibid.*, 291) that the section draws:

... a sharp distinction between capital money arising from a sale of land under a trust for sale and capital money arising from a sale of settled land (whether consisting of an undivided share or of the entirety) under the provisions of the Settled Land Act, 1925.

RUSSELL, L.J., also referred to the section, but not, I think, so as to throw any light on the present case.

The references to the section in *Re Stimpson's Trusts* (3) are, I think, difficult to follow. The point of that decision may be taken, so far as it is material, from the headnote ([1931] 2 Ch. 77):

Trustees of a will held land upon trust for sale and the proceeds of sale were not subject to any trust for re-conversion under the will:—HELD, that they were entitled to exercise the power of advancement out of capital conferred upon them by s. 32 of the Trustee Act, 1925, in favour of a remainderman, subject to the consent of the tenant for life, whose life interest was protected against assignment.

I will read the judgment of LUXMOORE, J., where he says (*ibid.*, 81):

It is therefore necessary in the case of property held on trust for sale to consider whether or not the proceeds of such sale are by statute or in equity to be considered as land or applicable as capital money for the purposes of the Settled Land Act, 1925. It is difficult to understand exactly what the sub-section is aimed at. There is, so far as I am aware, no statute which provides that the proceeds of sale of property held on trust for sale are to be considered as land, and certainly there is no rule in equity to that effect. The rule is entirely to the contrary. The only suggestion that has been made by counsel is that the reference in the sub-section to statute is a reference either to s. 28 of the Law of Property Act, 1925, or to s. 75 of the Settled Land Act, 1925. Section 28 of the Law of Property Act provides that: "Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority": Pausing there, all it comes to is that trustees for sale have the right to exercise certain powers under the Settled Land Act, 1925. Then—leaving out the interpolation contained in the schedule to the Law of Property (Amendment) Act, 1926... the section proceeds: "and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale."

I return to s. 28 itself. The marginal heading does not, of course, form part of the section and cannot be used as a guide to its interpretation. It is, however, to be noticed that LORD HANWORTH, M.R., in the passage from his judgment which I have quoted describes the section as dealing with questions of management. The first observation I would make is that neither the words "subject to any express trust to the contrary," which appear later in sub-s. (1), nor any similar words are to be found at the beginning of that sub-section. The consequence of that is that the powers, whatever they may be, conferred on trustees for sale by the Act are powers of which they cannot be deprived

by any provision in the trust instrument. Suppose a case (and it does not really differ from the present case) in which a testator, by his will coming into operation either before or after Jan 1, 1926, has directed that his real estate is to be sold and that the proceeds are to be invested in British government securities "and in no other form of investment." If the section has the wide operation contended for, the direction for investment would be overridden, and the land of such a testator, say, in Devonshire, could be sold and the proceeds applied in purchasing land in, say, Northumberland. That land in turn could be sold and the proceeds laid out in buying land in Kent and the operation could be repeated at the discretion of the trustees indefinitely. Such a result is, to my mind, so surprising as by itself to raise grave doubts as to the validity of the contention.

The next point to which I would draw attention is that the words "including in relation to the land the powers of management conferred by that Act"—that is the Settled Land Act, 1925—"during a minority" might be held to indicate by a sort of inverse application of the *ejusdem generis* rule that the powers previously mentioned were, or were analogous to, powers of management, but the separate mention, by way of inclusion, of those particular powers would seem to be accounted for by the circumstance that they were not formerly part of the settled land legislation, but were to be found in the Conveyancing Act, 1881, s. 42, and the Law of Property Act, 1922, s. 61. The point, if it exists, is a very minor one, but these are waters in which the swimmer may be pardoned for grasping at even the smallest of straws.

The problem is, of course, to discover what are the powers to which the section refers or, more particularly, whether those powers include the directions given by the Settled Land Act, 1925, s. 73 (1), as to the investment or other application of capital money. Section 73 (1) provides :

Capital money arising under this Act, subject to payment of claims properly payable thereout and to the application thereof for any special authorised object for which the capital money was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely) :—(i) In investment in government securities, or in other securities in which the trustees of the settlement are by the settlement or by law authorised to invest trust money of the settlement, with power to vary the investment into or for any other such securities ; (ii) In discharge . . . of incumbrances . . . ; (iii) In payment for any improvement authorised by this Act ; . . . (x) In purchase of the freehold reversion in fee of any part of the settled land, being leasehold land held for years ; (xi) In purchase of land in fee simple, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land ; (xii) In purchase either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes ; . . . (xix) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge ; (xx) In payment of costs . . .

In the view that I take, and am about to indicate, I am not prepared to say that any one of these matters is in itself excluded from the purview of s. 28, but the words of that section, when examined, appear, in my judgment, to indicate some limit in the conditions necessary to permit of recourse being had to them.

The question may be put more precisely as follows : Are the trustees for sale entitled to purchase or otherwise acquire land as an investment ? The last few words are to be emphasised. Generally speaking the powers referred to would seem to include all those enumerated in pt. II of the Settled Land Act, 1925, that is to say, in ss. 38 to 72 inclusive headed "Powers of a tenant for life." I need not specify them in detail. They include powers of exchange, leasing powers, powers to grant options, power to dedicate streets, to cut and sell timber, and many others. Section 90 also comes into the scheme. Section 102 is brought into it expressly. It seems to me, however, that all these powers are given to persons for the time being holding land on trust for sale in order for their being exercised in relation to such unsold land and not otherwise. Similarly, I read the section as saying that the proceeds of sale of other land

already effected by such persons may be applied by them in connection with such exercise of those powers in the same manner as capital moneys might have been applied under a settlement within the meaning of the Settled Land Act, 1925. That the section contemplates that land may be acquired under its provisions is plain from its wording. I do not doubt that such acquisition might be by way of exchange or by purchase, but, in my view, the acquisition of land *as an investment* is outside the authority which the section confers. If land is required for the preservation or protection of the unsold land or for its improvement, the case is, to my mind, wholly different. For example, an easement or other appurtenance over adjoining land, or a piece of ground necessary to preserve the amenities of the unsold land or to round off an estate, could, in my judgment, be acquired either by purchase or exchange within the terms of s. 28. Another example would be the purchase of the reversion in a lease. This is a very different matter from adding land to the range of permissible investments prescribed by the instrument creating the trust, or by law. I cannot believe that the section was intended to have such a far-reaching and revolutionary effect. I cannot believe that it permits an estate in Devonshire to be exchanged for a house in London any more than that it permits such an estate to be sold and the proceeds applied in the purchase of such a house. It seems to me, therefore, that, while the section permits the acquisition of land by exchange or by purchase in relation to or in connection with the unsold land held by the trustees for sale, it does not go so far as to permit land to be acquired *as an investment*.

The view which I am taking seems to gain some support from the Law of Property Act, 1925, s. 32, which deals with the case where a settlement of land held on trust for sale contains a power to invest money in the purchase of land. This is hardly consistent with the contention that every such settlement necessarily contains such a power by virtue of s. 28. It must always be remembered that land may be purchased by trustees as an investment with the leave of the court under the Trustee Act, 1925, s. 57, if the expediency of the proposed transaction can be satisfactorily proved. I do not overlook the arguments to the contrary of the view which I have taken. It is true that the powers of a tenant for life do include the power to select modes of investment (Settled Land Act, 1925, s. 73), and the power to contract for the purchase of land. None the less, I come to the conclusion that not only these, but all the other powers, are only to be exercised within limits. It is possible to say that s. 73 is not an empowering section at all, but I do not decide the case on that ground. The application of proceeds of sale under s. 28 is limited to certain purposes (see the Settled Land Act, 1925, s. 71), and their investment is not a "purpose authorised by the Settled Land Act, 1925," to quote the words of s. 28.

I may sum up by saying that when the words of the section are examined, I think that the proper meaning to extract from them is very shortly that in relation to and in respect of land held on trust for sale (but not otherwise) the trustees may (1) exercise all or any of what can be succinctly called the Settled Land Act powers, and may (2) apply proceeds of sales of land for what may also succinctly be called Settled Land Act purposes, and the section is careful to say that, if there is any capital money in hand as the result of any such dealings which is not applied to a Settled Land Act purpose, then it has to be dealt with under the provisions of the trust itself. I would put it thus. When the trustees are trustees with money to invest they are no longer trustees with land to sell and are outside the section altogether so far as that money is concerned. My decision is, I am aware, contrary to the views expressed by the writers of the text books and I hope that no one will suppose that I regard the point otherwise than as one of doubt and difficulty.

If the case fails as regards the £574 7s. 0d. in hand, and as regards the proceeds of future sales (and I think it does), it is even more difficult to sustain as regards the investments representing the £8,800 and £13,192 in respect of which a power of re-investment would have to be established. The £3,192 13s. 0d. received in respect of War Damage is admittedly not, and never was, proceeds of sale. I must declare that the trustees have no such power of investment or re-investment as the summons suggests. They have no power to invest or re-invest in the purchase of real estate as an investment.

The costs of all parties as between solicitor and client must be paid out of such part of the capital of the trust moneys as the plaintiffs may decide to be most convenient.

Order accordingly.

Solicitors: *Smith & Hudson* (for the plaintiffs and the third defendant); *Smith & Hudson*, agents for *Rollit, Farrell & Bladon*, Hull (for the first and second defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.] A

Re BRITISH FOLDING BED CO. *Ex parte* THE TRUSTEE *v.*
N. A. WOODIWISS & CO.

[CHANCERY DIVISION (Jenkins, J.), April 12, May 25, 26, June 16, 1948.] B

Bankruptcy—Commencement of bankruptcy—Petition adjourned—Application for liabilities adjustment order—Protection order made—Bankruptcy proceedings stayed—Adjustment order refused—Bankruptcy petition restored—Receiving order—Date of commencement of bankruptcy—Costs—Solicitors' profit costs and disbursements incurred by debtor before and after notice of act of bankruptcy—Whether allowable out of bankrupt's estate—Bankruptcy Act, 1914 (c. 59), ss. 30 (2), 37 (1). C

On Jan. 16, 1942, the debtors committed an act of bankruptcy, and on Jan. 21, 1942, a bankruptcy petition based thereon was presented. On Feb. 13, 1942, the petition came on for hearing, and at the request of the debtors was adjourned for six weeks. On Mar. 20, 1942, during the adjournment of the petition, the debtors applied to the county court for a liabilities adjustment order under the Liabilities (War-Time Adjustment) Act, 1941, and on Mar. 25, 1942, the county court made a protection order and referred the affairs of the debtors to the liabilities adjustment officer for investigation and report. The county court also ordered the sale of the debtors' stock-in-trade and the payment into court of the proceeds. On Mar. 27, 1942, consequent on the protection order, the bankruptcy petition was stayed. In November, 1942, the liabilities adjustment officer reported, and recommended that the application be dismissed and the protection order revoked, and on Apr. 15, 1943, the county court judge made an order in those terms, also ordering that creditors represented at the hearing should be allowed their costs out of the moneys of the debtors in court. An application for the payment of the debtors' costs out of their assets was refused. On Oct. 22, 1943, the Court of Appeal dismissed the debtors' appeal against the order revoking the protection order. The bankruptcy petition was restored and on Nov. 9, 1943, a receiving order was made, based on the act of bankruptcy of Jan. 16, 1942. At all material times the respondents, a firm of solicitors, acted for the debtors, and they claimed payment in full of both their disbursements and profit costs in some instances, and payment in full of disbursements and admission to proof of profit costs as debts in other instances. D

HELD: (i) as regards profit costs and disbursements incurred before Jan. 16, 1942, the respondents' rights must be limited to proof in respect of the taxed amounts, whether of costs or disbursements, and in order to arrive at the provable amount there must be deducted from the taxed total any sums paid to the respondents on account of those costs and disbursements before Jan. 16, 1942. E

(ii) there was nothing in the Act of 1941 to suggest that where a debtor obtained a protection order which was subsequently revoked and was followed by a receiving order against him, founded on an act of bankruptcy committed before the date of the protection order, the bankruptcy was not to be deemed to relate back to and commence on the date of the act of bankruptcy in the ordinary way, or that persons having notice of the act of bankruptcy were, merely by virtue of the fact that the act of bankruptcy had been followed by the making and subsequent revocation of a protection order, to be in any better position in the ensuing F

bankruptcy with respect to debts contracted after they had had such notice than they would have been in if the protection order had not been made, and, therefore, the ordinary rules of bankruptcy should be applied and the respondents were not entitled to anything by proof or otherwise in respect of costs and disbursements incurred after Jan. 16, 1942, when they had notice of the act of bankruptcy, except in so far as those costs and disbursements could be regarded as payment for services resulting in benefit to the debtors' estate within the principle in *Re Simonson, Ex parte Ball* ([1894] 1 Q.B. 433).

THE COURT disallowed the respondents' claim for profit costs and disbursements in respect of the adjustment proceedings in the county court and in respect of the unsuccessful appeal to the Court of Appeal on the ground that the proceedings were wholly brought for the benefit of the debtors and not for the benefit of the estate. As regards the profit costs and disbursements in an action brought by S. against the debtors by leave of the county court, the court substantially allowed the taxed amount on the ground that the defence of the action had, on the *Re Simonson* principle, resulted in a benefit to the estate. The respondents claimed to apply towards satisfaction of the costs and disbursements in the adjustment proceedings certain sums deposited after Jan. 16, 1941, generally on account of costs, in addition to receiving from the estate the full amount allowed in respect of the S. proceedings. It appeared from a memorandum and letter of the respondents that the money had in fact been applied towards the costs of the S. proceedings.

HELD: the respondents could not be allowed anything out of the estate without giving credit against their admissible claims for what they had received, and, therefore, such an application of the deposited sum was not permissible.

Re Sinclair, Ex parte Payne (1885) (15 Q.B.D. 616), distinguished.

[AS TO RELATION BACK OF TRUSTEE'S TITLE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 241-249, paras. 316-323; and FOR CASES, see DIGEST, Vol. 5, pp. 638-646, Nos. 5739-5797.]

Cases referred to:

- (1) *Re Simonson, Ex p. Ball*, [1894] 1 Q.B. 433; 63 L.J.Q.B. 242; 70 L.T. 32; 5 Digest 642, 5773.
- (2) *Re Sinclair, Ex p. Payne*, (1885), 15 Q.B.D. 616; 53 L.T. 767; 5 Digest 641, 5764.

MOTION by a trustee in bankruptcy for directions as to the payment or otherwise out of the bankrupt's estate of certain profit costs and disbursements claimed by solicitors who, or whose predecessor in business, acted for the bankrupt both before and after the act of bankruptcy on which the petition was based and of which they had immediate notice. The facts appear in the judgment.

Morle, K.C., and *R. M. Talbot* for the applicant (the trustee in bankruptcy).
Platts Mills for the respondents (the claimants).

Cur. adv. vult.

June 16. JENKINS, J., read the following judgment. This is an application by the trustee in the bankruptcy of the partners in a firm known as "The British Folding Bed Company" for directions as to certain costs and disbursements claimed by Messrs. N. A. Woodiwiss & Co., solicitors, to be payable in full out of the estate of the bankrupts. The claimants are the successors in business of Mr. N. A. Woodiwiss, a solicitor, who, before his death on June 30, 1945, had been practising alone under the style of N. A. Woodiwiss & Co. as the sole surviving partner in a former firm of that name. The claims dealt with in the evidence and discussed in argument before me were not confined to sums claimed as payable in full. There were actually three matters in respect of which both profit costs and disbursements were claimed to be payable in full, and twelve matters in respect of which disbursements were claimed to be payable in full and profit costs were claimed as debts which should be admitted to proof and rank for dividend in the bankruptcy. It was agreed at the hearing that on the present application I should deal with the whole position between the claimants and the trustee and give

directions as to the admissibility or otherwise of each of the amounts claimed whether as a provable debt or as a proper subject for payment in full.

The facts relevant to the claims may be summarised as follows. The relevant act of bankruptcy, in the form of failure by the debtors to comply with a bankruptcy notice, was committed on Jan. 16, 1942. Mr. Woodiwiss was at all material times acting as solicitor to the debtors, and it was admitted before me that for the present purpose he must be assumed to have had notice of the act of bankruptcy on the date on which it occurred. A bankruptcy petition founded on the above-mentioned act of bankruptcy was presented on Jan. 21, 1942, and came on for hearing on Feb. 13, 1942, when, at the request of the debtors, it was adjourned for six weeks. During the period of this adjournment, on Mar. 20, 1942, the debtors applied to the Westminster County Court for a liabilities adjustment order under the Liabilities (War-Time) Adjustment Act, 1941, and on Mar. 25, 1942, the Westminster County Court made a protection order under that Act in respect of the debtors and their affairs, referred the affairs of the debtors to the liabilities adjustment officer for investigation and report, adjourned the application for a liabilities adjustment order, and ordered that the stock-in-trade of the debtor firm should be sold with the approval of the liabilities adjustment officer and that all moneys realised by the sale should be paid into court. On Mar. 27, 1942, the bankruptcy petition was stayed by reason of the protection order thus made. The stock-in-trade of the debtor firm was in due course sold and the proceeds of such sale were paid into court in accordance with the county court's order of Mar. 25, 1942. By a further order of the Westminster County Court made in the liabilities adjustment proceedings on Aug. 5, 1942, it was ordered that the assets of the debtors be charged to the liabilities adjustment officer, such charge not to include the banking account or accounts of the debtors or any dividends arising out of such assets that might become payable to the debtors, and that the said charge should be subject to any existing charges on the debtors' assets and to any lien for costs on moneys coming into the hands of the debtors' solicitors.

The liabilities adjustment officer's investigation was protracted and his report under the county court's order of Mar. 25, 1942, was not completed until November of that year. In the concluding paragraph of his report he expressed the view that the case was not one in which it would be practicable or proper to make an adjustment order, and recommended that the application should be dismissed and the protection order revoked. The adjourned application for an adjustment order ultimately came on for hearing in April, 1943, when it was strenuously opposed by a number of creditors. On Apr. 15, 1943, after a hearing which seems to have lasted for seven days the learned county court judge made an order dismissing the debtors' application for an adjustment order and revoking the protection order, and directing (*inter alia*) that the creditors represented at the hearing be allowed their costs taxed on county court scale "C" out of the moneys of the debtors in court. I have been supplied with a copy of the transcript of the shorthand notes of the last day's proceedings in the county court from which it appears that an application was made for an order under the Liabilities (War-Time Adjustment) Rules, 1942, r. 60 (4), for the payment of the debtors' costs out of their assets and was refused by the learned county court judge. It was also represented to him that costs had been incurred by the debtors in prosecuting and defending certain actions for the benefit of the creditors and he was asked to make an order for payment of these costs out of the assets, but declined to do so. The debtors appealed to the Court of Appeal from the county court's order of Apr. 15, 1943, revoking the protection order, and their appeal was dismissed on Oct. 22, 1943. The bankruptcy petition was then restored and on Nov. 9, 1943, a receiving order founded on the act of bankruptcy committed on Jan. 16, 1942, was made. Adjudication followed on Nov. 30, 1943.

The claims on which the directions of the court are now sought are conveniently set out as items 1 to 15 of exhibit "G.C.2" to the affidavit of the trustee sworn in these proceedings on Feb. 26, 1948, and I will refer to them by the same numbers. Several of the items listed in this exhibit represent profit costs and disbursements incurred wholly or in part before the date of the act of bankruptcy (*i.e.*, Jan. 16, 1942) in actions by or against

the debtors commenced prior to that date. So far as costs and disbursements incurred before Jan. 16, 1942, are concerned, the trustee does not dispute the ordinary right of proof, subject to taxation of the relevant bills, but he says that the claimants' right must be limited to proof in respect of the taxed amounts, whether of profit costs or of disbursements, and that there is no justification whatever for the claim for payment of the disbursements in full. He further says that, to arrive at the provable amount, there must be deducted from the taxed total any sums paid to Mr. Woodiwiss on account of these profit costs and disbursements before Jan. 16, 1942. In my opinion, the trustee is quite clearly right on this part of the case.

The remainder of the profit costs and disbursements in question were incurred after Jan. 16, 1942, and (so far as they call for special mention at this stage) they include (item 3) a sum of £250 11s. 6d., profit costs and disbursements in the liabilities adjustment proceedings in the Westminster County Court (which are claimed in full), and also (item 15) £50 7s. 6d. disbursements and £135 4s. 0d. profit costs in the unsuccessful appeal to the Court of Appeal from the revocation of the protection order by the county court, which are claimed to be payable in full as regards the disbursements and provable as regards the profit costs. They also include (item 1) £581 5s. 3d. claimed in full as representing profit costs and disbursements (substantially all incurred after Jan. 16, 1942) in respect of the successful defence in the High Court and the Court of Appeal of an action brought against the debtors by a Miss Phyllis Stanley for £2,240 money lent, and (item 2) £69 2s. 7d. profit costs and disbursements claimed in full in respect of an action brought by the debtors against a company called Whitaker & Co., Ltd., after Jan. 16, 1942, which was still pending at the date of the receiving order and was settled by the trustee.

To deal with the items (or parts of items) representing profit costs and disbursements incurred after Jan. 16, 1942, it is necessary first to consider the question whether the proceedings in the county court under the Liabilities (War-Time Adjustment) Act, 1941, had the effect of displacing in favour of the claimants (or Mr. Woodiwiss through whom they claim) the ordinary rules of bankruptcy under which the bankruptcy of a debtor is deemed to have relation back to and commences at the time of the act of bankruptcy on which the receiving order is made: Bankruptcy Act, 1914, s. 37 (1); and a person having notice of any act of bankruptcy cannot prove for any debt or liability contracted by the debtor subsequently to the date of his so having notice: *ibid.*, s. 30 (2). In my judgment, this question should be answered in the negative. I can find nothing in the Liabilities (War-Time Adjustment) Act, 1941, to suggest that where a debtor obtains a protection order which is subsequently revoked and is followed by a receiving order against him, founded on an act of bankruptcy committed before the date of the protection order, the bankruptcy is not to be deemed to relate back to and commence on the date of the act of bankruptcy in the ordinary way, or that persons having notice of the act of bankruptcy are, merely by virtue of the fact that the act of bankruptcy has been followed by the making and subsequent revocation of a protection order, to be in any better position in the ensuing bankruptcy with respect to debts contracted after they have had such notice than they would have been in if the protection order had not been made. No doubt, under the wide powers conferred on the court making a protection order by the Liabilities (War-Time Adjustment) Act, 1941, s. 3 (2), directions may be given which may materially affect the ordinary course of administration in bankruptcy even though the protection order is ultimately revoked and a receiving order founded on an antecedent act of bankruptcy supervenes. Thus, the county court might (I apprehend) have directed the defence or prosecution, on behalf of the debtors, of any of the various actions and the payment of the costs of so doing out of the assets, but it gave no such directions. It might also (under the Liabilities (War-Time Adjustment) Rules, 1942, r. 60 (4)), have directed the debtors' costs of the adjustment proceedings to be paid out of the assets, but (as already mentioned) it declined to do so. None of the orders actually made in the adjustment proceedings gave Mr. Woodiwiss, so far as I can see, any special rights in respect of any of the amounts now claimed.

In my judgment, therefore, the ordinary rules of bankruptcy must be applied. It follows that the claimants are not entitled to anything, whether by way of proof or otherwise, in respect of any of the profit costs or disbursements incurred after the date on which Mr. Woodiwiss had notice of the act of bankruptcy (*i.e.*, admittedly the date of commission of the act itself, namely, Jan. 16, 1942) except in so far as they can be brought within the exception recognised in *Re Simonson* (1), the scope and limits of which are thus stated in the headnote ([1894] 1 Q.B. 433):

As a general rule a trustee in bankruptcy may, in the exercise of his discretion, adopt and pay for services rendered to a bankrupt after notice of an act of bankruptcy, where such services have clearly resulted in a benefit or profit to the bankrupt's estate commensurate with the services rendered, but he must be very strict in the application of the rule.

Applying the ordinary rules of bankruptcy, tempered by this exception, to the claims in the present case, the directions I give are as follows: (A) As to the Stanley action, (item 1), it appears that the county court gave the plaintiff leave to proceed unless her claim was admitted by the debtors, and that the debtors' defence of the action and appeal benefited the estate to the extent of the £2,240 which would have been a provable debt if judgment had been allowed to go by default. The trustee acknowledges the benefit and agrees that Mr. Woodiwiss's services in the matter, contributing as they did to this result, should be paid for out of the estate on the *Re Simonson* (1) principle. He points out however that, if the proceedings in bankruptcy had taken their ordinary course without the interposition of the stay occasioned by the protection order, the litigation of Miss Stanley's claim would have taken the form of proof and rejection of proof followed by an appeal to the judge in bankruptcy and thence to the Court of Appeal, and he says that this mode of procedure would have been cheaper to the estate than the defence of the action which was actually brought. There is no reason (says the trustee) why the claimants should receive more from the estate for Mr. Woodiwiss's services in securing this benefit than it would have cost the trustee to do so if he had dealt with the matter. I think this contention is well founded, and I, therefore, direct that the trustee should allow the claimants the full amount (to be taxed) of their profit costs and disbursements in the Stanley action and appeal but so that on such taxation any costs or disbursements in excess of those which would have been properly incurred if the claim had been made by proof in the bankruptcy and not by action are to be disallowed. (B) As to item 2, the action by the debtors against Whitaker & Co., Ltd., which was begun after Jan. 16, 1942, the writ not having been issued until July 24, 1942, there was a counterclaim in this action and at the date of the receiving order it had not come to trial, and the defendant company seems to have proved in the bankruptcy in respect of its counterclaim, which proof seems to have been rejected. Ultimately, on May 29, 1945, the matter was settled by means of a consent order (the trustee being made a party for this purpose) on terms that the claim and counterclaim should be withdrawn (each side paying their own costs), that the defendant company should make no claim in the bankruptcy in respect of the costs awarded to them by the Court of Appeal in the adjustment proceedings, and that the defendant company should withdraw an appeal they had lodged against the rejection of their proof. It is by no means apparent that the trustee could not have settled this claim and cross-claim in the bankruptcy on equally favourable terms if the action had never been started. Accordingly, I cannot regard the case as falling within the *Re Simonson* (1) principle, and I direct that this item (2) should be wholly disallowed. (C) As to items 3 and 15, which are the profit costs and disbursements in respect of the adjustment proceedings in the county court (claimed in full) and the disbursements (claimed in full) and profit costs (claimed as provable) in respect of the unsuccessful appeal to the Court of Appeal in those proceedings, I see no justification whatever for either of these claims and direct that they should be wholly disallowed. It should be remembered that in the county court an order for payment of the debtors' costs out of the assets was actually asked for and refused, and obviously there could be no question of any such order being made on the unsuccessful appeal from the county court. These proceedings were brought wholly for the benefit of

the debtors and not at all in the interests of their estate, and it is reasonably plain that they ought never to have been brought. Mr. Woodiwiss must have been well aware of the risk he was running. (D) Item (4) relates to the defence of an action commenced by Miss Stanley against the debtors, after the date of the act of bankruptcy, for damages for conspiracy. I think the trustee's objection that the claim involved was not a provable debt, so that the estate cannot have benefited by the defence of the action is unanswerable. Accordingly, I direct that this item should be wholly disallowed. (E) Item (5) relates to the defence of an action brought against the debtors and others between the date of the act of bankruptcy and the date of the protection order. It was stayed as against the debtors by the protection order, and no further steps were taken against them. Accordingly (as counsel for the claimants agreed) there can be no ground for any claim in respect of this item, which must be accordingly disallowed. (F) Item (6) was profit costs and disbursements in respect of an action brought by the debtors against one J. A. Maine for the return of certain rolls of cloth deposited by the debtors with the defendant as security for a loan or payment of £394 as the value of such cloth. The defendant had in a previous action recovered judgment in June, 1941, for the amount of the loan (which I understand to have been £2,000 owing on certain bills) but leave to proceed was only given as to the excess over £394, and on terms that the debtors should pay the £394 into court to abide the result of an action to be brought by the debtors on their claim with respect to the cloth. This action was accordingly commenced by the debtors against Maine on July 15, 1941, the £394 being paid into court on July 29, 1941. The action was continued after Jan. 16, 1942, but never came to trial, chiefly, it would seem, on account of the absence of an essential witness on war service. Ultimately on Dec. 15, 1944, the trustee settled the action on terms (so far as material) that £244 of the £394 in court should be paid out to the trustee, and the balance to the defendant's solicitors, each side paying their own costs. Counsel for the claimants argued that, so far as profit costs and disbursements incurred in this action after Jan. 16, 1942, are concerned, the case comes within the *Re Simonson* (1) principle because in the result the estate benefited from Mr. Woodiwiss's efforts to the extent of £244. In my view, however, this is not made out. The sum of £394 was already in court on Jan. 16, 1942, and *non constat* that the trustee could not have settled the matter on equally favourable terms if no step had been taken in the action after that date. The position might have been different if after Jan. 16, 1942, further steps in the action in order to keep the claim to the £394 alive had been necessitated by pressure on the part of the defendant, but this is not shown, and if there had been such pressure the debtors' proper course would surely have been to apply for directions in the adjustment proceedings. Accordingly, I think the proper way of dealing with item (5) is to allow (for proof only, and not payment in full) the amount (to be taxed) of the profit costs and disbursements incurred down to Jan. 16, 1942, and I so direct. (G) The remaining items (Nos. 7 to 14 inclusive) relate to a number of actions in which, with one exception, the profit costs and disbursements in question were incurred wholly or mainly before Jan. 16, 1942, the exception being No. 8, an action by the debtors against a company called All Transport Storage, Ltd., in which the greater part of the costs was incurred after that date. The proper direction in all these cases is clearly, I think, that the amount (to be taxed) of the profit costs and disbursements incurred down to Jan. 16, 1942, should be admitted to proof (not payment in full), and this is not disputed by the trustee. I think it is clearly not made out that the continuance of action No. 8 after Jan. 16, 1942, resulted in any benefit to the estate so as to bring it within the *Re Simonson* (1) principle.

I should add that the facts I have stated regarding the various actions, so far as not in evidence, represent the substance of the position in each case as agreed by counsel before me. I should add further that, in the course of the discussion, counsel for the trustee offered by way of compromise to admit as provable (subject to taxation) certain of the profit costs and disbursements claimed although incurred after Jan. 16, 1942. I do not intend the directions given above to rule out the possibility of concessions on these lines as part of a general compromise on the figures, and, in particular, on the amount to

be allowed in respect of item (1) (the Stanley action), which both in amount and because it ranks for payment in full, is by far the most important of those which I have considered allowable. Nor do I intend to rule out the possibility of dispensing with taxation, if figures can be agreed without going to that expense.

It only remains to consider the position with respect to certain sums received by Mr. Woodiwiss from the debtors on account of costs. These are £153 received before Jan. 16, 1942, and £245 5s. 0d. received subsequently to that date. As regards this latter sum, counsel for the claimants contends that he is entitled to appropriate it towards satisfaction of his claim for profit costs and disbursements in the liabilities adjustment proceedings (which I have disallowed) and thus recover *pro tanto* that disallowed claim in addition to receiving from the estate the full amount (when ascertained) which I have held allowable in respect of the Stanley action (item 1). He relies on *Re Sinclair* (2), in which certain small sums paid by a bankrupt to his solicitor to defray counsel's fees and other expenses in resisting bankruptcy proceedings were held (on adjudication following) not to be recoverable from the solicitor by the trustee in bankruptcy. I do not think this argument is well founded. In the first place, the £245 5s. 0d. was (as counsel for the trustee points out) in fact appropriated by the claimants to their costs and disbursements in the Stanley action by a memorandum enclosed in a letter from them to the trustee dated Aug. 8, 1947. Secondly, I do not see that *Re Sinclair* (2) has anything to do with this case, as the amount here in question does not represent sums paid to defray the necessary costs of opposing bankruptcy proceedings, but is the aggregate of some ten payments made between March, 1942, and the end of June, 1943, generally on account of costs, just as the £153 received before the act of bankruptcy represents the aggregate of some nine payments received between June and December, 1941, generally on account of costs. This clearly appears from the claimants' letter to the trustee dated Mar. 14, 1947, which lists all the items to which I have referred, other than the adjustment proceedings in the county court and Court of Appeal, encloses the bills relative to the listed matters, and concludes :

We still have to deliver our accounts *re* the adjustment proceedings. In addition to these accounts we enclose statement giving particulars of the amounts received by us on account of these respective matters.

The enclosed statement sets out a list of the payments made on account of costs on various dates from June 20, 1941, to June 29, 1943, without appropriation to any particular matter and without distinguishing between amounts received before and after the act of bankruptcy. The totals of £153 and £245 5s. 0d. are simply the result of adding up the amounts shown by the dates in this statement to have been received before and after the act of bankruptcy respectively. Further, this is not a case, as was *Re Sinclair* (2), in which the trustee is seeking to recover from a solicitor sums paid to him by the bankrupt, but is a case in which solicitors are claiming against the estate. In my opinion, the correct view clearly is that the claimants in the present case cannot be allowed anything out of the estate without giving credit against their admissible claims for what they have received. Accordingly, I direct that the £153 received before the act of bankruptcy must be deducted from the taxed (or agreed) total of the profit costs and disbursements incurred before the act of bankruptcy, and the proof must be only in respect of the balance remaining after such deduction, and that the £245 5s. 0d. received after the act of bankruptcy must be deducted from the taxed (or agreed) amount allowed in respect of the Stanley action (item 1), and only the balance (if any) of that amount remaining after such deduction is to be paid to the claimants. I make no order as to the costs of this application as between the trustee and the claimants, but the trustee should be allowed his costs out of the estate of the debtors.

Order accordingly.

Solicitors : *Biddle, Thorne, Welsford & Barnes* (for the trustee in bankruptcy) ; *N. A. Woodiwiss & Co.* (for the claimants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re THOMPSON (*deceased*). WESTMINSTER BANK, LTD. AND
ANOTHER v. THOMPSON AND OTHERS.

[CHANCERY DIVISION (Harman, J.), June 16, 1948.]

Administration—Will—Capital or income—Compensation for damage to requisitioned property—Compensation (Defence) Act, 1939 (c. 75), s. 2 (1) (b) (2) (3).

By his will, dated Mar. 12, 1937, a testator, who died on Jan. 15, 1938, after bequeathing annuities to various persons, gave his residuary estate to his executors and trustees on trust to pay the income to H. for life and on her death to pay the capital to charitable institutions. In 1943, certain leasehold property forming part of the residuary estate was requisitioned by the Ministry of Supply. In 1946, it was de-requisitioned, and compensation became payable by the Ministry under the Compensation (Defence) Act, 1939, s. 2 (1) (b), in respect of the cost of making good damage to the premises which had occurred during the period of requisition.

HELD: the compensation did not accrue until the premises were de-requisitioned and was not annual produce of the residuary estate, and, therefore, it formed part of the capital of the residuary estate and should not be applied as income.

[FOR THE COMPENSATION (DEFENCE) ACT, 1939 (c. 75), s. 2, see HALSBURY'S STATUTES, Vol. 32, pp. 1015-1018.]

ADJOURNED SUMMONS to determine (*inter alia*) whether a sum of £400 received by the executors and trustees of the will of Frederic Willoughby Thompson from the Ministry of Supply in respect of dilapidations to leasehold premises forming part of the residuary estate, which had been requisitioned by the Ministry, ought to be treated as part of the capital of the residuary estate, or whether it ought to be applied as income. It was conceded that sums received from sub-lessees by way of compromise of their liabilities under covenants to repair formed part of the capital.

Wilfrid Hunt for the plaintiffs (the trustees).

E. I. Goulding for the defendant Hilda Scott Thompson (an annuitant and interested in the income of the residuary estate for her life).

A. C. Nesbitt for the defendant the North London or University College Hospital (entitled under the ultimate trusts of the will).

R. L. Megarry for the remaining defendants.

HARMAN, J.: It is contended on behalf of the equitable tenant for life that this sum is income because of the words of the enactment under which it was paid, *i.e.*, the Compensation (Defence) Act, 1939, s. 2 (1) (b). That subsection provides:

The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums . . . (a) a sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation of the land . . . under a lease . . . whereby the tenant undertook to pay all usual tenants' rates and taxes and to bear the cost of the repairs and insurance . . . (b) a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession thereof is so retained . . .

The argument is (i) that compensation consists of the aggregate of those two heads and both ought to go in the same direction, and, (ii) that the rent which the Crown has been paying has been so much the less because the notional tenant was supposed to bear the costs of repair, and, therefore, the £400 in question here is merely the difference between the amount payable under a repairing lease and that payable under a non-repairing lease and is in the nature of additional rent.

I do not think the tenant for life can succeed because, to do so, she must show that this money can properly be described as the annual produce of the residuary estate. Under s. 2 (2) of the Act compensation payable under s. 2 (1) (a) accrues from day to day, but under s. 2 (3) compensation under s. 2 (1) (b) does not accrue until the end of the period. Therefore, I do not think that compensation of the latter class forms part of the income to which the tenant for life is entitled. Furthermore, it seems that, in effect, that compensation is properly described as dilapidations. It is compensation for damage to the

inheritance which has been done by the occupation by the Crown. That being so, there is no more reason why it should be treated as income than the compensation payable by the sub-tenant of the property which admittedly must go to the inheritance. I, therefore, decide that this £400 is capital.

Order accordingly. Costs of all parties to be taxed and paid out of estate.

Solicitors: *Hilder, Thompson & Dunn* (for the plaintiffs and all defendants except the North London or University College Hospital); *Pennington & Son* (for the North London or University College Hospital).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

ned. C.A. [1949] 1 All E.R.

ALLIANCE PROPERTY CO., LTD. v. SHAFFER.

[KING'S BENCH DIVISION (Slade, J.), June 14, 15, 1948.]

Rent Restriction—Standard rent—"Rent"—Lease of flat—Agreement in contemporaneous document to pay annual sums for decorative alterations and cost of management—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (a) (as amended by the Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1), sched. I).

Before the coming into operation of the Rent and Mortgage Interest Restrictions Act, 1939, a flat was let on a yearly tenancy at a rent of £175, but contemporaneously with the lease the parties executed a deed, described in the endorsement as a supplemental agreement, under which the tenant and any person in whom the lease at any time might be vested covenanted to pay an additional £40 a year in consideration of decorative and other alterations carried out by the landlords and a further £60 a year towards the cost of the management of the building in which the flat was situated, the second agreement to run concurrently with the lease and to determine with it and the sum payable thereunder to be paid together with the rent and to be recoverable "by distress or otherwise as for rent in arrear." The flat came within the protection of the Rent Restrictions Acts on the coming into operation of the Act of 1939.

HELD: the intention of the parties was that the premises should be enjoyed on the terms of, and subject to the liabilities specified in, both documents, and the additional sums, being part of the price paid for the beneficial occupation of the premises, were part of the rent, and, therefore, the standard rent within s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended by s. 3 (1) and sched. I of the Act of 1939) was £275.

Property Holding Co., Ltd. v. Clark ([1948] 1 All E.R. 165), followed.

White v. Richmond Court, Ltd. ([1944] 1 All E.R. 689), distinguished.

[AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369-370; and FOR CASES, see DIGEST, Vol. 31, pp. 559-561, 563-565, Nos. 7068-7084, 7111-7127.]

Cases referred to:

- (1) *Property Holding Co., Ltd. v. Clark*, [1948] 1 All E.R. 165; [1948] K.B. 630.
- (2) *White v. Richmond Court, Ltd.*, [1944] 1 All E.R. 689; [1944] K.B. 576; 113 L.J.K.B. 497; 171 L.T. 41; 2nd Digest Supp.
- (3) *Harman v. Richards*, (1852), 10 Hare, 81; 22 L.J. Ch. 1066; 17 Digest 300, 1126.

ACTION by the landlords for arrears of rent of a flat amounting to £115 2s. 2d., and counterclaim by the tenant for rent overpaid amounting to £165 13s. 6d. and for a declaration that the standard rent of the flat was £175. The action was originally commenced in the Bloomsbury County Court, but on an objection to the jurisdiction raised by the tenant the action was transferred to the High Court which upheld the contention of the landlords that the standard rent of the flat was £275 and gave judgment in their favour on both claim and counterclaim. The facts appear in the judgment.

Lionel Blundell for the landlords.

Michael Hoare for the tenant.

SLADE, J.: This case raises a short, but by no means easy, point of law. By a lease dated May 23, 1944, made between the plaintiffs as landlords of the

one part, and the defendant as tenant, of the other part, the defendant became tenant to the plaintiffs of a flat, No. 12, on the fifth floor of Weymouth Court, London, for a term of three years from June 7, 1944. The rent reserved by that lease was expressed to be £300 a year payable by equal quarterly payments on the usual quarter days. By a memorandum endorsed on the lease and dated May 7, 1947, the parties agreed that the term should be extended, by mutual consent, for a further seven years, the rent to be increased to £325 per annum as from June 7, 1948. The landlords concede that the rents of £300 a year reserved by the lease and £325 a year reserved by the endorsement are, in any event, excessive. They say that the standard rent of the premises is £275 a year, while the tenant says it is £175 a year. It is agreed between the parties that the only question I have to determine is whether the standard rent of the premises is £275 a year or whether it is £175 a year.

To ascertain the standard rent of the premises I have to look at s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as modified by s. 3 (1) and sched. I of the Act of 1939 in relation to houses which immediately prior to the passing of the Act of 1939 were not subject to any control. By sub-s. (1) (a) of that section, as so modified, the expression "standard rent" means "the rent at which the dwelling-house was let on Sept. 1, 1939." Both parties agree that these premises were let on Sept. 1, 1939, and, therefore, the rent at which they were let at that date is the standard rent of the premises. The standard rent of the premises depends on two documents which were executed by the landlords when letting the premises to a previous tenant, Mr. Reginald Denham, on May 31, 1934. The first document in point of time demised the premises to Mr. Denham "for the term of seven years from June 24, 1934, determinable as hereinafter mentioned"—I think they were determinable at the end of the third and fifth year of the seven years term by the appropriate notice—"yielding and paying therefore during the said term the yearly rent of £175." The first covenant by the lessee to the lessor was to "pay the rent hereby reserved." There was the usual proviso for re-entry conditioned by the words "if the rent hereby reserved shall be in arrear or unpaid." On the same day another agreement was signed sealed and delivered by Mr. Denham and sealed by the landlords, which begins by reciting that "the lessors have this day granted unto the lessee a lease in respect of a flat known as 12, Weymouth Court." It then recites that the lessors have made considerable decorative and other alterations to the premises and that "it has been agreed between the parties that the lessee in consideration thereof"—"thereof" I take to mean the expenditure by the lessors on the decorative and other alterations to the premises—"shall contribute the sum of £10 a quarter, i.e., £40 per annum during the period of his lease towards the cost of the aforesaid alterations in addition to the sum of £60 per annum towards the cost of the management of the building." It is those two sums of £40 and £60 per annum which make up the £100 difference between the £275, which the landlords say is the standard rent, and the £175, which the tenant says is the standard rent, of the premises. The operative part of this agreement is in these terms:

(1) The lessee shall pay to the lessor the sum of £25 on each of the four quarter days in each year during the period of his lease together with and as the rent reserved by the said lease becomes due. (2) This agreement shall run concurrently with the said lease and shall be deemed at an end as and when the said lease is terminated. (3) All amounts payable hereunder shall be recoverable by distress or otherwise as for rent in arrear.

Then there is a provision that the agreement shall be binding on the person or persons in whom the lease is for the time being vested.

The first question which arises in construing the expression in s. 12 (1) (a) of the Act of 1920, as amended, "standard rent" means the rent at which the dwelling-house was let on Sept. 1, 1939, is: What is included in the word "rent"? On that there have been a number of decisions. There have also been a number of decisions on the meaning of the word "rent" in proviso (i) to s. 12 (2) of the Act, which uses the words:

This Act shall not, save as otherwise expressly provided, apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance, or use of furniture.

That proviso has been used in some cases to show that the word "rent" within the meaning of the Rent Restrictions Acts may include payments in respect of board, attendance, or the use of furniture and cannot, therefore, be limited to the old common law meaning of the word "rent," but may include elements which are not strictly part of the term "rent" when given that restricted meaning. Recently a case came before the Court of Appeal which, with one possible exception—although an important exception—appears to me to be substantially on all-fours with the facts of the present case, namely, *Property Holding Co., Ltd. v. Clark* (1). That was a case on s. 12 (1) (a) of the amended Rent Act of 1920, and I understand it to lay down at least two principles. First, that the term "rent" in the context "standard rent" carries a meaning sufficiently wide to cover additional payments, whether or not some of the benefits to the tenant to which the additional payment is attributable have already been expressly or impliedly included in the main grant, and, secondly, that a covenant to pay a sum of money, an "additional sum," or just "an amount," may be a covenant to pay rent for the purposes of the definition of "standard rent" although the payment is not described in the agreement as rent.

It is unnecessary to decide whether a payment which was not tied up with the term "rent" by reference to the addition of such remedies as distress could be construed as being rent, because in the present case the second agreement of May 31, 1934, expressly provides that the £100—i.e., the aggregate of the £60 and the £40—shall be "recoverable by distress or otherwise as for rent in arrear." It is unnecessary also to decide whether the additional payment, even though described as rent, would constitute rent for the purposes of the definition if it was clear from the agreement that it related to something which did not really touch or concern the demised premises at all, e.g., if it were a payment—to use an illustration given by EVERSHER, L.J., in the *Property Holding Co., Ltd.* case (1) ([1948] 1 All E.R. 165, 174)—by the tenant for the use of a garage belonging to the landlord which was not included in the demise. In my judgment, both the matters for which the extra sums of £40 and £60 a year are made payable do touch and concern the demised premises. The first is a payment in respect of decorations and alterations to the demised premises themselves, and the second is a payment towards the cost of the management of the building of which the demised premises form part, the benefit of which management accrues to the tenant by virtue of his occupation of the demised premises. Except, as I have said, for the fact that in the *Property Holding Co., Ltd.*, case (1) the rent and the additional payment were all contained in the one document, whereas, in the present case, the £175 and the £100 are in two separate documents, the decision in the *Property Holding Co., Ltd.* case (1) appears to me to have turned on precisely the point which arises in this case, and I am, of course, bound by that decision.

The question, therefore, which arises is whether the fact that the rights of the parties in this case depend on the two documents which were executed between the landlords and Mr. Reginald Denham in 1934 distinguishes the case in law from the decision in the *Property Holding Co., Ltd.* case (1). Before I deal with that I must refer to one case on which counsel for the tenant relied. It is also a decision of the Court of Appeal, *White v. Richmond Court, Ltd.* (2), and also a case under s. 12 (1) (a), but with the important distinction that the flat in the present case was actually let on Sept. 1, 1939, and it, therefore, became unnecessary to consider the remaining provisions of s. 12 (1) (a), whereas in *White v. Richmond Court, Ltd.* (2) the premises had never been let prior to Sept. 1, 1939, and, therefore, the method of ascertaining the standard rent was by reference to later words in s. 12 (1) (a), which are in these terms: "Or in the case of a dwelling-house which was first let after the said Sept. 1, 1939, the rent at which it was first let," i.e., the rent at which the premises were first let after Sept. 1, 1939. In *White v. Richmond Court, Ltd.* (2), by a lease dated Mar. 24, 1941, the landlords demised to a tenant a flat which had never been previously let, and the lease reserved the rent at £200 a year. The counterpart of the lease was duly executed by the tenant. Pausing there for a moment, on the execution of that counterpart there came about, in my judgment, and I think it underlies the decision of the Court of Appeal, a concluded lease between the landlords and the tenant of the premises in question at a rent of £200 a year, and if that document was a concluded agreement and the premises had

never previously been let, that document constituted the first letting of the premises. If nothing else had happened and somebody had asked this question on the following day: "Have these premises ever been let?" the answer, in my judgment, would have been "Yes, they were let yesterday." Q.: "Was that the first time they had been let?" A.: "Yes." Q.: "What was the rent reserved?" A.: "£200 a year." Therefore, £200 a year would have been the rent at which the premises were first let after Sept. 1, 1939. After the tenant had executed the counterpart—and it does not seem to me to affect the principle whether it was two hours or two days afterwards—he executed another document under which the landlords, in consideration of the flat being taken in an undecorated condition, agreed to reduce the rent by £50 a year during the continuance of the tenancy, thus making the rent actually payable by the tenant £150 a year. On an application by the tenant to the county court to determine the standard rent the county court judge fixed it at £150 a year, which was the difference between £200 a year and the £50 reduction. On appeal to the Court of Appeal, it was held that the rent at which the dwelling-house was first let within the meaning of s. 12 (1) (a) was £200 a year—the rent reserved by the original lease and counterpart executed by the tenant. The key to the decision in that case seems to me to be contained in the words of SCOTT, L.J., where he says ([1944] K.B. 576, 578):

It is to be observed that the lease was completely self-contained and that the deed executed by the landlords on the same day necessarily followed the lease in point of time since it expressed the reduction in the amount of the rent fixed by the lease, the counterpart of which had been signed by the tenant. I agree with the landlords' contention that that concludes the matter.

I understand SCOTT, L.J., in those words to be saying that the question for decision, according to the wording of the Act, is: "What is the rent at which the premises were first let?" When he says that "the second agreement necessarily followed the lease in point of time" he was emphasising that fact because it was the first document which constituted the first letting, and when he says: "I agree with the landlord's contention that that concludes the matter," I think he was saying that the premises were first let by that document and, whatever effect any subsequent document might have on the contractual obligations of the parties towards each other, nothing could alter the fact that it was the first document under which the premises were first let. I, therefore, think that *White v. Richmond Court, Ltd.* (2) is distinguishable from *Property Holding Co., Ltd. v. Clark* (1)—in which case, incidentally, it was not cited, possibly because of an oversight, but more probably because the point was not thought to be material on the question which arose.

Is there any distinction in law between having the rent and the additional payment contained in the same document, on the one hand, and having them contained in two documents, on the other hand? Before I answer that question, I must deal shortly with one other point raised by counsel for the tenant. He said, correctly, that on May 18, 1937, the landlords wrote to Mr. Denham, the then tenant of the premises, in reply to a letter, dated May 17, 1937:

We are in receipt of your letter of the 17th instant and note that you desire to remain in the above flat on a yearly tenancy as and from June 24 next on the same terms and conditions as your present tenancy. To this we are agreeable and we are informing our accounts department accordingly.

I agree with counsel that the correct interpretation to put on that document was that the option to determine the tenancy had not been exercised in accordance with the terms of the original lease but that the landlords were content to accept the desire of Mr. Denham to terminate the agreement. I agree that the right way to regard that is as a surrender of the existing tenancy and the creation, by agreement, of a new yearly tenancy on the same terms and conditions as the former tenancy. It is common ground that that yearly tenancy was still in operation on Sept. 1, 1939, and it was that tenancy which was the tenancy under which the premises were let at the material date. Counsel for the tenant further argues that that clearly put an end to the earlier of the two documents of May 31, 1934, and, as the latter of the two documents, by the operative cl. 2, made the later agreement run concurrently with the earlier one, the effect of the termination of the earlier one was also to terminate the later one. I agree with that too, but it does not carry the matter any further because

the yearly tenancy was on the same terms and conditions as the former tenancy. If, therefore, the terms and conditions of the former tenancy are to be found in the two documents and not merely in the one, then the terms of the yearly tenancy were the ordinary terms of a yearly tenancy as supplemented by the terms of the tenancy which had been surrendered. Does, then, the fact that the contract of tenancy was contained in two documents instead of one alter the principle which I understand the Court of Appeal to have laid down in *Property Holding Co., Ltd. v. Clarke* (1)? In my judgment, it does not. The emphasis has been put, in a number of cases, on the necessity for looking at the substance rather than the precise form of a transaction—I am dealing now solely with the Rent Acts and the words "standard rent" in those Acts—and of giving a liberal interpretation to the word "rent."

I have no evidence before me of the circumstances in which the landlords entered into these two agreements on the same day with Mr. Denham. I have no evidence before me as to how these two agreements came to be executed when one agreement would have sufficed. I am, however, entitled to look at the two agreements themselves. The original document signed by Mr. Denham—the second of the two documents of May 1, 1934—was put in and it was described on the endorsement as a supplemental agreement. It is clear that the second agreement in point of time can have no meaning unless it is read in conjunction with the earlier agreement of the same date. That agreement is equally easily identifiable, because the later agreement says:

The lessors have this day granted unto the lessee a lease in respect of a flat known as 12, Weymouth Court, No. 1, Weymouth Street, in the parish of Saint Marylebone in the County of London and whereas the lessors have made considerable decorative and other alterations to the premises and whereas it has been agreed between the parties that the lessee in consideration thereof shall contribute the sum of £10 per quarter, *i.e.*, £40 per annum during the period of his lease towards the cost of the aforesaid alterations in addition to the sum of £60 per annum towards the cost of the management of the building. Now it is hereby agreed as follows, *viz.*, (1) The lessee shall pay to the lessors the sum of £25 on each of the four quarter days in each year during the period of his lease together with and as the rent reserved by the said lease becomes due. (2) This agreement shall run concurrently with the said lease and shall be deemed at an end as and when the said lease is terminated.

One can only find when the lease is capable of termination by looking at the earlier document of the same date. Then there is the point, though I place no reliance on it, that this agreement is to be binding on the persons in whom the lease is for the time being vested. I think the proper way to interpret those two documents is to regard the second as being supplemental to the first. I think that the intention of the parties was that the premises should be deemed to be enjoyed on the terms and subject to the liabilities of both documents, and that the additional payments covenanted to be paid under the second document were intended to form part of the price which Mr. Denham was to pay for his beneficial occupation of the premises.

I inclined to that view before counsel for the landlords cited to me a case with regard to the construction of contemporaneous deeds. He referred me to a passage in the judgment of SIR WILLIAM PAGE WOOD, V.-C., in *Harman v. Richards* (3) where he says (10 Hare 81, 85):

The question, whether several deeds are to be taken as parts of the same transaction, must, as I apprehend, depend upon all the surrounding circumstances of each particular case, and not upon the simple fact, whether the deeds are or are not by express reference grafted into or connected with each other; and we must therefore, in this case, look to what are the surrounding circumstances, so far as they affect the connection of the deeds.

The only surrounding circumstances of which I have evidence are those which can be inferred from the language of the documents themselves, and, for the reasons I have indicated, I am satisfied that it was the intention of the parties in this case that the documents should be read together. I have not overlooked the fact that the crucial matter is not necessarily what the parties themselves intended should be a contract enforceable between them, but what was the *rent* at which the premises were actually let, bearing in mind that the Acts operate, so to speak, *in rem*, binding the premises with the standard rent. In the present case I can see no ground for supposing that there was not a valid agree-

ment that the amount to be paid for the enjoyment of these premises—at a time when the parties were at arms length and the premises were not subject to any control—should be £275 a year, and I hold that the standard rent of the premises in question in this action is £275 a year. That being so, it was agreed that there would be judgment for the landlords on the claim for the amount claimed and also judgment for the landlords on the counterclaim.

A I, therefore, make the following order : Judgment for the landlords for £115 2s. 2d. on the claim with costs on the appropriate county court scale up to the time of transfer and thereafter on the High Court scale ; judgment for the landlords on the counter-claim with costs on the appropriate county court scale, up to the time of transfer to the High Court and costs on the High Court scale thereafter.

Order accordingly.

B Solicitors : *Clifford-Turner & Co.* (for the landlords) ; *Bernard Shaffer* (for the tenant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

C

CHARLES OXFORD, LTD. v. GONSHAW, LTD.

[COURT OF APPEAL (Lord Greene, M.R., and Wrottesley, L.J.), June 14, 1948.]

D

Practice—Inspection of goods—Non-compliance with order—Striking out defence—R.S.C., Ord. 31, r. 21.

Court of Appeal—Vexatious and oppressive defence—Inherent jurisdiction to strike out.

E

R.S.C., Ord. 31, r. 21, provides : “ If any party fails to comply with any order . . . for discovery or inspection of documents, he shall be liable to attachment. He shall also . . . be liable . . . if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended . . . ”

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H

The plaintiffs, who were wholesale dealers in clothing, issued a specially indorsed writ against the defendants claiming the return of, or the value of, or damages for wrongful detention of, 107,080 clothing coupons, being the balance of coupons, which, together with some cloth for making up, the plaintiffs had delivered to the defendants. On an application for summary judgment under R.S.C., Ord. 14, the defendants filed an affidavit denying liability on the ground that cloth to the value of 63,045 coupons, delivered by the plaintiffs, had been made up, and, further, that, in accordance with the contract, cloth of their own to the value of 36,951 coupons had also been made up, and that the garments were and always had been ready for delivery on payment. Leave to defend was granted and a defence containing substantially the same allegations was delivered, except that the figures, which were later said to have been due to a mistake, were omitted. On Nov. 18, 1947, the master ordered the defendants to give to the plaintiffs inspection of the garments referred to in the defence within 10 days and ordered that in default the defence be struck out and the plaintiffs be at liberty to sign final judgment. Pursuant to that order judgment was signed by the plaintiffs on Dec. 9, 1947. On Jan. 12, 1948, on an application by the defendants, the judgment was set aside and the defendants were ordered by the master to deliver within 14 days a schedule of the goods mentioned in the defence and to give full inspection within 7 to 14 days of the delivery of that schedule. That order did not provide that in default of compliance the defence should be struck out. On Jan. 23, 1948, in response to that order the defendants delivered to the plaintiffs a schedule of garments of 27,000 coupons value and an invoice covering a sale of the remainder of the goods

to a third person. On Apr. 19, 1948, the master, purporting to exercise jurisdiction under R.S.C., Ord. 31, r. 21, ordered that the defence be struck out, that the plaintiffs be at liberty to sign judgment, and that the defendants be put in the same position as if they had not defended. The latter order was affirmed by the judge.

HELD: (i) failure to comply with the order for inspection of goods, although analogous to discovery, did not fall within the words "discovery or inspection of documents" in R.S.C., Ord. 31, r. 21.

(ii) the fact that the master and the judge were exercising, or purporting to exercise, jurisdiction under that rule did not prevent the Court of Appeal from granting relief on the ground that the defence was vexatious and oppressive, if that was the proper course to take.

[AS TO FRIVOLOUS AND VEXATIOUS PLEADINGS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 252-256, paras. 418-420; and FOR CASES, see DIGEST, Pleading, pp. 82-92, Nos. 691-777.]

Case referred to:

- (1) *Reichel v. Magrath*, (1889), 14 App. Cas. 665; 59 L.J.Q.B. 159; 54 J.P. 196; Digest, Pleading 84, 701.

APPEAL by the defendants from an order of PRITCHARD, J., dated May 6, 1948, affirming an order of the master, purported to be made under R.S.C., Ord. 31, r. 21, that the defence should be struck out on the ground of the failure of the defendants to comply with an order for inspection of goods. The appeal was allowed on the ground that there was no jurisdiction to make the order under that rule, but the Court of Appeal, in the exercise of its inherent jurisdiction, struck out a part of the defence as being vexatious and oppressive. The facts appear in the headnote.

Stenham and Bernard Lewis for the defendants.
Gallop, K.C., and *Gillis* for the plaintiffs.

LORD GREENE, M.R., stated the facts, read R.S.C., Ord. 31, r. 21, and continued: On appeal, PRITCHARD, J., affirmed the decision of the master, but expressed some doubt whether under r. 21 there was jurisdiction to make such an order. It would have been competent to the master, when he made the order of Jan. 12, 1948, to provide that in default the plaintiffs should have liberty to sign judgment, but he did not do so. The question, therefore, is whether under this or any other rule the plaintiffs, on default, are entitled to have an order giving them liberty to sign judgment. That was the point on which PRITCHARD, J., felt doubt. It has not been seriously argued before us that the court had jurisdiction, and, in my judgment, it had not. The rule gives specific power to the court to strike out the defence and to place the defendant in the same position as if he had not defended in certain limited classes of case, namely, failure to comply with an order to answer interrogatories or for discovery or inspection of documents. The defendants' failure in this case does not come under any of those heads. It was failure to comply with an order for inspection, and, although inspection is in a sense analogous to discovery, it does not, in my opinion, fall within the phrase "discovery or inspection of documents" in the rule. The clothing here cannot be described as "documents."

Counsel for the plaintiffs, however, defended his order on a different ground. He suggested, in the first place, that the order might be construed as having been made in the exercise of the inherent jurisdiction of the court to strike out a frivolous and vexatious defence. That view I am unable to accept, because the very language of the order and the observations of PRITCHARD, J., make it clear that neither the master nor the judge conceived themselves to be exercising any such jurisdiction. Counsel took as his alternative point that the Court of Appeal have the power to exercise the inherent jurisdiction and strike out the defence on that ground, and to give the same relief as is given by the order, namely, liberty to sign judgment. His reference to *Reichel v. Magrath* (1) satisfies me that, although the master and the judge were purporting to exercise a different jurisdiction, that does not prevent this court from giving relief on the ground that the defence is vexatious and oppressive if we consider that

that is the proper course to take. In my opinion, counsel for the plaintiffs is right when he says that we have jurisdiction to make an order which is appropriate to a case of vexatiousness and oppression. In my opinion, also, this defence, so far as it relates to the specific sentences dealing with the cloth and the garments of which inspection ought to have been given, is vexatious and oppressive. That seems to me to be the only inference to be drawn from the conduct of the defendants. They obtained leave to defend on the faith of an allegation of precisely the same character (save that it contained certain figures) as they subsequently pleaded, when it came to putting in the defence they omitted the figures, and they now say that the allegation in their affidavit was due to a mistake. Not only were two or three orders for inspection made against them, but, taking only the last one, they not only did not comply with it, but deliberately flouted it and put it out of their power to give the inspection which had been ordered.

To my mind, therefore, the defendants should not be allowed to maintain the defence for a moment longer, subject to a point which I am about to mention. The jurisdiction to strike out a defence or paragraphs of a defence is quite different from the jurisdiction under which the court gives liberty to sign judgment. The effect of striking out the parts of this defence to which I have referred would be to leave the rest of the defence intact for what it is worth, and, if that is sufficient to prevent the plaintiffs obtaining summary judgment, they will go to trial in the ordinary way and have to prove their case. If, however, what is left of the defendants' case is not sufficient to entitle them to defend but is such as to enable the plaintiffs to take a more summary step, that is the fault of those parts of the defence which we are allowing to stand. I am not disposed to give counsel for the plaintiffs the full relief for which he asks on the ground of vexatiousness and oppression. He asks for the whole defence to be struck out. I am not prepared to do that, but I consider that in the discretion of the court we ought to strike out all the matters which are dealt with in the paragraphs in relation to which inspection was ordered, because it is the conduct of the defendants in relation to those paragraphs that satisfies me that the defence contained in them can only be described as frivolous and vexatious and oppressive.

I have said there is a qualification, and I must now mention it. The only defence which seems to me to arise from the facts is that, as the goods mentioned in the schedule are shown to be goods which the plaintiffs are under contract to buy and in relation to which coupons were delivered or debited to the defendants, the defendants have a good defence in respect of that quantity of coupons, and, in my discretion, I should not feel disposed to preclude the defendants from putting up that limited defence, for what it is worth, and amending their defence accordingly. In the result, the order below will be modified in the way I have indicated. There will be leave to substitute for the paragraphs we strike out a paragraph limited to the garments mentioned in the schedule and their coupon value. No further liberty to amend will be granted.

WROTTESELEY, L.J. : I agree.

Order varied. Defendants to pay three-fourths of the costs of the appeal in any event.

Solicitors : *Edward Davis, Nelson & Co.* (for the defendants); *B. A. Perkoff* (for the plaintiffs).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

INSALL v. NOTTINGHAM CORPORATION.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), June 18, 1948.]

Rent Restriction—Standard rent—Uncontrolled dwelling-house let at uneconomic rent—Subsequent letting, when controlled, at increased rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (a) (as amended by the Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), sched. 1).

In 1938 Mrs. G., the owner of property, sold it to the landlords, and at the same time, in pursuance of an arrangement made during and as part of the negotiations for the sale, the landlords granted to Mr. and Mrs. G. a tenancy of part of the premises at a rent of £50 per annum. The tenancy agreement did not disclose any consideration for the lease beyond the rent and the usual covenants. An arrangement appeared in correspondence immediately following the grant of the lease that Mr. G. should continue to manage the property, but there was no evidence to show that that arrangement was a binding obligation for services. There was, however, evidence to show that a rent of £50 per annum, while not being less than two-thirds of the rateable value, was not an economic rent. The tenancy agreement was still continuing on Sept. 1, 1939, when the part of the premises in question became subject to the Rent and Mortgage Interest Restrictions Act, 1939. On Sept. 4, 1946, after the termination of this tenancy, the same part of the premises was let to another tenant at a rent of £120 per annum, and that tenant applied to the court for a declaration that the standard rent was £50 per annum.

HELD: that the rent at which the premises were let on Sept. 1, 1939, was the actual monetary rent being paid under the tenancy agreement, namely, £50, and not a rent in money plus services, and that that rent was the standard rent, regardless of whether or not that figure represented the full economic value of the premises.

Chamberlain v. Farr ([1942] 2 All E.R. 567), *applied*.

Roberts v. Jones ([1946] 2 All E.R. 678), *distinguished*.

Observations of SCOTT and MACKINNON, L.JJ., in Davies v. Warwick ([1943] 1 All E.R. 309, 311, 312), *considered*.

[AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, p. 312, para. 369; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132.]

Cases referred to:

- (1) *Roberts v. Jones*, [1946] 2 All E.R. 678; [1947] K.B. 221; [1947] L.J.R. 606; 176 L.T. 33; 2nd Digest Supp.
- (2) *Davies v. Warwick*, [1943] 1 All E.R. 309; [1943] K.B. 329; 112 L.J.K.B. 245; 169 L.T. 130; 2nd Digest Supp.
- (3) *Chamberlain v. Farr*, [1942] 2 All E.R. 567; 112 L.J.K.B. 206; 2nd Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE CAPORN, made at Nottingham County Court and dated Dec. 19, 1947, fixing at £120 per annum the standard rent of premises let, when uncontrolled, at a rent of £50, and subsequently, when controlled, let to the tenant at £120. The Court of Appeal now upheld the tenant's contention that the standard rent was £50 per annum. The facts appear in the judgment of TUCKER, L.J.

Lionel A. Blundell for the tenant.

Heathcote-Williams for the landlords.

TUCKER, L.J.: This is an appeal from a decision of His Honour JUDGE CAPORN in which he fixed the standard rent of certain premises at £120 per annum. The application was made to him by the present tenant of the premises, pursuant to s. 11 (1) of the Act of 1923, which provides:

The county court shall have power on the application of a landlord or a tenant to determine summarily any questions as to the amount of the rent, standard rent or net rent of any dwelling-house to which the principal Act applies, or as to the increase of rent permitted under that Act or this Part of this Act.

The tenant asked the judge to fix the rent at £50 in place of the contractual rent of £120 which he had undertaken to pay, but the judge decided against him and fixed it at £120. It is common ground that the house in question,

which formed a part of Newstead Abbey, was subject to the Rent Restrictions Acts. It was also agreed that the premises were brought within the control of those Acts by the Act of 1939, and that on Sept. 1, 1939, there was in existence a letting under an agreement dated Nov. 7, 1938, which purported to fix the rent at £50 per annum, and it was conceded that that sum was being paid by the tenant to the landlord on Sept. 1, 1939.

On Sept. 1, 1939, the tenants of the part of the premises in question were a Mr. and Mrs. German. Before 1938 Mrs. German was the owner of the premises, and in 1938 she came to an agreement with the corporation of Nottingham whereby she sold to the corporation these premises and other property for a total amount of some £3,950. Part of the arrangement which was come to between the parties in the process of negotiating the sale of the premises was that Mr. German, or Mr. and Mrs. German, should be granted a tenancy of these premises at a rental of £50 per annum after the corporation had bought them, and an agreement was signed giving effect to that arrangement. It was said on behalf of the corporation that this rent of £50 did not represent the real economic rent of the premises, but was a preferential rent which had been agreed to in the case of Mr. and Mrs. German, because Mr. German had for many years shown himself interested in Newstead Abbey and the property generally, had managed or supervised it, and had promised to continue to do so. The county court judge held that that was the true view of the negotiations which took place. I do not think, having regard to the view I take as to the main question involved in this appeal, that it is necessary to express any opinion whether there was sufficient evidence to support that finding by the learned judge, but I am going to assume that there was.

[His LORDSHIP referred to the correspondence and the evidence and continued:] In my view, it is impossible to say that on that evidence and those documents there was a binding contractual obligation on Mr. German that he would continue to manage these properties on behalf of the corporation so that he would have committed a breach of contract if, within a day or two days after the commencement of the tenancy, he had ceased to render those services. I take the view on the material before us that it was merely a gratuitous undertaking on his part, with no period of time fixed for its continuance, and was nothing more than what is called a "gentleman's agreement" or an honourable undertaking given in the course of negotiations. Even if I am wrong about that and it did constitute an obligation on the part of Mr. German, I am unable to take the view which counsel for the landlords asks us to take, that it amounted to a promise to perform services which amounted to part of the rent payable for these premises. Counsel for the landlords says that the rent was £50 in money plus services, but, having regard to the evidence and the documents, I find it impossible to say that the true view of the transaction which culminated in this tenancy agreement was that £50 did not really represent the rent, and that there could be no standard rent at that period for these premises because there was an unknown quantity, namely, the value of the services which Mr. German had undertaken to render. There is not one word in the tenancy agreement putting on Mr. German any obligation to perform any service at all, either as a condition of the tenancy or as creating a collateral obligation on his part. Therefore, I think that the rent was fixed by the agreement between the corporation and Mr. and Mrs. German, namely, the rent of £50, unless it can be said that that cannot be taken as the standard rent of the premises because that did not represent the full economic value of the premises, and that I regard as the substantial question which arises for decision in the present appeal.

The learned judge's note of his own decision was as follows :

Letting to Germans—was negotiated as part of conditions of sale by Mrs. German to corporation—in light of services that had been and were to continue to be rendered by Mr. German. £50 reserved not a fair market criterion of rental value of premises at time, but as part of terms of sale and services. Clear this must have been so from all the surrounding facts including rents at which similar houses part of same estate let to other tenants. In my view first let within meaning of Rent Acts when let to the applicant, and £120 is standard rent.

We have a note taken by counsel for the tenant of the learned judge's judgment which I need not read in full, but when the learned judge comes to give his

actual decision on the case, having referred to the cases that were cited to him, and, in particular, to *Roberts v. Jones* (1) he says :

As I understand the language of SCOTT, L.J., the Rent Restrictions Acts refer only to a rent of a dwelling-house which at the time of the rent being fixed was a free house so that the rent fixed would *prima facie* afford criterion of fair market value. It seems to me that, as you can look to the statute, so equally you can look to other matters. As between the two parties they were ignoring the fair market value of the property and dealing with it as part and parcel of a bigger thing. Counsel has drawn my attention to other cases which do not fit in with my view of the law. My view supported by *Roberts v. Jones* (1) . . . On the facts of this case I am quite satisfied that the letting to Germans was negotiated as part and parcel of the terms of sale to the corporation. They had acquired another part and were anxious to acquire this part owned by Mrs. German. Mr. German, moreover, had for some time voluntarily acted as a sort of supervising agent. Germans quite willing to transfer to corporation provided they could go on living there. Mr. German willing to go on supervising. It was part and parcel of the terms of sale they should stay on at rent of £50 and that Mr. German should go on doing the services. Never any negotiation about the rent.

With regard to the authorities, the cases principally relied on by counsel for the tenant were *Davies v. Warwick* (2) and *Chamberlain v. Farr* (3). *Davies v. Warwick* (2) dealt with a house which in 1916 had been let at a rent of 4s. 3d., but which then went outside the Acts and was brought within the sphere of the Acts again by the Act of 1939, and in October, 1939, was let at 12s. 6d. The question was whether the standard rent was 12s. 6d., the rent at which the premises were first let after Sept. 1, 1939, or whether it was the 4s. 3d. provided for in the previous letting in 1916. In the course of dealing with that case SCOTT, L.J., and MACKINNON, L.J., made certain observations which, I think it is true, went beyond what was strictly necessary for the decision of the case, but, nevertheless, those observations require careful consideration. SCOTT, L.J., dealing with the hardship which it had been suggested would result by going back to a rent in 1916 which might bear no relation to the circumstances prevailing at the later date with which the court were concerned, said ([1943] 1 All E.R. 309, 311) :

The statutory reference back to some almost prehistoric letting might take one to a time when economic conditions and the value of money were totally different from what they are today . . . Or, again, a landlord might, as an act of kindness, have let a cottage to some deserving person for a short time at a nominal rent ; the retainer dies, and the landlord wants either to let at a market rent or to sell. In either choice he is penalised by the retrospective provision in the Act. That Parliament was not intending to penalise landlords is shown by s. 6 of the 1933 Act, which, in certain circumstances, made the average rent of comparable houses in the neighbourhood the test for the standard rent. In the present case there is no evidence that either landlord or tenant had any knowledge that the house had ever before been let ; neither plaintiff nor defendant was called as a witness, so that the allegations in the pleadings were never tested. I cannot doubt that if the hardships of the kind I indicate had been foreseen by Parliament, discretion might well have been given, and might by an amending Act still be given, to the court to have regard to circumstances which make the rigid application of the past-rent rule work unfairly ; and in such case to fix a rent with due regard to the fair value of other houses in the neighbourhood and so temper the rigour of the Act.

MACKINNON, L.J., said (*ibid.*, 312) :

If reliance be placed on a previous letting 50 or 500 years ago, the judge is given no discretion to take into account the altered value of money. If the landlord proves that the rent the tenant agreed to pay is perfectly fair, and is in fact lower than the rent being paid by every other tenant of identical houses, the judge is not allowed to consider that. If the landlord proves that the previous letting years ago was an act of charity at a nominal rent by the owner to his aged relative, or at a low or nominal rent to a servant, the judge cannot take either of these facts into account. If the landlord proves that, under the old letting the tenant agreed to do all the repairs whereas in the agreement with the recalcitrant tenant the landlord had to do the repairs—apparently that is not a matter the judge is allowed to consider. Indeed, if it were proved that at the old letting relied on the landlord agreed to a very low rent in consideration of a lump sum paid down by the tenant, or in consideration of the tenant putting the house in repair and enlarging it, I find it difficult to see how the judge could take either of those circumstances into account. The standard rent under this section is to be "the rent" at which the house was last "let" before Sept., 1939, with no qualification whatever, and with no discretion given to the judge to consider the terms and circumstances of that last letting, or even its date.

That is very strong language indicating the view the learned Lords Justices took as to the meaning of the word "rent" in this Act for this purpose.

I think that *Chamberlain v. Farr* (3) is even more in favour of the contention of counsel for the tenant. In that case the tenant had entered into an agreement for buying premises No. 1, Falling Lane, Yiewsley, which were then in the course of construction. Completion was to take place on Aug. 7. Under cl. 7 of the agreement it was provided that, if the vendor should allow the purchaser to occupy the property before the completion of the purchase, the purchaser agreed that the occupation was to be a tenancy at will at 17s. 6d. The house was not in a condition for completion and occupation on the date fixed, and it was impossible for the purchaser to go into occupation so as to bring that clause into operation. Instead, an arrangement was come to under which he went into possession of No. 7 in the same road—a 1939 Act house—and agreed to pay a rent of 12s. per week. The question was whether the 12s. per week that he agreed to pay in those circumstances for No. 7 was or was not to be regarded as the standard rent. LORD GREENE, M.R., said ([1942] 2 All E.R. 567, 569):

We, therefore, have this position. Here is a tenancy and here is a rent of 12s. per week. There is no question about that. It would appear on those facts that 12s. is the rent at which the dwelling-house was let on Sept. 1, 1939, within the meaning of s. 6. It was argued that this rent cannot be regarded as a rent contemplated by that section, because, it was contended, it was not a full economic rent, and the parties must have contemplated that, sooner or later, it would be raised to an economic figure. It is said that that is really what the registrar, and after him the learned deputy county court judge, meant in their judgments. With regard to this it would be sufficient to say that there is no evidence whatever to support that contention, but I go further, and I say that, even if there had been an arrangement or understanding that this was not a full, economic rent, it would not have displaced the operation of the relevant words of s. 6, because, whether it was an economic rent or whether it was not, whether the parties did or did not contemplate that it might thereafter be raised, it was, in fact, the rent at which the dwelling-house was let on the relevant date. Once there is sufficient evidence (and on this basis there clearly was sufficient evidence) to enable the court to ascertain that rent, the court is precluded, and admittedly precluded, from having regard to the standard rents of similar dwelling-houses in the neighbourhood for the purpose of determining the standard rent of the house in question. Of course, in cases where the rent which is in fact paid under a lease is to a particular extent below an economic rent, there is provision in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7), for dealing with the case. In such a case, which is where the rent payable is less than two-thirds of the rateable value, the Act is to apply as if the tenancy did not exist. Therefore, there is ample provision for cases of non-economic rents, where they fall below the stated figure mentioned in that subsection. It is not suggested that that subsection applies to the present case.

Those authorities, I think, strongly support the view that, provided one has a rent which is a real rent and not a sham, the fact that it does not come up to the true economic rent which might be obtained in respect of the premises, or the fact that it has been reduced for family reasons or in preference for a particular tenant, are matters which must be excluded from the purview of the court in fixing the standard rent.

The case primarily relied on by counsel for the landlords was *Roberts v. Jones* (1), which, in my opinion, is clearly distinguishable from the facts of the present case. In that case a dwelling-house, which had been reconstructed with the aid of a grant made under the Housing (Rural Workers) Act, 1926, had been let in the year 1938 to a tenant at 7s. 6d. per week, that being the rent fixed by the local authority in accordance with the conditions imposed by that Act. In 1941 the house became unoccupied, and later in the same year the landlord let the house to another tenant at 17s. 6d. per week, and repaid the grant. Thereupon the Act of 1926 ceased to apply to the house, which became subject to the Rent Restrictions Acts. The question which arose was whether the standard rent was the 17s. 6d. for which the house was let after it had come within the purview of these Acts, and it was held that the standard rent was the rent at which the house was first let after being freed from the restrictions of the Housing (Rural Workers) Act, 1926, namely, 17s. 6d. a week. SCOTT, L.J., said [1946] 2 All E.R. 678, 680):

... the standard rent provisions of the Rent Restrictions Acts *prima facie* do not apply to houses the rent of which is subject to different and special legislation.

Earlier in his judgment the learned Lord Justice said this ([1947] K.B. 221, 224; [1946] 2 All E.R. 678, 680):

There is, therefore, no question of going back to see what was the rent when the old house, which *ex hypothesi* had ceased to exist, was let at a half-a-crown a week. If the house let under the Housing (Rural Workers) Acts at 7s. 6d. is to be regarded, 7s. 6d. is the criterion; but, if the Rent Restrictions Acts refer only to the rent of a dwelling-house which at the time of the rent being first paid was a free house, so that the rent would *prima facie* afford a fair market criterion of the rental value of the house, then the court can have no regard at all to the time when the rent was 7s. 6d., for the house was not then free and its rent cannot be the standard. In that case it must have regard to the rent of 17s. 6d., which was the first rent of this house freely agreed between landlord and tenant, after the time when this house, a new house, became free from the restrictions of the Housing (Rural Workers) Acts.

Then the learned Lord Justice goes on to deal with those Acts and comes to the view which is summarised in the headnote. I find nothing in that judgment which conflicts with the decisions in *Davies v. Warwick* (2) and *Chamberlain v. Farr* (3). The mere fact that the learned Lord Justice says: "if the Rent Restrictions Acts refer only to the rent of a dwelling-house which at the time of the rent being first paid was a free house, so that the rent would *prima facie* afford a fair market criterion of the rental value of the house," and indicates that, in his view, that was the foundation for the policy of the Act in fixing the standard rent in a certain way, is, in my view, no authority for the proposition that the court, in fixing a standard rent, has any business to disregard a contract actually arrived at between the parties and substitute some fresh rent for that which they have arrived at, based on the view of the court of the real economic value of the premises. I think that, to attribute that meaning to what they said, would be stretching the language of the learned Lord Justice and also that used by SOMERVELL, L.J., in his judgment far beyond anything which they intended. It is true that, in arriving at their decision and explaining the working of the Act, expressions were used in which reference was made to the fair market value of the rent and to the effect of legislation depressing that value, but, as I have said, there is nothing in this case which can be relied on as authority for an entirely novel proposition until now, that the function of the county court judge is to ascertain the real economic rent as distinct from the contractual rent at which the parties have arrived. For these reasons I think that this appeal succeeds, and there must be a declaration that the standard rent of these premises is the sum of £50, and not £120.

SOMERVELL, L.J.: I agree that the appeal must be allowed. I thought that counsel for the landlords, in the course of his argument, was inclined to agree that, if the position was that a low rent was accepted by the corporation because Mr. German had voluntarily in the past been useful to Newstead Abbey, and had given them an assurance, again on a voluntary basis, that he was prepared to go on in that way in future, the case was covered by *Chamberlain v. Farr* (3), and he could not succeed. Whether or not I was right in that, I am satisfied myself, for the reasons that have been given by TUCKER, L.J., that, if it were the position that the corporation were accepting the figure that had been put forward, although it was less than the economic rent, that would be covered by what the MASTER OF THE ROLLS said in *Chamberlain v. Farr* (3). Certainly the main part of counsel's argument was based on the submission that there was evidence on which the learned county court judge could find that Mr. German had put himself under a contractual liability to continue to do what he had been doing and to look after the property and, a second proposition—necessary, I think, for his submission to get on its legs—that that undertaking was part of the consideration for the use and occupation of this house. It seems to me that, in a case like this where one starts with a lease, a document which purports to set out the consideration for the use and occupation of a house, one needs, at the least, unambiguous evidence if a court is to be entitled to hold that there was some other consideration for the use and occupation in addition to that expressed in the document. In my opinion, there is no such unambiguous evidence here on which the learned judge could find both that there was a legal obligation to do this work and that the undertaking of that legal obligation was consideration

additional to the rent as set out for the use and occupation of the house. If counsel for the landlords had been successful on those two points, or if, to put it another way, the court was confronted with a lease which, on the face of it, showed, in addition to the rent, some further consideration which could be evaluated in money, then a different question would be raised which can be dealt with when it arises. With regard to the authorities, again I agree with what has been said by TUCKER, L.J. I think it is possible that some of the examples given by SCOTT, L.J., and MACKINNON, L.J., in *Davies v. Warwick* (2) went beyond what was necessary for the decision of that case, and may raise questions on which I would like to hear argument before coming to a definite opinion. I think in particular, that the Lords Justices, in the examples which both of them gave of a purely nominal rent, may not have had in mind s. 12 (7) of the Act of 1920, which is referred to by the MASTER OF THE ROLLS in *Chamberlain v. Farr* (3).

COHEN, L.J. : I also agree with the order proposed by TUCKER, L.J. I only desire to add a word on one point. As I understand the judgment of the learned county court judge, he based his decision on a passage in the judgment of SCOTT, L.J., in *Roberts v. Jones* (1) which my Lord has already read, and which is in these terms :

... if the Rent Restrictions Acts refer only to the rent of a dwelling-house which at the time of the rent being first paid was a free house, so that the rent would *prima facie* afford a fair market criterion of the rental value of the house, then the court can have no regard at all to the time when the rent was 7s. 6d., for the house was not then free and its rent cannot be the standard.

The county court judge appears to have understood SCOTT, L.J., as having laid down that in any case where there was evidence to indicate that the fixed rent was not a fair market rent the court must disregard it. He says :

It seems to me that as you can look to the statute, so equally you can look to other matters. As between the two parties they were ignoring the fair market value of the property and dealing with it as part and parcel of a bigger thing.

If that were the true interpretation of the observations of SCOTT, L.J., it would, I think, be inconsistent with the decision of this court in *Chamberlain v. Farr* (3) to which my Lord has referred, but I do not so understand the observations. I think SCOTT, L.J., was clearly saying that, where one finds that the rent was not fixed by agreement between the parties, but was imposed under a statutory provision, then it could not be said to be a fair market criterion of the rental value of the house. I think, if that was his intention, that his real meaning is clear from the other passages in his judgment. If that be the true view, as I think it is, there is nothing inconsistent in the decision in *Roberts v. Jones* (1) with the decision in *Chamberlain v. Farr* (3). In my view, on the facts of this case, we are compelled by the decision in *Chamberlain v. Farr* (3) to hold that the learned county court judge was wrong, and that the standard rent is, as my Lord has said, £50 a year. For these reasons I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors : *Torr & Co.*, agents for *Harrop White, Gamble & Vallance*, Mansfield, Notts. (for the tenant); *Sharpe, Pritchard & Co.*, agents for *A. J. G. Hardwicke*, Nottingham (for the landlords).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

GRANT v. SUN SHIPPING CO., LTD. AND OTHERS.

[HOUSE OF LORDS (Lord Thankerton, Lord Porter, Lord Uthwatt, Lord du Parcq and Lord Oaksey), March 2, 4, 5, 8, 9, June 23, 1948.]

Negligence—Stevedore—Injured by falling into uncovered hatch—Hatch covers and electric lights removed by ship repairers—Breach of statutory regulations by shipowner and repairers—Contributory negligence—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), regs. 12 (c), 37, 45.

On Feb. 12, 1942, a stevedore, who was employed with other labourers in shifting cargo on a ship berthed at a quay in Glasgow, was rolling oil drums along an alleyway between the hatches and the ship's starboard side, on the 'tween deck, from No. 3 to No. 1 hatch, passing No. 2 hatch on the way. The 'tween deck was lit by three clusters of portable electric lights, two on the starboard side casting light up the starboard alleyway, and one on the port side near No. 2 hatch, arranged so as to light the place where the oil drums were to be stowed. At the same time workmen employed by a company of ship repairers were at work in the holds, strengthening the decks and sides of the ship. On the morning in question, the repairers were shoring up the 'tween deck and removed some of the hatch covers to make room for wires which were used as a support for staging. At noon, when the stevedore and his mates went for their dinner, the repairers were still at work, and the stevedore heard one of the officers of the ship tell them to see that everything was secure when they finished their work. When the stevedore and his mates returned to their work at 1 p.m., the repairers had left, having completed their work, and had removed the staging and wiring. They had, however, failed to replace the hatch covers and to refix the cluster of lights on the port side which they had, apparently, taken down for the purpose of their work and had left lying on the deck. As the stevedore was rolling an oil drum up the starboard alleyway and alongside No. 2 hatch, he found himself in darkness and noticed that the port cluster of lights had gone. He shouted to the other men not to come forward and then observed the missing lights on the other side of the ship. Assuming that the hatch covers were on, he turned round to go and get the lights, stepped on to the hatch coaming and fell into the hold below, suffering injury. By the Docks Regulations, 1934, which were made "in respect of the processes of . . . moving and handling goods in, on, or at any dock, wharf or quay," it was provided (by para. (b) under "Duties") that it was "the duty of the owner, master, or officer in charge of a ship to comply with pt. II" of the regulations, and by reg. 12, which was in pt. II: "When the processes are being carried on . . . (c) all parts of the ship to which persons employed may be required to proceed in the course of their employment, shall be efficiently lighted, due regard being had to the safety . . . of all persons employed . . ." Regulation 37, which was in pt. IV, provided that hatches should be fenced or securely covered, when not in use for the passage of goods, and, by para. (d) under "Duties," it was "the duty of every person who by himself, his agents, or workmen carries on the processes, and of all agents, workmen, and persons employed by him in the processes, to comply with pt. IV" of the regulations. By reg. 45, if any hatch covering or lights were removed in case of necessity, they were to be restored "at the end of the period during which their removal was necessary by the persons last engaged in the work that necessitated such removal." In an action by the stevedore (a) against the shipowner for breach of statutory duty, and (b) against the repairers for negligence at common law, it was contended by the defence that the stevedore was guilty of contributory negligence, and the shipowner further contended that the repairers were also in breach of statutory regulations and were solely or chiefly to blame, while the repairers claimed that liability should rest on the shipowner alone as the essential cause of the accident was the failure of the shipowner's servants to see that everything had been made secure for the workmen after the repairers left:—

HELD: (i) the accident was a result of the negligence and breach of statutory duty of both the shipowner and the repairers, and the repairers could not escape liability by reason of the so-called "rule of the last

opportunity," as it was still their negligence which directly contributed to the accident. It was a settled principle that, when separate and independent acts of negligence on the part of two or more persons had directly contributed to cause injury and damage to another, the person injured might recover damages from any one of the wrongdoers, or from all of them.

Admiralty Comrs. v. North of Scotland etc. Steam Navigation Co., Ltd. ([1947] 2 All E.R. 350), *applied*.

(ii) (LORD OAKSEY *dissenting*) on the facts, the stevedore did not fail to take the ordinary care which was to be expected of him in the circumstances, and he was not guilty of contributory negligence. Where the negligence which was the cause of the accident was a breach of regulations, made to secure the safety of workmen which might be presumed to be strictly enforced in the ordinary course of the ship's discipline, it could not be said that the workman was careless if he assumed that there had been compliance with the law.

Gee v. Metropolitan Ry. Co. (1873) (L.R. 8 Q.B. 161), *approved*.

(iii) accordingly, the shipowner and the repairers were both liable to the stevedore in damages.

[*Per* LORD DU PARCQ]: (i) Since the ship was at the quay side, the pursuer was engaged in "moving and handling goods . . . at" a "quay," within the meaning of the Docks Regulations, 1934.

(ii) The regulations imposed on the repairers the duty of replacing the hatch coverings and of leaving the lights in their proper place after removing them, and, accordingly, the repairers were in breach of their duty, under regs. 37 and 45, while the shipowner had failed in his duty under reg. 12.

[AS TO EFFECTIVE CAUSE OF INJURY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 590-596, paras. 843-845; and FOR CASES, see DIGEST, Vol. 36, pp. 24, 25, Nos. 118-124.]

AS TO CONTRIBUTORY NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 679-688, paras. 963-970; and FOR CASES, see DIGEST, Vol. 36, pp. 109-117, Nos. 726-781.]

Cases referred to:

- (1) *Macdonald v. Wyllie & Sons*, (1898), 1 F. (Ct. of Sess.) 339; 36 Sc.L.R. 262; 6 S.L.T. 209; 36 Digest 84, 556 *xxviii*.
- (2) *Eccles v. Cross & M'Ilwham*, 1938 S.C. 697; Digest Supp.
- (3) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (4) *Admiralty Comrs. v. North of Scotland and Orkney and Shetland Steam Navigation Co., Ltd.*, [1947] 2 All E.R. 350; *sub nom.*, *Boy Andrew (Owners) v. St. Rognvald (Owners)*, [1948] A.C. 140; [1948] L.J.R. 768.
- (5) *Burrows v. March Gas Co.*, (1870), L.R. 5 Exch. 67; 39 L.J.Ex. 33; 22 L.T. 24; *affd.*, (1872), L.R. 7 Exch. 96; 36 Digest 25, 124.
- (6) *Mills v. Armstrong, The Bernina*, (1888), 13 App. Cas. 1; 57 L.J.P. 65; 58 L.T. 423; 52 J.P. 212; *affg.*, *The Bernina* (2), (1887), 12 P.D. 58; 36 Digest 121, 807.
- (7) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; Digest Supp.
- (8) *Gee v. Metropolitan Ry. Co.*, (1873), L.R. 8 Q.B. 161; 42 L.J.Q.B. 105; 28 L.T. 282; 8 Digest 78, 533.

APPEAL by the pursuer from an interlocutor of the Second Division of the Court of Session (LORD COOPER (Lord Justice-Clerk), LORD MACKAY, LORD JAMIESON and LORD STEVENSON), dated Nov. 1, 1946, recalling the interlocutor of LORD KEITH (Lord Ordinary).

The pursuer, a dock labourer, was at work on board the steamship, *Empire Impala*, berthed at Stobeross Quay, Glasgow, on Feb. 12, 1942, when he fell through an uncovered, unfenced and unlighted hatch and was seriously injured. On the morning of the day in question he was one of a number of labourers who were engaged in shifting cargo on board the ship, which was owned by Sun Shipping Co., Ltd., the first defenders. This cargo consisted of oil drums, which the men were rolling along the 'tween decks from the after end of hatch No. 3, past hatch No. 2, to the forward end of hatch No. 1. It was necessary to light artificially the part of the 'tween decks adjacent to hatches 1 and 2 because the covers of these hatches on the upper deck were in position and

shut out the daylight. For this purpose three clusters of electric lights were in use. These clusters were portable and they had been arranged so as to light up the alleyway which ran between the hatches and the starboard side of the ship, along which the drums were being rolled. The LORD ORDINARY held it established "that in the forenoon . . . one cluster was fixed to a beam below the upper deck in the vicinity of No. 3 hatch and on the starboard side of the ship, and that the second cluster was fixed to another beam overhead at the after end of No. 2 hatch, also on the starboard side . . . The third light was fixed on the port side of the ship at the forward end of No. 2 hatch and so arranged as to throw light across the ship over No. 2 hatch and No. 1 hatch to the place at which the drums were being stowed on the starboard side." During the morning, while the pursuer and his fellow labourers were rolling drums, men employed by the second defenders, Alexander Stephen & Sons, Ltd., ship repairers, were at work in the holds securing shoring, so as to strengthen the decks and sides of the ship. They had removed some of the hatch covers of No. 2 hatch at 'tween decks' level in order to make room for wires which were attached to cross beams above the 'tween decks and supported a small scaffolding or staging of one or two planks hanging within the hatch below deck level. At mid-day the pursuer and those working with him left the ship for dinner. The pursuer said that during the morning he heard the ship's third officer telling the repairers' men to see that everything was secure and the hatches on before they left. The third officer in question was called as a witness for the shipowners, and said that he had told the repairers' men that they were to replace the hatch coverings. His view was that "in the ordinary practice of seamen" they should have replaced the hatch covers even though they were shortly to return, and his evidence was that the hatches could have been covered safely, with space left for a wire or rope to pass between the battens. The pursuer and his fellow workmen returned to work at about 1 p.m. The repairers' men had then all departed. The LORD ORDINARY found that their work was finished some time in the morning of the accident, and at latest before the pursuer returned to the ship after the dinner interval, and that they had removed all their gear, which included the staging and the supporting wires. The evidence satisfied the LORD ORDINARY that they had not replaced the covers of the hatch before leaving, and that more hatch covers were off after the dinner interval than had been off before dinner. Further, the LORD ORDINARY found that the repairers' men had taken the light which had been hanging on the port side and left it lying face down, either on the deck or in a barrow that was standing there.

On May 28, 1942, the pursuer raised an action against (i) Sun Shipping Co., Ltd., the shipowners, and (ii) Alexander Stephen & Sons, Ltd., the repairers, in which he alleged that he had suffered his injury by reason of the breach of statutory duty of the shipowners and the negligence at common law of both the defenders. It was difficult in war-time to procure the attendance of witnesses. Evidence had to be heard as and when it became available, without regard to order, and with much delay. In the result, the hearing of evidence, which began on May 1, 1944, was not concluded until Jan. 25, 1946, and, unfortunately, not all the witnesses were heard by the same Lord Ordinary. The hearing of evidence was begun by LORD KEITH, but at an early stage in the proceedings that learned judge had to be replaced temporarily by LORD MAC-KINTOSH who heard a considerable body of important evidence. It was thought that, as LORD KEITH had begun the hearing of evidence, it was desirable, if not essential, that he should continue the proof as soon as he was able to do so, and pronounce judgment. In accordance with this view, LORD KEITH resumed the hearing of evidence in time to hear six witnesses, of whom three were called on behalf of the shipowners and three on behalf of the repairers, and, in the result, he found himself compelled to form an opinion of much of the evidence, including that of the pursuer himself, solely on the written record. The LORD ORDINARY awarded the pursuer the sum of £800, by way of reparation, against the shipowners, and held that the repairers were under no liability to the pursuer. In the Inner House it was held that the pursuer was not entitled to recover because of his own contributory negligence. Against this decision he appealed to the House of Lords, claiming to be entitled to recover reparation from one or other of the defenders or from both. The shipowners contended that the

repairers were either solely to blame, or, at least, more gravely to blame than they were themselves. It was agreed on all sides that, if the pursuer was entitled to recover anything, the LORD ORDINARY had justly assessed the reparation to which the pursuer was entitled.

The House * now held that both the shipowners and the repairers were guilty of negligence and a breach of statutory duty, that the pursuer was not guilty of contributory negligence, and, accordingly, that the shipowners and the repairers were both liable to him in damages.

Arthur P. Duffes, K.C., and *J. G. Leechman* (both of the Scottish Bar) for the pursuer.

Hector M'Kechnie, K.C., and *C. J. D. Shaw* (both of the Scottish Bar) for the first defenders, the shipping company.

James Walker, K.C., and *R. Smith Johnston* (both of the Scottish Bar) for the second defenders, the ship repairers.

The House took time for consideration.

June 23. The following opinions were read.

LORD PORTER: My Lords, I have had the opportunity of reading the opinion to be delivered by LORD DU PARCQ and agree with him in thinking that this appeal should be allowed. *Prima facie*, the question whether a pursuer or defender was negligent or not is a matter for the judge who tries the case or the jury, if there be one, provided, of course, that there is some evidence of negligence. In the present case, however, the matter is a little complicated owing to the fact that the LORD ORDINARY did not see the whole of the witnesses and, in particular, did not preside when the pursuer was examined. No doubt, this circumstance was unavoidable, but it is unfortunate as it left him with little better material for judgment than that possessed by an appellate court and compels your Lordships' House, as, I think, it compelled the Second Division, to treat the decision and its ground somewhat more critically than would normally be necessary.

[HIS LORDSHIP set out the facts, and continued:] The pursuer and his mates having returned after the dinner hour, the pursuer himself was the first to resume the work up the alleyway, which was well lit by the screened lights, and he did not notice the absence of the port light. The repairers, however, had gone and he did not see the wires which had previously supported the cradle, though it may be that he did not consciously notice their absence. When, however, he had rolled his first drum up to and alongside No. 2 hatch, he found himself in semi-darkness, shouted to his fellows not to come forward and then, looking round, observed the missing light lying on the deck or on a barrow, apparently below or almost below the position in which it had been slung. Thereupon, without any thought of danger, he stepped on the unlit open hatch and fell into the hold below, seriously injuring himself. For this injury he claims damages and in doing so confronts Your Lordships with three questions: (i) were the shipowners negligent; (ii) were the repairers negligent; and (iii) was he himself guilty of contributory negligence, a circumstance which in the then state of the law would deprive him of all right of recovery?

My Lords, all those who have dealt with the case in the Scottish Courts have, I think, come to the conclusion that both the defenders were negligent, though the LORD ORDINARY came to the conclusion that the repairers' negligence was not a cause of the accident. That the repairers were negligent seems to me to be incontrovertible. LORD DU PARCQ has set out the relevant regulations of the Docks Regulations, 1934 (S.R. & O., 1934, No. 279), referring, in particular, to reg. 45, which prohibits the removal of any hatch cover or lights, save when authorised or in case of necessity, and ends with the words:

If removed, such things shall be restored at the end of the period during which their removal was necessary by the persons last engaged in the work that necessitated such removal.

But, indeed, unless there was some provision to the contrary, I should consider that, even in the absence of regulations, workmen who had been working on

* LORD THANKERTON, who was present at the hearing of the appeal, died on June 13, 1948, before the opinions were delivered.

a hatch on which a light was shining, and knew that stevedores had been working in the neighbourhood and would return and yet left the hatch covers off and removed the light were plainly guilty of negligence at common law, none the less so when it is remembered that they had been specially reminded of their duty by the third officer. Whether the shipowners were guilty of negligence appears to me to be a much more difficult question, and I am not sure that, if left to myself, I should have found them guilty either of negligence or of breach of statutory duty. But those of your Lordships who agree with me in thinking that the appeal should be allowed think that some, though not a large measure of, blame for the accident should attach to them, and I am not prepared to differ. In taking the view that the shipowners were in fault, the LORD ORDINARY came to the conclusion that they alone were liable to the pursuer. In his opinion the essential cause of the accident was the failure of the shipowners' servants to inspect the 'tween decks and see that the hatch covers were replaced and lights in their proper position. I agree with my noble and learned friend, LORD DU PARCQ, in thinking that this method of approach fails to give due weight to certain material considerations which should, I think, lead to a different conclusion. I see no break in the chain of causation existing between the negligence of the repairers and the subsequent accident. At the vital moment the hatch covers were off and the light down. That negligence never ceased to operate nor were the repairers entitled to rely on someone afterwards coming to put it right. No doubt, if it be conceded that the shipowners had a separate duty to see that the lights were in position and the hatch covers in place, the consequences of the negligence of the repairers might have been avoided, but it was still their negligence which directly caused or contributed to the accident.

There remains the question whether the pursuer was himself guilty of contributory negligence. This matter is largely a question of fact and, if there was evidence from which a tribunal could fairly come to the conclusion that the pursuer was not himself negligent, and if the judge or jury before whom the case was tried came to that conclusion, I imagine your Lordships would not interfere with the decision. It is, I think, not in dispute that the decision has to be made in the light of the characteristics of the type of men affected. In this case the pursuer was a stevedore, used to taking the ordinary risks of loading and unloading a ship, no doubt not very ready in describing his mental processes, but plainly by his acts and, indeed, as I think, by his words indicating that it never occurred to him as a possibility that the men who had been working on No. 2 hatch would take down the cluster lighting it and leave the covers off or, indeed, in defiance of their duty, would leave the hatch open after their work was done, more particularly as they knew that stevedores were passing and re-passing the hatch in the course of their work and as they had been reminded by the third officer to leave all in order. In these circumstances he stepped on to the hatch without thinking of danger. It may be that "inadvertently" does not describe the act with complete accuracy, and perhaps "without conscious thought" is more exact—but everyone acts constantly on the instincts gained by a lifetime of experience and I do not think the pursuer can be blamed for so acting. It is, I understand, common ground that the only question which your Lordships have to determine on this part of the case is: Would a prudent stevedore with a lifetime of experience behind him reasonably think that workmen who had both apparently and in fact gone and had taken down the light which had previously shone across the deck instinctively conclude that the hatch covers were on? I myself think he was justified in doing so and hold the view the more strongly in as much as the LORD ORDINARY came to that conclusion and had evidence on which he could do so. I should allow the appeal, and hold the defenders liable for damages and costs. *Inter se*, however, they should bear both damages and costs in the proportions suggested by LORD DU PARCQ.

LORD UTHWATT: My Lords, I have had the advantage of reading in advance the opinion which my noble and learned friend, LORD DU PARCQ, proposes to deliver. I entirely agree with his reasoning and his conclusions. In the circumstances, I do not feel it necessary to do more than express my adherence.

LORD DU PARCQ [having stated the facts as set out above] : It is obvious that, whereas before the mid-day interval the conditions under which the pursuer had worked were safe enough, a new peril had been created by the time it terminated. The pursuer was the first of his gang to re-start work. He was rolling a drum forward. He says that he "came to a darkness" and then "looked and saw the light was away." He shouted a warning to the men who were behind him to come no further, and then "saw the light over on the other side of the ship shining on to the wing of the ship." Taking it for granted (he says) that the hatch covers were on and everything secured, he turned round to go and get the light, "stepped off with one foot and went down the hatch." I need not at this point quote further from his evidence, or comment on it. The pursuer has averred that the repairers were negligent at common law, and the shipowners have further averred against them breaches of statutory duty. I have no doubt that the servants of the repairers owed a duty to the pursuer as one of a body of workmen who, as they well knew, had been working, and were about to resume work, close to No. 2 hatch. Whatever statutory regulations may enjoin, common prudence might suggest that, when it has become necessary to uncover a hatch, the person who has uncovered it should replace the covers at the first reasonable opportunity. If hatches are for some reason left uncovered, at a time when it is known that men will shortly be taking up work near by, it is, I think, plainly negligence of a dangerous kind to leave them in darkness. When once it was established that the repairers were responsible for leaving the hatch uncovered and unlighted, the charge of negligence made against them was fully made out. I will consider whether they were also guilty of a breach, or breaches, of statutory regulations, as the shipowners (but not the pursuer) averred, when dealing with the case of the shipowners, to which I now turn. Their position differs from that of the repairers on whom the duty of replacing the hatch coverings primarily lay. The question is whether the shipowners can justly say that, in the circumstances of this case, they had come under no obligation to the pursuer and were entitled to rely on the repairers to complete their work.

So far as the regulations are concerned the matter stands in this way. The relevant provisions are contained in the Docks Regulations, 1934 (S.R. & O., 1934, No. 279), which were made under the Factory and Workshop Act, 1901, and are now continued in force and deemed to have been made under the Factories Act, 1937, by virtue of s. 159 (1) of the latter Act. The regulations are made in respect of certain "processes" which include "moving and handling goods in, on, or at any dock, wharf or quay." The Empire Impala was at the quay side and there can be no doubt, I think, that the pursuer was engaged in moving and handling goods "at" a quay. Regulation 12, in pt. II, with which it was "the duty of the owner, master, or officer in charge of a ship to comply" (see para. (b) under "*Duties*"), provides :

When the processes are being carried on . . . (c) all parts of the ship to which persons employed may be required to proceed in the course of their employment, shall be efficiently lighted, due regard being had to the safety . . . of all persons employed . . .

which means, under the definition clause, persons employed in the "processes." Regulation 14 requires that :

All hatch coverings shall be kept plainly marked to indicate the deck and hatch to which they belong and their position therein . . .

with a proviso which is applicable when hatch coverings are interchangeable. Regulation 37 begins with the provision :

(a) If any hatch of a hold accessible to any person employed and exceeding 5ft. in depth . . . is not in use for the passage of goods, coal or other material, or for trimming, and the coamings are less than 2ft. 6ins. in height, such hatch shall either be fenced to a height of 3ft. or be securely covered.

This regulation (which admittedly applied to the hatch now in question) contains the proviso :

. . . this requirement shall not apply . . . (ii) to any vessel during meal times or other short interruptions of work during the period of employment.

The regulation further provides, by para. (c), that hatch coverings are to be

replaced in the positions indicated by the markings made on them in pursuance of reg. 14.

Regulation 37 is in pt. IV, and, by para. (d) under "*Duties*," it is :

... the duty of every person who by himself, his agents, or workmen carries on the processes, and of all agents, workmen, and persons employed by him in the processes, to comply with pt. IV of these regulations.

These words are followed by the proviso that :

... where the processes are carried on by a stevedore or other person other than the owner of the ship, it shall be the duty of the owner, master or officer in charge of the ship to comply with reg. 37, so far as it concerns (1) any hatch not taken over by the said stevedore or other person for the purpose of the processes, and (2) any hatch which, after having been taken over by the said stevedore or other person for the purpose of the processes, (i) has been reported by written notice in the prescribed form to the owner, master or officer in charge of the ship, by or on behalf of the said stevedore or other person, as being a hatch at which the processes have been completed or completed for the time being, and (ii) either has been left by the said stevedore or other person fenced or covered as required by reg. 37, or has been taken into use by or on behalf of the owner of the ship, and in either case has been so reported by such written notice as aforesaid.

The last of the relevant regulations is reg. 45, the material words of which are as follows :

No person shall, unless duly authorised or in case of necessity, remove or interfere with any ... hatch covering ... lights ... or other things whatsoever required by these regulations to be provided. If removed, such things shall be restored at the end of the period during which their removal was necessary by the persons last engaged in the work that necessitated such removal.

My Lords, I think that there is no doubt that these regulations imposed on the repairers the duty of replacing the hatch-covering and of leaving in place the light which was necessary for the illumination of that part of the ship in which the pursuer was working. The question was raised in argument whether the words "required by these regulations to be provided," in reg. 45, were to be read as qualifying only the words "other things whatsoever" or as qualifying all the preceding substantives. Little perhaps turns on this, since there was plainly a breach of reg. 37 on the part of the repairers, but I have no doubt that the former construction is correct. No other seems to me to be possible with due regard to the context. One of the preceding words is the general word "gear," and it cannot have been the intention of the Secretary of State to prohibit the removal only of such gear as was required by the regulations to be provided. The shipowners seem, at first sight, to be in better case, and they are certainly in a position to say that the duty of replacing coverings was primarily on the repairers, and that (as is admitted) the repairers never reported to them or to their officers by written notice that the "processes" had been completed. They are, however, shown to have failed in their duty under reg. 12, and, but for that failure, the fact that the hatch coverings had not all been replaced would have been apparent to the pursuer. Even if there were no regulations to be considered, I should have thought the shipowners liable for negligence. The pursuer was an invitee in their ship, and their officers knew that he would be returning to resume work after the dinner interval. It was, therefore, the duty of their officers to see that the place where the pursuer was to work was reasonably safe, and they are not absolved from this duty, as between themselves and the pursuer, by requirements in the regulations which made it incumbent on the repairers to do that which, in fact, they left undone. The officers ought not to have contented themselves with telling the repairers' men to make all secure, but ought to have made sure that the order had been carried out before the pursuer began work in the afternoon. On this view of the case, the importance of the regulations is lessened, but I have dealt with them fully because they throw some light on the most difficult part of this case, namely, the question whether there was contributory negligence on the part of the pursuer. I am leaving this question to the end, chiefly because it is best considered in its setting and in relation to the nature of the fault attributable to the shipowners and the repairers.

On the facts as I have stated them, accurately as I believe, the LORD ORDINARY'S conclusion that liability must rest on the shipowners alone seems

to me surprising. It would not, I think, lead to a just result, and I am satisfied that it has no legal foundation. It was said by counsel for the repairers that it was founded on authority, and, in particular, on the authority of two Scottish cases, *Macdonald v. Wyllie & Sons* (1) and *Eccles v. Cross and M'Iwham* (2). I do not wish to cast doubt, or, indeed, to express any opinion whatever, on either of these decisions, because, in my opinion, neither of them is of assistance in the present case. The decision in the first of the two cases was that, as between a master and his servant, the master was bound to supply safe plant, and that it could not avail the master to say that he had employed skilled persons to erect the plant. In the latter case the decision was on relevancy, and it was held that the relation between an injured party and the defender was too remote to make the defender liable on the principle established by *Donoghue v. Stevenson* (3), when his alleged negligence, as a contractor, in fitting an electric installation in a building was said to have caused the death of the pursuer's husband two months after the work had been completed. The decision was founded on the pursuer's own averments that the owners of the building had had an opportunity and duty of inspection.

My Lords, I regard it as a well-settled principle that, when separate and independent acts of negligence on the part of two or more persons have directly contributed to cause injury and damage to another, the person injured may recover damages from any one of the wrongdoers, or from all of them. The LORD ORDINARY's view was that:

... the effect of any negligence of the second defenders was broken by the later negligence of the first defenders.

This reasoning seems to me to be akin to that which has led to frequent and determined attempts to establish the so-called "rule of the last opportunity," of which less will be heard since the decision of Your Lordships' House in *Admiralty Comrs. v. North of Scotland etc. Steam Navigation Co., Ltd.* (4). I refer especially to the opinion of VISCOUNT SIMON ([1947] 2 All E.R. 350, 353). With the greatest respect for the LORD ORDINARY's opinion, I think that his reasoning is fallacious. If the negligence or breach of duty of one person is the cause of injury to another, the wrongdoer cannot in all circumstances escape liability by proving that, though he was to blame, yet but for the negligence of a third person the injured man would not have suffered the damage of which he complains. There is abundant authority for the proposition that the mere fact that a subsequent act of negligence has been the immediate cause of disaster does not exonerate the original offender. In the well-known case of *Burrows v. March Gas Co.* (5) the defendant company broke a contract with the plaintiff by supplying him with a defective pipe, but the immediate cause of an explosion which caused damage to the plaintiff was the negligence of a third party, a gas-fitter who, having been called in to look for the source of an escape of gas, searched for it with a lighted candle. The company was held liable. Cases in which independent acts of negligence on the part of two drivers cause injury to a third person must be heard almost daily, and they are not, in my experience, decided by considering whose act of negligence was the last link in a chain of causation. As LORD HERSCHELL said (13 A.C. 1, 9) in Your Lordships' House in *Mills v. Armstrong, The Bernina* (6):

If by a collision between two vehicles a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defence, "I am not guilty, because but for the negligence of another person the accident would not have happened."

In the same case LORD ESHER, M.R., in the Court of Appeal, discussed the question (12 P.D. 58, 61):

... what is the law applicable to a transaction in which a plaintiff has been injured by negligence, and in the course of which transaction there have been negligent acts or omissions by more than one person?

The learned MASTER OF THE ROLLS said that on many points as to such a transaction the common law was clear, and stated the first of these points in these words (*ibid.*):

If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer.

My Lords, it was truly said by counsel for the defenders that the case now before Your Lordships would in normal times have been one proper for the consideration of a jury. A jury would not have profited by a direction couched in the language of logicians, and expounding theories of causation, with or without the aid of Latin maxims. It would, I think, have been right to instruct them in language similar to that used by LORD ESHER, M.R., in the passage which I have just quoted. For my own part, I have no doubt (leaving aside for the moment the question whether fault can be attributed to the pursuer) that the negligence and breach of statutory duty attributable to each of the defenders "partly" and "directly" caused the pursuer's injuries. Whether or not a cause is a "direct" cause is sometimes a difficult question, but here the precautions which the regulations prescribed and ordinary prudence should have dictated have for their object the prevention of accidents of the very nature of that which befell the pursuer.

I now come to the question whether the pursuer is shown to have been guilty of contributory negligence. I will adopt the formula used by LORD ATKIN ([1939] 3 All E.R. 722, 731) in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (7), and ask myself: "Have the defenders proved that the injury was caused solely or in part by the omission of the pursuer to take the ordinary care that would be expected of him in the circumstances?" This is a question of fact, or, more strictly, of the inference to be drawn from the facts, on which normally an appellate court is properly reluctant to disturb the finding of the judge who tried the case. Here, however, the judge had not the usual advantage of hearing all the evidence, and, in particular, did not hear the evidence of the pursuer, and I think (in agreement with the Second Division) that the reasons which he gave for his decision are not wholly satisfactory. Unless the opinion of the Second Division itself seems unsatisfactory to your Lordships, doubtless it ought to be affirmed. If, on the other hand, the ultimate decision of the LORD ORDINARY on this point was right, though his reasons for it may be unconvincing, the interlocutor appealed from ought not to stand. I must now state my own view of the matter. I accept the evidence of the pursuer as that of a truthful man, and I assume that his memory of the occasion was not gravely impaired as a result of his injuries. It must be remembered, however, that his evidence was given long after the event, and his account of an occurrence which must have been much on his mind while litigation was pending may well have been to some extent a reconstruction of an incident which had itself passed in a flash. It is right, therefore, to test it in the light of the probabilities and the known facts of the case.

One salient fact is that, if the repairers had done their duty, the pursuer could have done what he did without the slightest danger. They had finished their work, and ought to have replaced the hatch-coverings. The pursuer in several of his answers seems to suggest, and, perhaps, impliedly to state, that he knew that the repairers' men had finished and gone, but he nowhere says so in terms, and it was rightly pointed out that the evidence of some of his workmates shows that they, at any rate, had no such knowledge. It is, therefore, right, I think, to deal with the case on the footing that the pursuer knew only, what of course he could not help observing, that the repairers were not at work when he returned. On this assumption they might, for all he knew, be only temporarily absent. If that were so, what would he naturally assume the state of the hatchways to be? The regulations to which I have referred are intended to ensure that hatchways shall normally be covered and shall never be both uncovered and unfenced and also unlighted. If, during short interruptions of work, they are left uncovered, the obligation to keep them sufficiently lighted when men are at work in their neighbourhood provides the necessary protection. It is reasonable to suppose that, even apart from the regulations, the precautions which they enjoin would be taken, as a matter of common prudence, in every well-regulated ship. If this be so, an ordinary workman must get into the habit of thinking that uncovered hatchways are never left unlighted and may argue from this, not I think illogically, that, if a hatchway has been left in darkness, not only by experienced ship repairers but also by the ship's officers, the coverings must be on. This, according to the pursuer, was his own state of mind. He said:

I thought the men would have put on the hatches and left it secure and, if it was

them that took the light, that they would not have taken the light away and left a hole. If I am right in thinking that the danger of uncovered hatchways must be a matter of constant concern to those who serve and work in ships and that it is an elementary duty to take the usual precautions against that danger, it cannot be said that the pursuer was to blame for inferring that No. 2 hatch must be covered, and, therefore safe, for his purpose. There is no doubt that he acted quickly and without prolonged thought. He says that he and his mates were dealing with "Red Cross cargo" and were hurrying to get it shifted. This does not necessarily mean, however, that his action was "involuntary" (as the LORD ORDINARY put it) or merely instinctive, or thoughtless. It is right to remember that the human mind can, and often does, take in a second, or a fraction of a second, decisions which can only be taken in the light of past experience and acquired knowledge, and which involve some degree of ratiocination. The LORD ORDINARY thought that the pursuer had suffered a "lapse of memory" and forgotten that some of the hatch coverings were off before dinner-time, and in the Inner House much was made of the fact that the pursuer had known that they were off at that time. In my opinion, the important question is not what he had seen the condition of the hatch to be before dinner-time, but what his years of experience as a dock labourer taught him to expect its condition to be in the circumstances which he found on his return. He was not asked how often (if ever) in his long experience he had been set to work, without warning, in the proximity of an unlighted, unfenced, uncovered hatchway. It is, I hope, safe to assume that so perilous a task is never imposed on a dock labourer.

My own conclusion, therefore, is that the pursuer did not fail to take the ordinary care that would be expected of him in the circumstances. If the standard of the conduct of "an ordinary prudent man" is preferred, I do not think that his own conduct fell below it. Almost every workman constantly, and justifiably, takes risks in the sense that he relies on others to do their duty, and trusts that they have done it. I am far from saying that everyone is entitled to assume, in all circumstances, that other persons will be careful. On the contrary, a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common. Where, however, the negligence is a breach of regulations, made to secure the safety of workmen, which may be presumed to be strictly enforced in the ordinary course of a ship's discipline, I am not prepared to say that a workman is careless if he assumes that there has been compliance with the law. The real complaint of the defenders is that the pursuer reposed an unjustified confidence in them. No doubt, his confidence was not justified in the event, but he is not, I think, to be blamed for that. The courts have long recognised that in some circumstances an omission to make sure for oneself that others have done what they ought to have done is not negligent. Thus, in *Gee v. Metropolitan Ry. Co.* (8), when a railway passenger who had leant against a carriage door, which he had erroneously supposed to be properly fastened, had fallen through it and suffered injury, it was unanimously held in the Exchequer Chamber that he was entitled to hold a verdict against the company, and three of the judges were of opinion that there had been no evidence of contributory negligence to go to the jury. He had, in the words of KEATING, J. (L.R. 8 Q.B. 161, 174) :

... a right to assume that the company were not negligent, and that all the doors were properly shut ...

My Lords, under the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, s. 3, it would have been necessary for the LORD ORDINARY, if he had not discharged the second repairers from all liability, to consider in what proportions the defenders ought to contribute *inter se* to the damages. For myself, I am prepared to agree with the view indicated by LORD MACKAY that 75 per cent. of the agreed figure of £800 (and expenses) should be contributed by the repairers and 25 per cent. by the shipowners, and I suggest to your Lordships that this is a reasonable apportionment. I would allow the appeal. I think that the interlocutor of the Second Division should be set aside, and the interlocutor of the LORD ORDINARY varied so as to make both defenders liable to the pursuer in the proportion which I have mentioned, and that the pursuer should have expenses throughout.

LORD OAKSEY [read by **LORD UTHWATT**]: My Lords, this is an appeal from a judgment of the Second Division of the Court of Session, reversing the judgment of **LORD KEITH**, the Lord Ordinary, in an action by the pursuer, a stevedore, against the first defenders, the shipowners, and the second defenders, a company of ship repairers, for damages for injuries sustained by him when he fell through an open hatch into the hold of the first defenders' ship in which he was working. The **LORD ORDINARY**, who only heard a part of the evidence and did not hear the pursuer give his evidence, decided the case in the pursuer's favour on the view that the pursuer was not guilty of contributory negligence and that the shipowners were alone liable as being the last party at fault. The Second Division allowed the appeal holding that the pursuer was guilty of contributory negligence.

[**HIS LORDSHIP** stated the facts, and continued:] At about 1.10 p.m. the stevedores returned and the pursuer was the first man to roll an oil drum up the starboard alleyway. When he got to a point near the forward section of No. 2 hatch he found himself in darkness and observed that the port cluster of lights had gone. He stopped and shouted to the men behind him to stop because there was no light. He then looked round and saw a light on the port side and, without looking or feeling in any way with his hands or feet, he stepped on to the hatch coaming, intending to walk across the unlighted hatch covers at the forward end of the hatch to get the light, and fell through the open hatch covers into the hold and was injured. His own explanation of why he took this course was because he had heard one of the ship's officers say to the ship repairers that, when they finished their work, they should see that everything was secure. Neither he nor his foreman nor anyone else knew whether the ship repairers had finished their work. For all that the appellant knew, the ship repairers might have been coming back after their dinner: he did not observe that the staging and its wires had gone. He did not look at the aft section of No. 2 hatch to see if the hatch covers were still on, though he admitted that if he had looked he could have seen.

The pursuer's case before your Lordships was that an ordinarily prudent man would have assumed from what he had heard the ship's officer say to the ship repairers and from seeing the port light removed that the ship repairers had finished their work and replaced the hatch covers. It has also been suggested that a workman is entitled to assume that the Docks Regulations, 1934, have been carried out and that, therefore, the pursuer was entitled to assume that No. 2 hatch must be covered, but, in my opinion, no such inference could reasonably have been drawn from what the pursuer saw, nor is his evidence consistent with his having drawn this inference. He says that he stopped and told the men behind him to stop because there was no light. In such circumstances he could not have thought that the shipowners had performed their duty adequately to light the ship while the stevedores were rolling the oil barrels up the starboard alleyway. He knew that they had not and he stepped across the hatch to remedy the default. The port cluster of lights was found by Breslin, the pursuer's foreman, face downwards in a barrow after the accident and, although the pursuer could not see its exact position, he must have seen that it was in an unusual position and could not, in my opinion, reasonably have drawn the inference from it that the ship repairers had left everything secure. There was no urgency or crisis. Breslin, the foreman, was within earshot and had a torch. The pursuer had only to turn and go round the aft end of No. 2 hatch which, he says, was better lighted, or he could have felt his way round the forward end of No. 2 hatch. He did not try to do either. He neither looked nor felt, but started to walk straight over an unlighted hatch.

It is always a difficult and unpleasant task to decide the issue of contributory negligence in the case of a workman who was doing his duty, but the fact that it is natural to sympathise with such an injured workman makes it all the more necessary to address one's mind solely to the question whether he acted as an ordinary prudent man would have acted in all the circumstances. In my opinion, the pursuer did not, and I entirely concur in the judgments of **LORD COOPER** (Lord Justice-Clerk) and **LORD JAMIESON**.

Appeal allowed. Interlocutor of the Second Division of the Court of Session to be set aside, and the interlocutor of the Lord Ordinary varied, so as to make

both defenders liable to the pursuer, in the proportions of 25 per cent. of the agreed figure (and expenses) in the case of the first defenders, and 75 per cent. in the case of the second defenders. The pursuer to have his expenses throughout.

Solicitors: O. H. Parsons, agent for Herbert Macpherson, S.S.C., Edinburgh, and L. and L. Lawrence, Glasgow (for the pursuer); Botterell & Roche, agents for Montgomerie, Flemings, Fyfe, MacLean & Co., Glasgow, and Beveridge, Sutherland and Smith, W.S., Leith (for the shipping company); Beveridge & Co., agents for Biggart, Lumsden & Co., Glasgow, and Morton, Smart, Macdonald & Prosser, W.S., Edinburgh (for the ship repairers).

[Reported by C. St.J. NICHOLSON, ESQ., Barrister-at-Law.]

Reversed. C.A. [1949] 1 All E.R. 532.

LAVENDER v. DIAMINTS, LTD.

[KING'S BENCH DIVISION (Denning, J.), June 11, 1948.]

Factory—Safe means of access—Window cleaner—Independent contractor—Invitee—Duty of occupier—Responsibility of independent contractor—Factories Act, 1937 (c. 67), s. 26 (1).

A window cleaner, working as an independent contractor, having inspected a factory, entered into a contract with the occupiers to clean the factory windows, a task which necessitated climbing on some asbestos roofing which, in the light of technical experience since its construction, but unknown to the occupiers, was not strong enough to bear a man's weight. After cleaning the windows in that part of the building, the window cleaner placed the ladder flat on the roof, walked along it, lost his balance, fell through the roof to the floor, and was injured. In an action for damages at common law and for breach of s. 26 (1) of the Factory Act, 1937:—

HELD: (i) the occupiers had not been guilty of want of reasonable care to prevent damage from unusual danger of which they knew or ought to have known, and were, therefore, not liable at common law.

(ii) the occupiers were guilty of a breach of s. 26 (1) of the Act, but it was the duty of the window cleaner, as an independent contractor, to provide his own plant and appliances and to lay out the work himself so that it was reasonably safe, and, as he had failed in this duty, his negligence was the decisive cause of the accident and the whole responsibility under s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, fell on him, and, consequently, he was not entitled to succeed.

Whitby v. Burt Boulton & Hayward, Ltd. ([1947] 2 All E.R. 324), applied.

Per cur.: (i) The occupiers, who were toffee manufacturers, could not be expected to know the latest building requirements and to re-construct their factory to make it conform to modern design.

(ii) The duty owed by the occupier of a factory, under s. 26 (1) of the Factories Act, 1937, to provide and maintain a "safe means of access to every place at which any person has at any time to work" is a duty owed not only to the workmen employed by the occupier of the factory, but to workmen employed by an independent contractor and to the independent contractor himself, and it applies in respect both of the inside and the outside of the factory, but the duty of an employer to a servant is much higher than that of an occupier to an independent contractor.

[AS TO DUTY OF OCCUPIER OF PREMISES TO INVITEE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 604-608, paras. 853-857; and FOR CASES, see DIGEST, Vol. 36, pp. 41-43, Nos. 247-267.]

AS TO SAFE MEANS OF ACCESS, see HALSBURY Supp., Factories; and FOR CASES, see DIGEST Supp., Factories.]

Case referred to:

(1) *Whitby v. Burt Boulton & Hayward, Ltd.*, [1947] 2 All E.R. 324; [1947] K.B. 918; [1947] L.J.R. 1280; 177 L.T. 556.

ACTION by the plaintiff, a window cleaner, against the defendants, occupiers of a factory, for damages at common law and for breach of s. 26 (1) of the

Factories Act, 1937, in respect of injuries sustained by him while cleaning the factory windows under a contract between him and the defendants. Judgment was given for the defendants. The facts appear in the judgment.

Quass and G. Simmonds for the plaintiff.

Berryman, K.C., and S. Chapman for the defendants.

DENNING, J. : This case raises the question of the duty of an occupier of premises towards window cleaners. The plaintiff is a window cleaner working on his own account. The defendants are toffee manufacturers. In the autumn of 1946 the plaintiff came to an arrangement with the defendants whereby he, an independent contractor, was to clean the windows of the defendants' factory. The windows were difficult to clean. There was a skylight over part of the ground floor of the factory, and there were upper windows on the first and second floors which did not open and had to be cleaned from outside. The plaintiff agreed to clean the factory windows once a month for 30s. a month, and to clean the office windows for 7s. twice a month. In November, 1946, he cleaned the skylight over the ground floor. Then, to clean the windows on the first and second floors, he climbed up by his ladder to some roofing, which was made of asbestos, over part of the ground floor. He laid a plank on the roofing, and then pulled his ladder up and put it against the wall with its feet on the plank. In that way he got to the upper windows and cleaned them. Then he took down the ladder and laid it along the asbestos roofing, and when he was walking along the ladder preparatory to getting down, his foot slipped or something else caused him to lose his balance and his weight came on the asbestos roofing. It was not strong enough to bear him. He fell through the roof to the floor below and fractured his back and dislocated his wrist. Fortunately, he has now substantially recovered apart from some nervousness at heights. I assess the damage which he has suffered at the sum of £400, but the question is whether in point of law the defendants are liable. That raises questions, first, at common law, and, secondly, under the Factories Act, 1937.

With regard to the claim at common law. No doubt, the plaintiff was invited by the defendants to do work at the factory. He was an invitee, and it was their duty to use reasonable care to prevent damage from unusual danger of which they knew or ought to have known, he, of course, taking reasonable care for his own safety. In this case there was an unusual danger because the asbestos roofing was not strong enough to bear the weight of a man. The span of each asbestos sheet, from one support to the other, was 4ft. 6ins., which is too long a span for safety. The defendants, however, did not know of that, nor could they reasonably be expected to know of it. The factory was built before the war, and at that time it was very usual to put up asbestos sheeting with spans of 4ft. 6ins. or even 6ft. It was during the war that it was discovered that in the case of asbestos those spans are too long for safety, and the British standard specification now lays down that for sheets of asbestos of this kind the spacing between purlins should not exceed 3ft., and emphasizes that this should be regarded as a maximum under all conditions. The London County Council now adopts the same requirements and adds that when people are called on to go on asbestos roofs, even with a 3ft. span, they should always have planks or cat-walks so as to distribute the weight. The reason is that asbestos is brittle and friable and an unsafe material for any person to go on unless adequate steps are taken for safety. The question at common law, however, is, not whether the roofing complied with modern specifications, but whether the occupiers of the factory were wanting in reasonable care. I cannot hold that they were. There are, I am told, all over the country thousands of factories and buildings, built before the new requirements were specified, with asbestos roofing having spans of more than 3ft. They were passed, as this one was, by the local authority—in this case, the London County Council. Is it a breach of duty for all those occupiers to continue the premises as they are? Are all of them to be expected to know the latest developments in building design and building materials? Are they to be expected to reconstruct their factories to make them conform to modern design? I think not. I cannot hold that these occupiers were guilty of any want of reasonable care in not knowing the modern developments

in building design or in not altering their factory roof. So I hold that they are not liable at common law. It was an unusual danger, but not one of which they knew or ought to have known. They were not guilty of any want of reasonable care.

Secondly, there is the claim under the Factories Act, 1937, s. 26 (1) of which provides :

There shall, so far as reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work.

In my judgment, the duty owed by that section is a duty owed, not only to the workmen employed by the occupiers of the factory, but also to workmen employed by independent contractors and the independent contractors themselves. It applies also both in respect of the inside of the factory and of the outside of it, and, therefore, in respect of the work of cleaning windows. There was a duty on the occupiers, so far as reasonably practicable, to provide and maintain safe means of access to the windows which were the places where the window cleaner had to work. The question is whether that duty was broken, and also, if it was broken, how far the plaintiff was himself responsible for the breach.

I hold that the duty was broken. It should be within the ingenuity of reasonably intelligent persons to devise a means of access to these windows which would be safe. I do not go so far as to suggest that the asbestos roofing should be taken down and reconstructed in accordance with modern specifications. It is not reasonably practicable to require work to that extent, but it seems to me that by using a sufficient number of planks or ladders it should be reasonably practicable to ensure safe means of access to these windows. I hold, therefore, there was a breach for which the occupiers are *prima facie* responsible.

The next question, however, is : How far is the plaintiff responsible ? He was not a servant of the defendants. He was an independent contractor working on his own account. The duty of an employer to a servant is much higher than that of an occupier to an independent contractor. The employer owes a duty to his servant to use reasonable care in laying out the work to see that it is safe, and he has a duty to use reasonable care to provide proper plant and appliances for his servants. No such duty rests on the occupier of premises who employs a window cleaner as an independent contractor to clean his windows. In such a case it is the duty of the window cleaner to provide his own plant and appliances and to lay out the work himself so that it is reasonably safe. No occupier ever dreams of taking on himself the responsibility of telling the window cleaner how to do the work or what plant or appliances he should use. So here, although this was a factory, it seems to me that it was the plaintiff's responsibility to lay out the work properly and to provide proper plant and appliances, or, in other words, to see that there were safe means of access to the windows. That responsibility of window cleaners is well-known, and insurances are regularly taken out by them on account of it. In this case, therefore, as between the defendants and the plaintiff, it was the plaintiff and not the defendants who was responsible for seeing that there were safe means of access. That is borne out by the evidence. When the work was discussed the plaintiff went and looked at the job, inspected it, decided what was necessary and quoted his price. He could see the nature of the asbestos roofing and the spans it covered, and it was for him to do whatever was necessary to ensure safety. In my judgment, therefore, although there was a breach of duty by the defendants of s. 26 of the Factories Act, 1937, there was also a breach of duty by the plaintiff in failing so to lay out the work and to provide such plant and appliances that there would be safe means of access to the windows. Having regard to the special responsibility of care and skill which is required of a window cleaner, I hold that he was guilty of negligence, and, indeed, of negligence which was the decisive cause of the accident. If he had provided safe means of access—if he had provided more planks, or even if he had walked along this ladder more carefully and had not slipped—there would have been no accident.

The result is that, apart from the Law Reform (Contributory Negligence) Act, 1945, his claim would be defeated by reason of his own negligence. What is the effect of that Act in this case ? Section 1 (1) provides :

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . .

"Fault" is defined in s. 4 so as to include negligence or breach of statutory duty. The court has the task of deciding what is the claimant's share in the responsibility for the damage. That is a task similar to that imposed by the Law Reform (Tortfeasors) Act, 1935, and *Whitby v. Burt Boulton & Hayward, Ltd.* (1) is relevant. In that case where the occupiers of the factory were guilty of a breach of the Factories Act, 1937, but the real responsibility rested on independent contractors, I held that the whole of the responsibility should fall on the independent contractors. Applying that to the present matter, if the plaintiff had not been his own master, but had been employed by other persons, that is, by independent contractors, I should have had no hesitation in holding that the plaintiff's remedy would be against the independent contractors and not against the occupiers of the factory, or, at all events, the occupiers of the factory would have a complete indemnity, such as I ordered in *Whitby's* case (1), but the plaintiff was his own master. The relevant Act is not the Act of 1935 (which expressly contemplates that in some circumstances a complete indemnity may be ordered), but the Act of 1945 which does not say anything about a complete indemnity, but refers to "damages . . . shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." In this case, I think, the claimant's share in the responsibility is, for all practical purposes, the whole responsibility. Although there was a breach of the Factories Act, 1937, he was the person who ought to have provided the plant and appliances and to have laid out the work so that the means of access was safe. Otherwise he ought not to have undertaken the work. As between himself and the occupiers, he was the person responsible. In those circumstances, I think that the shares of the occupiers in the responsibility for the damage is nominal, and that the share of the plaintiff is the whole share. I do not think it is necessary to award a nominal figure. It seems to me I ought to deal with the matter on broader lines. The Act of 1945 should be interpreted on parallel lines with the Act of 1935. Inasmuch as the plaintiff's share in the responsibility for the damage is the whole share, the action is dismissed.

Judgment for the defendants with costs.

Solicitors: *Silkin & Silkin* (for the plaintiff); *L. Bingham & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

AMALGAMATED ANTHRACITE COLLIERIES, LTD. v. WILDS. SAME v. SAME. SAME v. JEREMIAH.

[HOUSE OF LORDS (Lord Porter, Lord Simonds, Lord du Parc, Lord Normand and Lord Oaksey), May 4, 6, 7, June 23, 1948.]

Workmen's Compensation—Industrial disease—"Notional accident"—Total incapacity—Further "notional accident" during incapacity caused by first "accident"—Nystagmus followed by pneumoconiosis or silicosis—Partial capacity recovered—Right to compensation in respect of second "notional accident"—Workmen's Compensation Act, 1925 (c. 84), ss. 9 (3) (i), 43 (1) (c) (d)—Various Industries (Silicosis) Scheme, 1931 (S.R. & O., 1931, No. 342), para. 9 (2) (a)—Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943 (S.R. & O., 1943, No. 885), para. 9 (3).

In assessing the amount of compensation to be awarded to a workman who is partially incapacitated by an accident, actual or notional, and afterwards is further incapacitated by an industrial disease or by illness which is the subject of a statutory scheme, the relevant pre-accident wages in the case of the second accident are those which the workman was earning

or able to earn after the injury in respect of which he first received compensation and not the wages he was earning before his earlier injury.

Decision of the Court of Appeal ([1947] 1 All E.R. 551), *reversed*.

Bacon v. Wills (A. W.) & Sons, Ltd. ([1933] 2 K.B. 493), *Cole v. Amalgamated Anthracite Collieries, Ltd.* (1933) (26 B.W.C.C. 560), and *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* ([1937] 2 All E.R. 756), *approved*.

Evans v. Oakdale Navigation Collieries, Ltd. ([1940] 2 All E.R. 201), *disapproved*.

[AS TO COMPENSATION IN CASES OF MORE THAN ONE ACCIDENT, see HALSBURY, Hailsham Edn., Vol. 34, p. 912, para. 1255, note (e); and FOR CASES, see DIGEST Supp., Master and Servant, No. 3362, *a, b*. See, also, WILLIS'S WORKMAN'S COMPENSATION, 37th Edn. pp. 288-290.]

Cases referred to:

- (1) *Harwood v. Wyken Colliery Co.*, [1913] 2 K.B. 158; 82 L.J.K.B. 414; 108 L.T. 283; 6 B.W.C.C. 225; 34 Digest 348, 2803.
- (2) *Thompson v. London & North Eastern Ry. Co., Ltd.*, [1935] 2 K.B. 90; 104 L.J.K.B. 515; 152 L.T. 571; 28 B.W.C.C. 95; Digest Supp.
- (3) *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.*, [1937] 2 All E.R. 756; [1937] 2 K.B. 426; 106 L.J.K.B. 667; 156 L.T. 490; 30 B.W.C.C. 171; Digest Supp.
- (4) *Doudie v. Kinnell, Cannell & Coking Coal Co., Ltd.*, [1947] 1 All E.R. 6; [1947] A.C. 377; [1947] L.J.R. 395; 176 L.T. 125.
- (5) *Evans v. Oakdale Navigation Collieries, Ltd.* (No. 2), [1940] 2 All E.R. 201; [1940] 1 K.B. 702; 109 L.J.K.B. 493; 164 L.T. 17; 33 B.W.C.C. 122; 2nd Digest Supp.
- (6) *Cole v. Amalgamated Anthracite Collieries, Ltd.*, (1933), 26 B.W.C.C. 560; Digest Supp.
- (7) *Bacon v. Wills (A. W.) & Sons, Ltd.*, [1933] 2 K.B. 493; 102 L.J.K.B. 611; 149 L.T. 385; 26 B.W.C.C. 374; Digest Supp.
- (8) *Jones v. Amalgamated Anthracite Collieries, Ltd.*, [1944] 1 All E.R. 1; [1944] A.C. 14; 113 L.J.K.B. 49; 170 L.T. 78; 36 B.W.C.C. 195; 2nd Digest Supp.
- (9) *Heathcote v. Haunchwood Collieries*, [1918] A.C. 52; 87 L.J.K.B. 226; 117 L.T. 677; 10 B.W.C.C. 647; 34 Digest 395, 3230.
- (10) *Richards v. Goskar*, [1936] 3 All E.R. 839; [1937] A.C. 304; 106 L.J.K.B. 85; 156 L.T. 52; 29 B.W.C.C. 357; Digest Supp.

APPEALS by the employers, from orders of the Court of Appeal dated Feb. 27, 1947, reported [1947] 1 All E.R. 551, affirming, in the case of the workman Wilds, awards by an arbitrator to the workman of £1 10s. 0d. a week in respect of nystagmus and a further £1 10s. 0d. a week in respect of pneumoconiosis subsequently contracted. The same question of principle arose in the case of the workman, Jeremiah, to whom awards were made in respect both of nystagmus and of silicosis subsequently contracted. The appeals were allowed. The facts appear in the opinion of LORD PORTER.

Edmund Davies, K.C., and *G. Owen George* for the employers.

Paull, K.C., and *T. Jenkin Jones* for the workman.

The House took time for consideration.

June 23. The following opinions were read.

LORD PORTER: My Lords, these three appeals raise the same point. The arbitrations on which they depend were heard successively in the county court and the appeals from the award there given were heard together in the Court of Appeal. The question at issue concerns the amount to be awarded to a workman who is partially incapacitated by an accident, actual or notional, and afterwards is further incapacitated by an industrial disease or by illness which is the subject of a statutory scheme. The problem is to determine whether the pre-accident wages in the case of the second accident are to be considered to be those which the workman was earning before his earlier injury or those which he was earning or able to earn after the injury in respect of which he first received compensation.

In the county court the following facts were established in respect of the workman, Wilds:—(a) He had worked for the employers as an underground worker since 1937. (b) On June 14, 1944, the examining surgeon (Dr. John R. Smith) certified that Wilds, who was then 35 years of age, was suffering from miner's nystagmus and was thereby disabled from earning full wages, and that

the disablement commenced on June 13, 1944. (c) He ceased work on June 13, 1944. His average weekly earnings for the twelve months before this date were £7 10s. and he was paid weekly compensation for miner's nystagmus at the rate of 30s. together with supplementary allowances on the basis of total incapacity as from June 13, 1944. (d) On Dec. 8, 1944, Wilds, while still totally disabled by miner's nystagmus and while still receiving full compensation for that incapacity, was examined by the medical board appointed under the Silicosis and Asbestosis (Medical Arrangements) Schemes, 1931-1943, and on Dec. 18, 1944, the medical board certified that he was suffering from pneumoconiosis, a disease coming within the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, and s. 47 of the Workmen's Compensation Act, 1925, and suspended him as and from Dec. 8, 1944, from all processes specified in para. 2 of the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943. The medical board further certified that the disease was in an early stage and that he was fit for moderately heavy work. (e) On Jan. 10, 1945, he was examined by Dr. Joseph Harvey, who certified that he had recovered to some extent from miner's nystagmus and that he was fit for light work on the surface as and from Jan. 10, 1945, but the employers, perhaps unaware of his partial recovery, continued to pay full compensation for miner's nystagmus until Nov. 10, 1945. (f) As and from Nov. 11, 1945, he received from the employers compensation on the basis of partial incapacity in respect of the miner's nystagmus at the rate of £1 5s. 6d. per week, plus supplementary allowances. The weekly earnings which he was deemed to be able to earn as a partially disabled workman were agreed at £4 3s. 0d. In respect of his partial incapacity due to miner's nystagmus Wilds was entitled to receive and received by way of compensation half the difference between the said sums of £7 10s. 0d. and £4 3s. 0d., limited to a maximum of 30s. per week, together with supplementary allowances. (g) In respect of his partial incapacity due to pneumoconiosis he did not receive any weekly payment as compensation from the employers, who maintained that, as his earning capacity was not reduced by the second disability, he was entitled to no further sum in compensation.

Had the workman been the victim of two actual successive accidents instead of two notional accidents, for the first of these accidents he would have received half the difference between the wages he was earning before the first accident, when he was of full working capacity, and what he was able to earn as an injured man after it, but limited, of course, to the maximum sum payable. For the second accident he would receive half the difference between the earning capacity as an injured man before the second accident and his diminished capacity to earn as a further injured man after the second accident. If, however, as is the fact in the present case, his earning capacity was not impaired by the second accident he would receive no further compensation in respect of that accident. These results follow from the wording of ss. 1 (1) and 9 (3) (i) of the Workmen's Compensation Act, 1925, *viz.* :—

Section 1 (1): If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained . . .

Section 9 (3): The rules for calculating the weekly payment in the case of partial incapacity shall be—(i) if the maximum weekly payment would, had the incapacity been total incapacity, have amounted to 25s. a week or upwards, the weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident . . .

and are supported by the authority of *Harwood v. Wyken Colliery Co.* (1), *Thompson v. London & North Eastern Ry. Co.* (2) and *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* (3) approved in your Lordships' House in *Doudie v. Kinneil, Cannell and Coking Coal Co., Ltd.* (4).

Indeed, the matter is not in issue, but it is said that the position is altogether different in the case of an industrial disease or of disablement by exposure to certain conditions which are the subject of schemes set up under the provisions of the Act. The relevant sections of the Acts are portions of s. 43 and sched. III, and s. 47 (1) (b) of the Workmen's Compensation Act, 1925, and s. 1 (1)

and (3) of the Workmen's Compensation Act, 1943. They read as follows :

Workmen's Compensation Act, 1925. s. 43 (1) : Where—(i) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in sched. III to this Act and is thereby disabled from earning full wages at the work at which he was employed ; . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension . . . he . . . shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications :—(a) The disablement or suspension shall be treated as the happening of the accident ; . . . (c) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due ; . . . (d) The amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable . . .

(2) For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given . . .

Third Schedule.

Description of Disease or Injury.

Description of Process

19. The disease known as miner's nystagmus, whether occurring in miners or others, and whether the symptom of oscillation of the eyeballs be present or not.

Mining

Section 47 (1) The Secretary of State may by scheme provide for the payment of compensation by the employers of workmen in any specified industry or process or group of industries or processes involving exposure to silica dust— . . . (b) who, though not totally disabled, are found on medical examination to be suffering from silicosis, or from silicosis accompanied by tuberculosis, to such a degree as to make it dangerous to continue work in the industry or process, and are for that reason suspended from employment.

Workmen's Compensation Act, 1943, s. 1 (1) : Section 47 of the Workmen's Compensation Act, 1925 (which as amended by the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, provides for the making of schemes applying that Act to workmen suffering from fibrosis of the lungs due to silica dust or asbestos dust) shall extend to workmen suffering from any form of pneumoconiosis ; . . . (3) This section shall not affect the validity of any scheme made under the said s. 47 . . . which is in force at the passing of this Act, and any such scheme made under the said s. 47 shall have effect as if it had been made under that section as amended by the schedule to this Act . . .

The two relevant schemes in these appeals are the Various Industries Silicosis Scheme, 1931, and the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943.

The material provisions of these two schemes are in the form set out below :—

THE VARIOUS INDUSTRIES (SILICOSIS) SCHEME, 1931.

4. Where the medical board certify— . . . (3) that a workman, though not totally disabled, is suffering from silicosis or from silicosis accompanied by tuberculosis to such a degree as to make it dangerous for him to continue work in the processes, and is for that reason suspended from employment ; and where the disease is due to employment in the processes whether under one or more employers, the workman or his dependants, as the case may be, shall be entitled to claim compensation as if the disease as aforesaid were a personal injury by accident arising out of and in the course of that employment, as provided by the Act, but subject to the modifications hereinafter contained . . . 6. For the purposes of this Scheme the date of the injury shall be deemed to be the date on or from which the workman is certified to be totally disabled or, while not totally disabled, is suspended from employment . . . 8 (1) The compensation shall be claimed and recoverable from the employer who last employed the workman in the processes . . . 9 (2) In cases of suspension due to silicosis or silicosis accompanied by tuberculosis where the workman is not totally disabled—(a) if the medical board certify that the workman's general physical capacity for employment is impaired by reason of the disease, the workman shall be entitled, while impairment continues, to a weekly payment fixed in accordance with the provisions of the Act for fixing the compensation in cases of partial incapacity.

THE COAL MINING INDUSTRY (PNEUMOCONIOSIS) COMPENSATION SCHEME, 1943.

4. Where the medical board certify— . . . (3) that a workman, though not totally disabled, is suffering from pneumoconiosis, or from pneumoconiosis accompanied by tuberculosis to such a degree as to make it dangerous for him to continue work in the

industry or in any operation or work in the industry and is for that reason suspended from employment ; and where the disease is due to employment in the industry whether under one or more employers, the workman or his dependants, as the case may be, shall be entitled to claim compensation as if the disease as aforesaid were a personal injury by accident arising out of and in the course of that employment, as provided by the Acts, but subject to the modifications hereinafter contained . . . 6. For the purposes of this scheme the date of the injury shall be deemed to be the date on or from which the workman . . . is suspended from employment in the industry or in any operation or work in the industry, as the case may be . . . 8 (1) The compensation shall be claimed and recoverable from the employer who last employed the workman in the industry . . . 9 (2) In cases of suspension due to pneumoconiosis or pneumoconiosis accompanied by tuberculosis where the workman is not totally disabled :—(a) if the medical board certify that the workman's general physical capacity for employment is impaired by reason of the disease, the workman shall be entitled, while impairment continues, to a weekly payment fixed in accordance with the provisions of the Acts for fixing the compensation in cases of partial incapacity . . . (3) In the application of the aforesaid provisions of the Acts the amount of compensation shall be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under this scheme . . .

In reliance on the facts established and the legal provisions set out above Wilds made two separate and independent claims. (a) A claim for compensation on the basis of partial incapacity for disablement by miner's nystagmus from Nov. 11, 1945, based on a certificate of the examining surgeon dated June 14, 1944, as to a disablement certified to have commenced on or about June 13, 1944 ; (b) A claim for compensation on the basis of partial incapacity for disablement by pneumoconiosis from Jan. 11, 1945, based on a certificate dated Dec. 18, 1944, by the medical board appointed under the Silicosis and Asbestosis (Medical Arrangements) Schemes, 1931-1943, as to a disablement certified to have commenced on or about Dec. 8, 1944, on which date Wilds was suspended from all processes specified in the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, on account of pneumoconiosis, a disease coming within the last-mentioned scheme and s. 47 of the Workmen's Compensation Act, 1925. On July 23, 1946, the learned judge gave his award and ordered that the employers should pay to Wilds weekly the sum of £1 10s. together with supplementary allowances on the basis of partial incapacity as compensation in respect of miner's nystagmus suffered by him on June 13, 1944, and that the said weekly payment should commence as from Nov. 11, 1945, and continue during the total or partial incapacity of Wilds for work or until the same should be ended, diminished, increased or redeemed in accordance with the provisions of the Workmen's Compensation Acts, and also that an additional £1 10s. per week together with supplementary allowances should be paid by the employers to Wilds in respect of pneumoconiosis on the basis of partial incapacity from Jan. 11, 1945, and be continued during the said incapacity or until the same should be ended, diminished, increased or redeemed in accordance with the provisions of the Workmen's Compensation Acts. On appeal the Court of Appeal approved these awards, but so far as two of the Lords Justices were concerned only, I think, because they felt bound by the authority of *Evans v. Oakdale Navigation Collieries, Ltd.* (5). From their judgment this appeal is brought before your Lordships' House. Like the Lords Justices I think the principles set out in that case govern the present appeal and your Lordships have, accordingly, to determine whether that decision is right.

While the workman was totally disabled by nystagmus no claim was made for the further injury by pneumoconiosis. He was already totally incapacitated, and there was, therefore, no capacity left which could be taken away by the second injury. Accordingly, the principle adopted in *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* (3) was accepted and until there was partial recovery from the nystagmus the compensation payable for that disability was not sought to be increased though the workman had suffered a further notional injury by accident as a result of the pneumoconiosis, but once he had recovered from the nystagmus a claim was made to receive compensation for partial loss of earning power brought about by the nystagmus and also compensation for total loss of earning power due to the pneumoconiosis. The argument, as I understood it, was similar to that employed in *Evans v.*

Oakdale Navigation Collieries, Ltd. (5). The miner, it was said, suffers from nystagmus causing a loss of earning power. That loss, which originally was total, has now become partial, and for it the workman is rightly receiving the appropriate amount of compensation fixed in accordance with the terms of the Act and recoverable so long as the incapacity remains. The employers do not dispute this contention, but part company with the workman on his further argument when he maintained that, as he suffers from pneumoconiosis as well as nystagmus, he is entitled to compensation for both none the less though his earning power has not been reduced.

Admittedly, if the second accident had been what may be described as an actual and not a notional one compensation would be based on his earnings as an injured man, not on the wages he earned when receiving full wages as a miner. These latter would be irrelevant in ascertaining the loss caused by the second accident. His pre-accident earnings would be those paid to him as an injured man, not those obtained while in work as a miner, but where the second disability is a notional one it is contended that, under the provisions of cll. 8 and 9 (3) of the scheme, compensation is to be claimed and recoverable from the employer who last employed the workman in the processes, and in applying the appropriate provisions of the Act—*viz.*, ss. 8 to 11—the amount of compensation is to be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under the scheme. This language is said to mean that, in the case of silicosis or pneumoconiosis or any of the illnesses which are the subject-matter of schemes, the relevant pre-accident wages are those which the workman obtained from his last employer in work to which the scheme applies.

LUXMOORE, L.J., said in *Evans v. Oakdale Navigation Collieries, Ltd.* (5) [1940] 2 All E.R. 201, 209):

I am unable to find any words, either in the Act or in the scheme, to suggest that in any case the compensation for total disablement by silicosis is to be calculated with reference to any average weekly earnings other than those of the workman under the employer who last employed the workman in the process in which the notional injury by accident caused by contracting silicosis arose, or with reference to any want of capacity other than total incapacity.

The cases of *Cole v. Amalgamated Anthracite Collieries, Ltd.* (6) and *Bacon v. Wills* (7) both dealt with the circumstances of a single notional accident as to which it was held that, as the employer to be looked to was the last under whom the workman served in the material process and as the workman might recover compensation though he had not been employed in the process at all for three (now five) years before the notional accident, the relevant pre-accident wages must be the average of the twelve months before the last period at which the workman was so employed and, therefore, not the pre-accident wage subsisting after the first accident.

The argument receives its strongest support from the wording which appears in both Act and Scheme, *viz.* :—"the amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable." Under the provisions of the schemes as they now stand that employer may not have employed the workman for some five years and any number of accidents to the employee may have happened before he is certified or suspended. Accordingly, it is asked, which of the various pre-accident earnings of a man, who has changed his job and whose capacity has been altered by one or more accidents subsequent to his change of employer, is to be taken as the relevant pre-accident wage unless it be that which was paid by the employer on whom the duty to compensate the workman is imposed. *Evans v. Oakdale Navigation Collieries, Ltd.* (5) carried the argument a step further and applied the same principle to a case of successive accidents. The question to be determined was what was the pre-accident wage applicable where the workman met with an actual accident and was awarded compensation for it, but later was certified as suffering from silicosis. Was the relevant wage in the case of the silicosis that which the workman was earning before his first accident or that which he was earning after that accident and at the time when he was certified as suffering from silicosis. The former was held to be the material time. SLESSER, L.J., said ([1940] 2 All E.R. 201, 206):

... notwithstanding the actual partial incapacity ... the Various Industries (Silicosis) Scheme, 1931, requires the workman, in the circumstances, to be assumed to be of full capacity ...

and (*ibid.*, 207):

... the legislature ... has ordained that, contrary to natural experience, the injury (the disease) must be regarded as preceding the accident (the certification) ...

LUXMOORE, L.J., said (*ibid.*, 209):

... there is a material difference between the case where a workman is in the first instance partially incapacitated by an injury by accident other than a notional accident by disease, and is then rendered totally incapable by reason of a second accident, which is also not a notional one, and the case where the original partial incapacity is followed by total incapacity arising from a notional accident caused by industrial disease. In the former case, the compensation in respect of the second accident, which resulted in the partial incapacity from the first accident becoming total incapacity, must, on the true construction of the Act be calculated with reference to the average weekly earnings immediately preceding the second accident: *Harwood v. Wyken Colliery Co.* (1) and *Thompson v. London and North Eastern Ry. Co.* (2) ... Of course, if, as the result of the first accident, the workman suffers total disability, it matters not whether he is subsequently certified to be suffering from an industrial disease, which also has rendered him totally incapacitated, for in such a case there is no capacity for work on which the notional accident can operate: *Wheatley v. Lambton, Hetton and Joicey Collieries, Ltd.* (3). As SIR WILFRID GREENE, M.R., pointed out in *Evans v. Oakdale Navigation Collieries, Ltd.* (5) so long as the total incapacity lasted from the first accident, no compensation could be recovered in respect of the second accident, although in respect of the second accident a declaration of liability might properly be obtained.

Having regard to these authorities, and, in particular, to the decision in *Evans v. Oakdale Navigation Collieries, Ltd.* (5) the Court of Appeal dismissed the appeal to them, though all three members of that court described the result at which they arrived as wanting in logic. No doubt, in a case of successive accidents one would have expected "an enquiry with a view to allocating the parts of the total reduction which resulted respectively from the injury caused in each accident" to use LORD THANKERTON'S words in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (8) ([1944] 1 All E.R. 1, 4), but it is for your Lordships to determine whether in a case where a notional accident follows another, actual or notional, the provisions of this Act and scheme compel you to hold otherwise.

My Lords, I am not sure that I should myself describe the conclusion arrived at as illogical. No doubt, in one aspect where an Act prescribes a certain quantum of compensation it is illogical to give it twice over, but the stages by which that result is arrived at are themselves strictly logical if the view be adopted that a man who is incapacitated by an industrial disease or disease dealt with by a scheme is required by the Act to be deemed to be of full capacity whatever his actual circumstances may be when a second and notional accident is met with. So far as the decision in the present case is concerned I am not disposed to quarrel with the judgment in *Bacon v. Wills* (7) or *Cole v. Amalgamated Anthracite Collieries, Ltd.* (6). Each was an instance of a single accident. The workman, in fact, had been of full capacity and had become totally disabled by a notional accident, the only question was whether the pre-accident wage was to be taken to be that immediately preceding that notional accident or that at which he had been remunerated when engaged in working at the "process." No question arose whether compensation awarded for a previous accident should be taken into account. The amount of compensation had to be, and was, calculated with reference to the earnings under the employer from whom compensation was recoverable, but, though the calculation is to be made with reference to those earnings, neither the Act nor the scheme says that other matters may not be taken into consideration. In the two cases referred to there were no other matters. In the present case the workman was already in receipt of a sum sufficient to compensate him for his loss of wages to the extent which the Act allows. In my view, that circumstance should also have been taken into consideration. In no case should the workman receive less than a sum adequate to provide the statutory compensation for his loss, but there is nothing to compel a court to give it twice over. In general, I find myself in agreement with the views held by MORTON and SOMERVELL, L.JJ.,

and on which I understand they would have acted had they not been bound by the decision in *Evans v. Oakdale Navigation Collieries, Ltd.* (5). I should allow the appeal and direct that the workman pay the employers' costs in your Lordships' House and below.

My Lords, in the case of Jeremiah I have not felt it necessary to prepare a separate opinion. The facts so closely resemble those in the case of Wilds that the same result must follow, but it is right, I think, that one should state what the facts are on which the case of Jeremiah depends, and I am taking those facts from the case as presented by the workmen to your Lordships' House.

"(11) The workman Jeremiah was employed by the employers as a coal miner and on May 24, 1943, he was certified to be disabled by miner's nystagmus. He was paid weekly compensation in respect of such disablement, at first on the basis of total incapacity and as from the time when he partially recovered on the basis of partial incapacity. (12) On May 14, 1945, when partially disabled by miner's nystagmus, Jeremiah was certified to be partially disabled by silicosis, being suspended from working in all processes specified in the Various Industries (Silicosis) Schemes, 1931-39, as from Apr. 21, 1945. (13) The average weekly earnings of Jeremiah before his first notional accident were agreed at £6 16s. 8d. The average weekly amount which he was able to earn by reason of his incapacity due to nystagmus was, by agreement, assessed at £4 3s. 0d. The average weekly amount which he was able to earn by reason of his incapacity due to silicosis was, by agreement, assessed at £4 0s. 0d. (14) Jeremiah had not been employed at any time since he was certified to be disabled by miner's nystagmus. (15) Compensation at the rate of 19s. 4d. per week together with supplementary allowances was paid by the employers to Jeremiah in respect of his partial incapacity from miner's nystagmus as from Dec. 26, 1944, and no compensation has been paid in respect of his disablement by silicosis. (16) On Aug. 7, 1946, Jeremiah filed in the Ammanford County Court an application for arbitration claiming increased weekly compensation on the basis of partial incapacity in respect of his disablement by miner's nystagmus, and weekly compensation on the basis of total or in the alternative partial incapacity in respect of his disablement by silicosis."

The case then states that the workman succeeded in the county court and that decision was upheld in the Court of Appeal.

From these facts it is apparent that the same principles must apply in Jeremiah's case as those that apply in Wilds' case. The result will be that it will be necessary to work out the exact figures, but the principle upon which your Lordships determine the case is that he is not entitled to the double compensation.

LORD SIMONDS : My Lords, I have had the opportunity of considering the opinion which my noble and learned friend on the Woolsack has just delivered and also that which my noble and learned friend, LORD NORMAND, is about to deliver. I concur so fully in their reasoning and conclusions that I do not propose to add anything myself.

LORD DU PARCQ : My Lords, I have had the advantage of reading in print the opinion which is to be delivered by my noble and learned friend, LORD NORMAND. I agree with it, and join with him in adopting the reasoning of MORTON, L.J., and SOMERVELL, L.J. It may be useful to add that a parallel to that reasoning is to be found in the opinions delivered in this House in *Heathcote v. Haunchwood Collieries* (9). There it was para. 3 of sched. I to the Act of 1906 which was being considered. That paragraph, like s. 9 of the present Act, used the words "which he" (*scilicet*, the workman) "is earning," and thus made the injured workman's actual earnings the basis of the calculation which the arbitrator was required to make. The words "which he is earning" were unqualified. Nevertheless, it was held that, if a man chose to earn a much smaller wage than he could earn if he were so disposed, his actual earnings must be ignored. This result was arrived at by following the elementary rule of construction which requires the courts to look at an Act as a whole and to read each section in its context. Section 1 of the Act of 1906 made manifest the intention of the legislature, and a strictly literal construction of the words of para. 3, read without their context, would have defeated that intention.

So, here, the construction of the material words in s. 43 of the Act of 1925 which it is proposed that your Lordships should adopt is necessary in order to carry out the intention of Parliament. That intention plainly appears from s. 1. It is, perhaps, well to emphasize the fact that your Lordships are not amending the statute, but interpreting it according to a well-known canon. I agree with the motion proposed.

LORD NORMAND: My Lords, I agree that the appeals should be disposed of as my noble and learned friend on the Woolsack has proposed. In the Court of Appeal MORTON, L.J., and SOMERVELL, L.J., held themselves bound, as they undoubtedly were, by *Evans v. Oakdale Navigation Collieries, Ltd.* (5), but they gave reasons which would have caused them, if they had been free, to decide in favour of the employers. Their reasoning is, I think, unanswerable. I respectfully adopt what they have said, and I shall only add some observations which are prompted by the argument addressed to your Lordships for the workman.

Three cardinal rules for construing the Workmen's Compensation Act have been established by decisions of this House:—(1) that the first thing one has to do is to apply one's mind to what is the substantive meaning of the Act; (2) that the right to compensation which is given by s. 1 is not to be enlarged or diminished by the provisions which prescribe the scale of compensation and the mode and conditions of its enjoyment; and (3) that by s. 1 compensation is given for loss of earning power through incapacity for work caused by personal injury by accident. In my opinion, the workmen's claim was supported by reasons which did violence to each one of these cardinal rules. The basis of it was the direction that in the disease cases the amount of compensation shall be calculated with reference to the earnings of the workman under the employer who last employed him within the twelve months previous to the date of the disablement or suspension in the employment to the nature of which the disease is due. I take these words from s. 43 of the Act, and there are corresponding words in the schemes made under s. 47. Now, this direction is solely for the purpose of reckoning the amount of compensation. It was a necessary direction in a section or scheme which assimilated incapacity caused by a progressive disease to incapacity caused by an injury by accident, for s. 9 of the Act, which provides a suitable mode of calculating compensation for loss of earning power resulting from an injury by accident, does not fit a loss of earning power which may not shew itself till a considerable time after the uncertain date when the disease began. But the substantive intention of the Act in its application to the incapacity caused by disease, as in its application to incapacity caused by injury by accident, is that the compensation is for loss of earning power. The workman's claim, however, (I take Wild's claim for simplicity's sake), is for compensation though there has been no loss of earning power caused by the incapacity resulting from the disease in respect of which the claim is made, for the arbitrator's finding is conclusive of the fact that the incapacity resulting from the pneumoconiosis did not prevent the workman from earning what he was able to earn in an employment suitable to a man already partially incapacitated by nystagmus. Counsel for the workman argued that, though the earning power was not affected by the pneumoconiosis incapacity, the field in which the workman could seek work was narrowed by it. It is true that the range of work is narrower for a man suffering from nystagmus and pneumoconiosis than for a man suffering from nystagmus alone, but I can only repeat that the Act gives compensation, not because the field of employment is narrowed, but because the workman's earning power is diminished.

The direction to calculate the compensation "with reference" to the earnings in the period specified by s. 43 (or by a scheme made under s. 47) does not mean that the ascertained total of wages received in the specified period is to be substituted *simpliciter* in the upper line of a subtraction sum for the average weekly wage specified in s. 9. The words "with reference to" rather require that the provisions of s. 9 shall be moulded, as LAWRENCE, L.J., said in *Bacon v. Wills & Son* (7) ([1933] 2 K.B. 493, 504), in order to solve the difficulty which comes from artificially assimilating incapacity caused by disease to incapacity caused by ordinary accidents. This mode of construing the statute, which is, I concede, bolder and more free than is permissible when there are no

words such as we have here or no specialties of implication to authorise it, was successfully resorted to in *Bacon v. Wills & Son* (7), *Cole v. Amalgamated Anthracite Collieries* (6) and *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* (3), and in *Richards v. Goskar* (10) this House found it necessary, in order to make the Act work, to construe s. 43 (1) (a) as if it were subject to limitations not expressed. In my opinion, if the Act is construed as it should be in accordance with the three cardinal rules with which I began and by the method used in the cases which I have just cited the workmen's present claim must fail. I should add that the ratio of *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* (3), which was, in my view, rightly decided, is irreconcilable with *Evans v. Oakdale Navigation Collieries, Ltd.* (5) and is decisive of the issue in these appeals.

LORD PORTER: My Lords, my noble and learned friend, **LORD OAKSEY**, has asked me to say that he concurs in the views which have been expressed.

Appeal allowed with costs in the House of Lords and below.

Solicitors: *Botterell & Roche*, agents for *Llewellyn & Hann*, Cardiff (for the employers); *John T. Lewis & Woods*, agents for *Randell, Saunders & Randell, Llanelly* (for the workmen).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Re HOOPER'S SETTLEMENT TRUSTS. BOSMAN AND ANOTHER v. HOOPER AND OTHERS.

[CHANCERY DIVISION (Jenkins, J.), June 15, 16, 1948.]

Perpetuities—Settlement—Limitation to a class—Introduction of new members into original class of takers—Gift to children who should attain 25—Proviso that, if any son should die under the age of 25 leaving any children who should attain 21, such children should take the share to which the parent would have been entitled, had he attained 25.

By a settlement made on Mar. 19, 1934, the settlor, by cl. 1, directed the trustees to hold the trust fund in trust in equal shares for all his children who should attain 25 (or, being daughters, married) "provided always that if any son . . . shall die before attaining the age of 25 years leaving surviving him a child or children who shall attain the age of 21 years such . . . child or children shall take . . . the share to which his or her or their parent would have become entitled had such parent attained the age of 25 years." By the Law of Property Act, 1925, s. 163, references in that clause to attaining the age of 25 were to be construed as reference to attainment of the age of 21. By cl. 3, each child of the settlor was to be entitled, on attaining 21, to receive the whole income of his or her share of the trust fund until the same should become vested or he or she should die, and cl. 4 provided for maintenance out of the expectant share of the child or other beneficiary. By cl. 5, if at any period there should not be any beneficiary who, if of full age, would be entitled to receive the income of the trust fund, the income was to be divided between the persons "who under the trusts hereof would at that date be entitled to the capital of the trust fund if the trusts . . . in favour of the children or other issue of the settlor had then failed . . ." Clause 6 contained the ultimate trust of capital if there should be no child or other issue of the settlor who should attain a vested interest under the trusts in cl. 1. This trust was for the benefit (a) of the employees of a certain company; (b) the directors of that company holding office at the date of the failure of the prior trusts, (c) certain officials and servants of that company; and (d) cousins of the settlor living at the date of the failure of the prior trusts. The question was whether all or any of the trusts contained in the settlement were void as offending the rule against perpetuities. The settlor was still living, and at present had no children. At the date of the settlement he had one child, a son, who died an infant and unmarried.

HELD: (i) the proviso to cl. 1 did not introduce a new gift to a different class, but merely altered the composition of the class previously described by introducing new members into it, and, therefore, since the beneficiaries

who were to take under the proviso were not necessarily ascertainable within the permitted period, the trusts in cl. 1 were wholly void as infringing the rule against perpetuities and, consequently, cl. 6 must also wholly fail. Since the children of a son were only to become members of the class in the event of the son himself failing to become a member, there was no divesting of something previously given so as to bring the case within the principle that, where a vested interest was given with the gift over divesting that interest in favour of objects not necessarily ascertainable within the perpetuity period, the gift over was rejected but did not divest the previous vested gift.

Pearks v. Moseley, Re Moseley's Trusts, (1880) (5 App. Cas. 714), *applied*.
Re Lord's Settlement, Martins Bank, Ltd. v. Lord, ([1947] 2 All E.R. 685), *followed*.

(ii) the income trusts in cll. 3, 4 and 5 were all ancillary to the trusts of capital and assumed that the capital had been validly settled, and, therefore, since cll. 1 and 6, which contained the essential beneficial trusts of the settlement, had failed, cll. 3, 4 and 5 must also fail.

[AS TO LIMITATION TO A CLASS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 134-141, paras. 229-235; and FOR CASES, see DIGEST, Vol. 37, pp. 98-100, Nos. 342-358.]

Cases referred to:

- (1) *Pearks v. Moseley, Re Moseley's Trusts*, (1880), 5 App. Cas. 714; 50 L.J.Ch. 57; 43 L.T. 449; 37 Digest 68, 98.
- (2) *Re Lord's Settlement, Martins Bank, Ltd. v. Lord*, [1947] 2 All E.R. 685; [1948] L.J.R. 207.
- (3) *Re Williams, Metcalf v. Williams*, [1914] 2 Ch. 61; 83 L.J.Ch. 570; 110 L.T. 923; 44 Digest 798, 6540.

ADJOURNED SUMMONS to determine whether all or any of the trusts contained in a settlement were void as offending the rule against perpetuities.

By cl. 1 of the settlement, the settlor directed the trust funds to be held in trust in equal shares for all his children who had attained 25, or, being daughters, had married, with a proviso that, if any son died under the age of 25 leaving any child or children who should attain 21, such child or children should take the share the parent would have taken had he attained 25. JENKINS, J., held that the provisions of the clause were wholly void, and that, in consequence, the ultimate trust of capital and the income trusts in a later clause of the settlement also failed. The facts and the relevant clauses of the settlement appear in the judgment.

Upjohn, K.C., and *J. V. Nesbitt* for the trustees.

Sir Andrew Clark, K.C., and *Tonge* for the first defendant (the settlor).

Neville Gray, K.C., and *Jopling* for the second, third and fourth defendants (representing the different classes of beneficiaries who might be interested under the ultimate trusts).

JENKINS, J.: The question which I have to decide on this summons is whether, on the true construction of a settlement, dated Mar. 19, 1934, and made between Lewis John Eric Hooper, of the one part, and himself and Alexander Rudolph Forbes Bosman, of the other part, all or any (and, if so, which) of the trusts contained in the settlement are void and inoperative on the ground that they offend the rule against perpetuities or otherwise. The settlement in question was a settlement by Mr. Hooper of 120,000 ordinary shares in Doulton & Co., Ltd. At the date of the settlement he had only one child, an infant son, John Doulton Hooper, who died while still an infant and unmarried. The relevant provisions of the settlement are these. After a recital of the settlor's desire to make provision for his infant son, John Doulton Hooper, and other children (if any) and the transfer to the trustees of the shares to be settled, there follow declarations of the trusts on which the fund is to be held. Clause 1 is the clause which occasions the difficulty, and it is in these terms:

The trustees shall hold the said shares or the investments for the time being representing the same (hereinafter referred to as "the trust fund") in trust for all the children of the settlor who being sons shall attain the age of 25 years or being daughters shall attain that age or marry under that age in equal shares and if there shall be only one such child in trust for that one child provided always that if any son of the settlor shall die before attaining the age of 25 years leaving surviving him a child or children who shall

attain the age of 21 years such last mentioned child or children shall take (and if more than one equally between them) the share to which his her or their parent would have become entitled had such parent attained the age of 25 years.

Pausing there, it is not disputed that, by virtue of the provisions of the Law of Property Act, 1925, s. 163, references in that clause to attaining the age of 25 years should be construed as references to attainment of the age of 21 years. That statutory provision removes an objection which would otherwise in itself have been fatal to a trust in these terms.

After an administrative provision about retention or sale of the shares, the settlement provides, by cl. 3 :

Each child of the settlor who shall attain the age of 21 years shall be entitled to receive the whole income of his or her expectant share of and in the trust fund until the same shall become vested or he or she shall previously die.

There follows a provision as to maintenance out of the expectant share of the child or other beneficiary, and then, by cl. 5 :

If the said John Doulton Hooper shall not attain the age of 25 years and there shall not at any period or periods be in existence any other beneficiary or beneficiaries who if of full age would be entitled to receive the income of the trust fund the trustees shall during such period or periods pay and divide the income of the trust fund unto and between the person or persons who under the trusts hereof would at that date be entitled to the capital of the trust fund if the trusts hereinbefore declared in favour of the children or other issue of the settlor had then failed and in the same shares and proportions.

Clause 6 contains what may be described as the ultimate trust of capital, and that opens in this way :

If there shall be no child or other issue of the settlor who shall attain a vested interest under the trusts hereinbefore declared the trustees shall as from the failure of such issue hold the trust fund as to both capital and income upon the trusts following that is to say . . .

Then follow a number of objects, (a), (b), (c) and (d), into the details of which I need not enter. The first object, (a), which, according to the terms of the trust, will take one fourth part of the fund, is a trust for the benefit of employees of Doulton & Co., Ltd., the trustees of the settlement creating those trusts being, in fact, the settlor himself and Mr. Bosman, who is one of the plaintiffs in this action in his capacity as a trustee of the settlement of Mar. 19, 1934. In sub-cl. (b) there is a trust with respect to another fourth part for the directors of Doulton & Co., Ltd., holding office at the date of the failure of the prior trusts. The interests of that class of beneficiary are represented by Sir Guy Locock. Sub-clause (c) provides as to another one-fourth part, being a gift for the benefit of certain officials and servants of Doulton & Co., Ltd., of whom the defendant, Mr. Ralph Wackrill, is one. Finally sub-cl. (d) deals with the remaining one-fourth part of the fund :

. . . to pay and transfer the same to the children of the late Orrock Mills Doulton and Alfred Virgoe Buckland [cousins or second cousins of the settlor] or the survivors or survivor of them living [at the date of the failure of the prior trusts] in equal shares (*per capita*).

Mr. Orrock Sherwood Doulton, as a member of that class, is joined as the last defendant. The other defendant before the court is the settlor himself, who is concerned to argue for the invalidity of the trust and a consequent resulting trust in his own favour. The remaining three defendants whom I have named are joined to argue on behalf of the classes which they respectively represent that the trusts are valid. The plaintiffs are two of the three present trustees of the settlement, the other trustee being the settlor himself.

Turning again to cl. 1 of the settlement, one observes that the objects who may take under the trusts of that clause comprise (i) all the sons of the settlor who shall attain the age of twenty-one years (reading the clause as modified by s. 163 of the Law of Property Act, 1925) ; (ii) the daughters of the settlor who attain the age of twenty-one years or marry under that age ; and (iii) any child or children who attain the age of twenty-one years of any son of the settlor who dies before attaining that age. Those are the possible objects of the trust, and of the three categories I have mentioned it is plain that the first and second, being the first generation—children of the settlor—must fall within the limit

allowed by the rule against perpetuities, *i.e.*, a life in being and twenty-one years thereafter—for this purpose, the life of the settlor and twenty-one years thereafter, but it is plain that the third category, namely, the child or children who attain the age of twenty-one years of any son of the settlor dying under that age, need not necessarily be ascertained within the permitted limit. It follows that, if cl. 1 of the settlement, on its true construction, makes a gift to a class of beneficiaries which includes the third category I have mentioned, the gift must be wholly bad on the principle laid down in *Pearks v. Moseley*, *Re Moseley's Trusts* (1), which clearly decides that, where there is a gift to a class, that gift is bad as infringing the rule against perpetuities unless the members of the class must necessarily be ascertained within the permitted period.

The question, therefore, is whether, on its true construction, cl. 1 of the settlement does make a gift to such a class. It will be remembered that the gift in *Pearks v. Moseley* (1) embraced a similar range of objects, but was in a different form, being a gift for all the children of the testator's daughter who should attain the age of twenty-one years and the lawful issue of such of them as should die under that age :

. . . leaving lawful issue at his, her, or their decease, or respective deceases, which issue shall afterwards attain the age of 21 years, or die under that age leaving issue at his, her, or their deceases, respectively, as tenants in common, if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living.

The inclusion of what may be described for this purpose as the obnoxious category of objects in the class was thus effected in what I may term the substantive portion of the trust creating the class, whereas in the present case the class is, in the first instance, defined as consisting of :

. . . children of the settlor who being sons shall attain the age of [21] years or being daughters shall attain that age or marry under that age in equal shares . . .

and the interests of the children of a deceased son are introduced by means of a proviso. It has been argued before me by counsel for those interested in the ultimate trusts in default of children or other issue of the settlor that this difference in form has a vital effect on the result. It is said that on its true construction this clause does not operate simply as one gift to a class including members who need not be ascertained within the permitted limit as in *Pearks v. Moseley* (1). It is contended that this is a gift to a class ascertainable within the permitted limit and consisting exclusively of children of the settlor, with a proviso substituting in a certain event—namely, the death of any son of the settlor under twenty-one years leaving a child or children who attain that age—a separate and distinct gift to a different class, which is admittedly a gift exceeding the permitted limit on the *Pearks v. Moseley* (1) principle. Therefore, it is said that the court can give effect to cl. 1 on its true construction without infringing the rule, by holding that *quoad* children of the settlor the gift is good, although, as I understand it, in the event of there being a son of the settlor who dies under twenty-one years leaving children, the alternative and obnoxious gift would supervene and thus destroy the validity of the settlement. I have endeavoured to understand how the construction of the clause that I am invited by counsel for those interested in the ultimate trusts to adopt can be made to work, and what is the real character of the interest which the children are said to take under that construction, and I must confess that I have failed to do so. It seems to me to be reasonably plain, looking at this clause simply for the purpose of construing it and without regard to the rule against perpetuities, that there is here a gift to one class and one class only. The proviso does not introduce a new gift to a different class. It introduces new members into the class previously described. It qualifies the composition of that class, and it does so in effect by saying that, if any son of the settlor dies before becoming a member of the class, leaving a child or children who shall attain the age of twenty-one, then the child or those children shall become a member or members of the class in respect of the share which the parent would have taken if he had lived to become a member. In my view, the proviso qualifies the composition of the class and introduces the grandchildren in such a case as members of the class of which their father would have become a member if he had attained

the age of twenty-one, but of which he never became a member because he failed *ex hypothesi* to attain that age.

A That being the construction I place on the gift, it is, as it appears to me, plainly within the principle of *Pearks v. Moseley* (1), and it cannot be compared with (and is wholly different from) a case in which vested interests are given with a gift over divesting those interests in certain events in favour of objects not necessarily ascertainable within the perpetuity limit. In a case of that kind the vested interest remains, and the offending gift over is rejected because, being offensive to the rule against perpetuities, it is void, and being void it cannot divest the previous vested gift. In this case, as far as I can see, there is no room for the application of any such principle. No interest vests in any son of the settlor until he attains the age of twenty-one years, so it cannot be said that the proviso divests the interest previously vested in the son so as to allow the son's interest to take effect on the proviso being held invalid. The son never becomes a member of the class, which by definition includes only sons who attain the age of twenty-one years, but, in the event of his failing to become a member, his children, not necessarily ascertainable within due limits, are to become members. There is no divesting of something previously given, but an alteration, before the gift takes effect, in the composition of the class to which the gift is made. Looking at the substance of cl. 1, it seems quite plain that it would by no means necessarily be possible to ascertain the beneficiaries who were going to take under the clause, or the shares in which they were going to take, within the permitted period of the life of the settlor and twenty-one years thereafter, because there would always be the possibility of a son being born to the settlor who, before attaining the age of twenty-one years, and after the death of the settlor, married and then died leaving a child who ultimately would or might attain twenty-one years, and would or might, therefore, qualify for admission to the class, and thus become a beneficiary under that clause. That, as it seems to me, is quite clearly the substance of the trust, and, that being the substance of it, my view is that the trust does infringe this technical rule.

C The conclusion to which I have come as regards the construction of cl. 1 accords with the decision of ROMER, J., in *Re Lord's Settlement, Martins Bank, Ltd. v. Lord* (2). In that case, ROMER, J., had to consider whether a clause in terms in all material respects precisely the same as cl. 1 of this settlement infringed the rule against perpetuities, and in order to decide that question he had to determine what was the effect of the proviso in that case corresponding to the proviso in cl. 1 in the present case. He held, aided thereunto by what was said by COZENS-HARDY, M.R. ([1914] 2 Ch. 61, 64) in *Re Williams, Metcalf v. Williams* (3), that the effect of the proviso was to introduce new members into the original class of takers which had been partly described by the earlier part of cl. 3 in the document before him. Thus, the view of ROMER, J., accords with the view which I have endeavoured to express in my own words as regards cl. 1 in the present case. I was invited by counsel for those interested in the ultimate trusts to decline to follow *Re Lord's Settlement* (2) which, it is suggested, was based on a misapprehension of the observations of the MASTER OF THE ROLLS in *Re Williams* (3). Whatever view I myself might hold on the question, I would certainly consider it my duty as a judge of first instance on a point of this kind to follow the decision of ROMER, J., in *Re Lord's Settlement* (2), leaving it to the parties to take the matter further, if so advised. But, quite apart from that, for the reasons I have endeavoured to state, it seems to me that the conclusion reached in *Re Lord's Settlement* (2) (which is the conclusion which I have myself arrived at in the present case) is the right conclusion. In my judgment, therefore, the trusts declared by cl. 1 of the settlement are wholly void as infringing the rule against perpetuities. It follows, and is, indeed, conceded, that on the footing that cl. 1 is bad, cl. 6 also must wholly fail, for it then becomes a limitation in remainder after, dependent on, and taking effect on the failure of the earlier clause.

H It remains to consider the effect of the income clauses, cls. 3, 4 and 5. Clause 3 provides :

Each child of the settlor who shall attain the age of 21 years shall be entitled to receive the whole income of his or her expectant share of and in the trust fund until the same shall become vested or he or she shall previously die.

In my view, that clause is purely ancillary to cl. 1 and postulates that a child on attaining the age of twenty-one years has an expectant share, but, if the trusts of cl. 1 are void, no child can have an expectant share at all, and it seems to me that the failure of cl. 1 necessarily involves the failure of cl. 3 as well. For similar reasons, I do not see how any validity can be attached to the amount of maintenance contained in cl. 4. That leaves cl. 5:

If the said John Doulton Hooper shall not attain the age of 25 years and there shall not at any period or periods be in existence any other beneficiary or beneficiaries who if of full age would be entitled to receive the income of the trust fund the trustees shall during such period or periods pay and divide the income of the trust fund unto and between the person or persons who under the trusts hereof would at that date be entitled to the capital of the trust fund if the trusts hereinbefore declared in favour of the children or other issue of the settlor had then failed and in the same shares and proportions.

That clause is appropriate since the son, John Doulton Hooper, did not attain the age of twenty-five (or twenty-one) years and there is not in existence any other beneficiary or beneficiaries who, if of full age, would be entitled to receive the income of the trust fund. I am, therefore, invited to hold that during the remainder of the life of the settlor, the income of the trust fund is divisible among the persons who would be entitled under the ultimate trust contained in cl. 6 if the prior trusts had then failed, and in the same shares and proportions. I find myself quite unable to accede to that contention. Of course, there being no children of the settlor, there is no beneficiary who, if of full age, would be entitled to receive the income of the trust fund, but, even if there was a child or other issue of the settlor, still there would be no one entitled to receive the income of the trust fund, for *ex hypothesi* there is no valid trust of the income or of the capital of the trust fund. It does not seem to me, therefore, that the events in which the clause was intended to operate have ever happened or could ever happen. Assuming, however, that the failure by infringement of the rule against perpetuities of the trust in favour of the children and the remoter issue of the settlor was an event apt to bring cl. 5 into operation, then the objects to whom the income is payable under that clause are expressed to be "the person or persons who under the trusts hereof would" at the date in question be entitled to the capital of the trust fund "if the trusts hereinbefore declared . . . had then failed." I find it impossible to hold that, the trusts being void—the invalidity extending, as I have said, to cl. 6 as well as to cl. 1—there will ever be any person who would be:

. . . entitled to the capital of the trust fund if the trusts hereinbefore declared in favour of the children or other issue of the settlor had then failed . . .

There could, so far as I can see, never be any such person except the settlor himself under the resulting trust consequent on the invalidity of the trusts declared by cll. 1 and 6 of the settlement. In truth, these income trusts, as it seems to me, are all of them ancillary to the trusts of capital, and assume that the capital has been validly settled, and, cll. 1 and 6 which contain the essential beneficial trusts of the settlement having failed, I think that cll. 3, 4 and 5 must necessarily share the same fate.

For these reasons, I am of opinion that the question raised by the summons should be answered in the sense that, on the true construction of the settlement, all the trusts contained in the settlement of Mar. 19, 1934, are void and inoperative on the ground that they offend the rule against perpetuities, and, accordingly, there is a resulting trust in favour of the settlor.

Declaration accordingly. Representation order made. Costs of all parties, as between solicitor and client, to be paid out of the trust fund.

Solicitors: *Vandercom, Stanton & Co.* (for all parties.)

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

WILSON v. PIKE.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), June 10, 23, 1948.]

Sale of Goods—Note or memorandum in writing—Signature of auctioneers' employee on behalf of purchaser—Whether sufficient to bind purchaser in action by auctioneer—Sale of Goods Act, 1893 (c. 71), s. 4 (1).

At an auction sale conducted by T., a licensed auctioneer employed by the plaintiffs, a firm of auctioneers, goods were sold for £20 to the defendant as a result of a bid made by M., the defendant's agent. In answer to T.'s inquiry as to the purchaser, M. supplied him with the defendant's name, which T. entered in the catalogue against the item in question. The plaintiffs, as auctioneers, having accounted to the vendors for the £20 bid, now claimed that amount from the defendant, who pleaded that there was no sufficient memorandum for the purposes of the Sale of Goods Act, 1893, s. 4. It was admitted that the marked catalogue would be a sufficient memorandum in an action between vendor and purchaser, but the defendant contended that the plaintiffs could not rely on a memorandum made by them as agents for the defendant for the purpose of enforcing a contract to which they were themselves parties.

HELD: although one party to a contract cannot be the agent of the other to make and sign a memorandum on his behalf, the signature of T. as the purchaser's agent (he being a licensed auctioneer as distinct from an auctioneer's clerk) was not invalidated on this account, since the other party to the contract was T.'s employers and not T. himself.

Farebrother v. Simmons, (1822) (5 B. & Ald. 333), *distinguished*.

Quære: whether an auctioneer sues for the price of the goods sold, not by virtue of the contract of sale, but by virtue of his special property and his lien, and also by virtue of his contract with the buyer that the price shall be paid into his hands.

[AS TO AGENCY FOR SIGNATURE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 37-42, paras. 39-48; and FOR CASES, see DIGEST, Vol. 1, pp. 277, 278, Nos. 91-100.]

Cases referred to:

- (1) *Farebrother v. Simmons*, (1822), 5 B. & Ald. 333; 106 E.R. 1213; 1 Digest 277, 95.
- (2) *Wright v. Dannah*, (1809), 2 Camp. 203; 1 Digest 277, 92.
- (3) *Bell v. Balls*, [1897] 1 Ch. 663; 66 L.J.Ch. 397; 76 L.T. 254; 3 Digest 7, 43.
- (4) *Williams v. Millington*, (1788), 1 Hy. Bl. 81; 3 Digest 35, 255.
- (5) *Benton v. Campbell, Parker & Co., Ltd.*, [1925] 2 K.B. 410; 94 L.J.K.B. 881; 134 L.T. 60; 89 J.P. 187; Digest Supp.
- (6) *Sharman v. Brandt*, (1871), L.R. 6 Q.B. 720; 40 L.J.Q.B. 312; 19 W.R. 936, Ex. Ch.; 1 Digest 277, 94.
- (7) *Bird v. Boulter*, (1833), 4 B. & Ad. 443; 1 Nev. & M. 313; 110 E.R. 522; 1 Digest 277, 93.
- (8) *Murphy v. Boese*, (1875), L.R. 10 Exch. 126; 44 L.J.Ex. 40; 32 L.T. 122; 3 Digest 8, 51.

APPEAL by the defendant from an order of His Honour JUDGE BURGIS, at Birkenhead County Court, dated Nov. 17, 1947. The learned county court judge held that the signature of the plaintiffs' employee on behalf of the defendant was sufficient to constitute a memorandum for the purposes of the Sale of Goods Act, 1893, s. 4 (1), and gave judgment against the defendant. The Court of Appeal dismissed the appeal. The facts appear in the judgment of the court.

Bingham for the defendant.

Vaines for the plaintiffs.

Cur. adv. vult.

June 23. TUCKER, L.J., read the following judgment of the court. This appeal from a judgment of His Honour JUDGE BURGIS raises a question as to the sufficiency for the purposes of the Sale of Goods Act, 1893, s. 4, of a note or memorandum made by an auctioneer on the sale of a Georgian mahogany side-board which formed one of the lots sold at an auction sale held by the plaintiffs on Dec. 19, 1946, in an action brought by the plaintiffs as auctioneers against the defendant as purchaser, the plaintiffs having accounted to the vendors

for the price of £20 bid at the auction on behalf of the defendant. The learned judge decided in favour of the plaintiffs and rejected the defendant's plea under s. 4 of the statute.

The plaintiffs, J. J. and G. D. Wilson, carry on business as auctioneers under the style of Wilson & Sons. Neither of them took part in the auction sale in question, which was conducted on their behalf by one Thackeray, a licensed auctioneer in their employ. In the course of the sale the lot in question was knocked down to the defendant at the price of £20 as a result of a bid made on his behalf by a Mrs. McCullick, an employee of the plaintiffs, who—as the judge has found—had the defendant's authority to bid on his behalf. As a result of the bid the auctioneer, Thackeray, having been supplied by Mrs. McCullick with the defendant's name as the buyer, entered his name in the catalogue against the item in question. It has been admitted throughout that there was in existence a sufficient note or memorandum to satisfy s. 4 of the statute in an action between vendor and purchaser, but it was contended on behalf of the defendant, on the authority of *Farebrother v. Simmons* (1), that in an action brought by the plaintiffs as auctioneers they could not rely on a note or memorandum made by them as agents for the defendant for the purpose of enforcing a contract to which they were themselves parties. The headnote to that case reads (5 B. & Ald. 333):

The agent contemplated by the 17th section of the Statute of Frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and therefore, where an auctioneer wrote down the defendant's name by his authority opposite to the lot purchased: *Held*, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute.

The material passage in the judgment of ABBOTT, C.J., is as follows (*ibid.*, 334):

The most favourable way for the plaintiff is to treat the question as a case of goods sold and delivered; and then, the goods being above the price of £10, the case will fall within the 17th section of the Statute of Frauds, which requires some note or memorandum in writing of the bargain, to be made and signed by the parties to be charged by it, or their agents, thereunto lawfully authorised. Now, the question is, whether the writing down the defendant's name by the plaintiff, with the authority of the defendant, be in law a signing by the defendant's agent. In general, an auctioneer may be considered as the agent and witness of both parties. But the difficulty arises, in this case, from the auctioneer suing as one of the contracting parties. The case of *Wright v. Dannah* (2) seems to me to be in point, and fortifies the conclusion at which I have arrived, *viz.*, that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party upon the record.

The learned county court judge, in his notes of judgment, dealt with the defendant's contention in these words:

The defendant put forward a further point in regard to lot 864, namely, that no note or memorandum had been signed by the defendant which would satisfy the requirements of the Sale of Goods Act. I found the following facts: 1. That Mrs. McCullick was the person who actually made the bid on behalf of the defendant and that she was duly authorised by him to bid. 2. That Mrs. McCullick gave the defendant's name to the auctioneer when asked by him for the name of the buyer. 3. That Thackeray was the person actually conducting the auction. 4. That the name of the buyer was entered in the catalogue by Thackeray. I held that an auctioneer's clerk has *prima facie* no authority to sign a note or memorandum on behalf of the buyer: *Bell v. Balls* (3); but that there were special circumstances from which I could and ought to infer that the auctioneer was specially authorised to sign a memorandum. These circumstances were the request by the auctioneer to be supplied with the name of the buyer, and the supplying of the name of the buyer by his agent, Mrs. McCullick. It was contended by Mr. Bingham in reliance on *Farebrother v. Simmons* (1), that in an action brought in the name of the auctioneer the entry in the catalogue was not sufficient to take the case out of the statute. I differentiated the case before me from *Farebrother's* case (1) on the ground that in the case before me the memorandum was not signed by the plaintiff to the action, but by a third party, namely, the auctioneer, Thackeray. I, therefore, held that the plaintiffs were entitled to recover the sum of £20.

The case was argued in the court below and on appeal on the assumption that in an action of this nature the auctioneer is suing on the contract of sale, and, accordingly, the absence of a sufficient note or memorandum to satisfy

A the Sale of Goods Act, 1893, s. 4, will afford a defence to the purchaser. There can be no doubt that the auctioneer, for the purpose of enforcing his right to receive the purchase price, can sue in his own name as for goods sold and delivered or bargained and sold, and this is so even where he has sold for a disclosed principal: see *Williams v. Millington* (4). None the less, we desire to reserve the question whether the true position is not as stated by *SALTER, J.*, in his judgment in *Benton v. Campbell, Parker & Co., Ltd.* (5), where, after a review of the authorities he expresses the opinion that the auctioneer sues for the price, not by virtue of the contract of sale, but by virtue of his special property and his lien, and also, in most cases, by virtue of his contract with the buyer that the price shall be paid into his hands.

B We will, however, assume for the purposes of this judgment that the plaintiffs must be taken as suing on the contract of sale made between the vendor and the purchaser. On this basis the parties to the contract must be the plaintiffs, *J. J. Wilson and G. D. Wilson* carrying on business as *Wilson & Sons*, of the one part, and the defendant *Pike*, of the other. This contract was made by *Thackeray* as agent for the plaintiffs offering the lot for sale by auction and knocking it down to the bid of £20 offered by *Mrs. McCullick* on behalf of the defendant. After the fall of the hammer *Thackeray*, pursuant to his authority so to do on behalf of the defendant, signed a memorandum sufficient to satisfy the requirements of s. 4 as between vendor and purchaser. *Thackeray* is not suing on a contract made by him as principal. He is not a party on the record. If he were, he would be met with the defence that one party to a contract cannot be the agent of the other to make and sign a memorandum on his behalf: see *Farebrother v. Simmons* (1) and *Sharman v. Brandt* (6). But one party to a contract can confer authority on the agent of the other party so to do: see *Bird v. Boulter* (7) and *Murphy v. Boese* (8), and it frequently happens that one C and the same person is authorised by each party to act as his agent for this purpose. Such is often the case where sales are made by brokers, and a sale by an auctioneer on behalf of the vendor followed by his signature on behalf of the purchaser is only another instance.

D In this case *Wilson & Sons*, who are the plaintiffs on the record, authorise their agent, *Thackeray*, to sell by auction, and the defendant, *Pike*, the purchaser, authorises *Thackeray* to sign on his behalf. It being conceded that the memorandum is otherwise sufficient, we can see no reason why *Wilson & Sons* cannot sue on this contract and rely on the memorandum signed by *Thackeray* as agent for the defendant. It seems to us that, on a true analysis of the facts of this case, the decision in *Farebrother v. Simmons* (1), limited, as it is, to the case of a contracting party who is also a party on the record, does not preclude them from recovering. We reach this conclusion irrespective of the learned judge's finding that *Thackeray* was specially authorised to sign as a result of his request to be supplied with the name of the buyer and the supplying of the name of the buyer by his agent, *Mrs. McCullick*. *Thackeray*, being a licensed auctioneer conducting a sale by auction—as distinct from an auctioneer's clerk—did not require any express authorisation to sign on ascertaining the identity of the buyer. For these reasons, and assuming that the plaintiffs must be taken as suing on the contract of sale, we are of opinion that this appeal E fails and should be dismissed.

G *Appeal dismissed with costs.*

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson and Berkson*, Birkenhead (for the defendant); *Pritchard, Englefield & Co.*, agents for *Latin & Masheder*, Liverpool (for the plaintiffs).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

*Re O'CONNOR'S WILL TRUSTS. WESTMINSTER BANK, LTD.
v. O'CONNOR AND OTHERS.*

[CHANCERY DIVISION (Roxburgh, J.), June 17, 18, 1948.]

Will—Legacy—General or specific—“To my son 10,000 preference shares” in private company—Testator holding only 9,000 shares—No words indicating testator’s ownership of shares bequeathed—Legacy not included in pecuniary legacies to be satisfied out of residue.

By cl. 5 of his will, dated Aug. 5, 1942, a testator, who died on Nov. 20, 1946, provided: “I bequeath to my . . . son (free of duty) 10,000 preference shares of £1 each fully paid in the capital of J. & K. Connor, Ltd.” By cl. 6 a number of pecuniary legacies, described as such, were given, and by cl. 7 and cl. 8 the residuary estate was given on trust for sale, with a direction to the executor to pay out of the proceeds the pecuniary legacies. The will contained no other general direction for the payment out of residue of legacies. At the date of his will and at the date of his death the testator held only 9,000 preference shares of the company, of which he was manager and governing director. The remainder of the company’s 45,000 preference shares were at the date of his death held as to 25,000 by the trustees of a family settlement and as to 11,000 by a subsidiary of the company. The articles of association of the company provided that a member wishing to transfer his shares must first offer them to the other shareholders, who would have a right to purchase them at a price to be determined by arbitration of the company’s auditors in default of agreement between the parties. Among the questions for determination by the court were (i) whether the gift of 10,000 preference shares was a specific or general legacy, and (ii) if it were general, the manner in which the executor was to discharge the legacy.

HELD: (i) the court leant strongly in favour of a general legacy and the bequest must be construed as general.

(ii) an inquiry would be directed whether or not it had been possible to purchase the additional 1,000 preference shares within twelve months of the testator’s death; if it had not been possible, the legatee was entitled to such a sum as at the expiration of that period would have been required to purchase the shares, with interest at 4 per cent. thereafter, such sum to be ascertained in accordance with the provisions of the company’s articles of association as to the sale price of shares; if it had been possible to make the purchase, further consideration as to the rights of the legatee would be necessary.

Robinson v. Addison, (1840) (2 Beav. 515), applied.

[AS TO SPECIFIC AND GENERAL LEGACIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 337, 338, para. 629; and FOR CASES, see DIGEST, Vol. 23, pp. 384-388, Nos. 4546-4584.]

Cases referred to:

- (1) *Re Willcocks, Warwick v. Willcocks*, [1921] 2 Ch. 327; 91 L.J.Ch. 27; 126 L.T. 86; *sub nom.*, *Re Willcocks, Warwick v. Willcocks*, 65 Sol. Jo. 793; 44 Digest 296, 1276.
- (2) *Robinson v. Addison*, (1840), 2 Beav. 515; 9 L.J.Ch. 369; 4 Jur. 647; 48 E.R. 1281; 44 Digest 298, 1299.

ADJOURNED SUMMONS to determine, *inter alia*, whether on the construction of the testator’s will a bequest of “10,000 preference shares” was a specific or a general legacy, and, if general, how it was to be satisfied. The facts appear in the judgment.

Rink for the executor.

C. A. Settle for the first defendant (the son to whom the bequest was made).

J. A. Brightman for the second defendant (the testator’s widow, one of the residuary legatees).

A. G. N. Cross for the third defendant (representing the other residuary legatees).

ROXBURGH, J.: This summons raises a question on the construction of the will of Austin O'Connor who died on Nov. 20, 1946. The first question

I have to decide is: "Whether the legacy of 10,000 preference shares of £1 each in the capital of J. & K. Connor, Ltd., is a specific legacy or a general legacy." The second question asked by the summons is:

(a) If the said legacy is a general legacy, then whether the plaintiff, as executor of the said will, ought to purchase (at the proper price to be determined by the company's auditors in accordance with art. 31 of the company's articles) 1,000 such shares with a view to causing them to be transferred to . . . Austin Henry O'Connor. (b) Alternatively, whether the plaintiff ought out of the testator's residuary estate to pay to the said Austin Henry O'Connor an amount equal to the proper value of 1,000 such shares such value being determined as aforesaid or in some (and what) other manner.

By his will of Aug. 5, 1942, the testator provided:

5. I bequeath to my said son [Austin Henry O'Connor] (free of duty) 10,000 preference shares of £1 each fully paid in the capital of J. & K. Connor, Ltd. . . . 7. I devise and bequeath all my real estate of every tenure and all my personal estate and effects whatsoever and whosoever not hereby otherwise disposed of (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto the bank upon trust that the bank shall sell call in collect and convert into money the said real and personal estate and premises at such time or times and in such manner as it shall think fit but as to reversionary property not until it falls into possession unless it shall appear to the bank that an earlier sale would be beneficial. 8. The bank shall out of the moneys to arise from the sale calling in and conversion of or forming part of my said real and personal estate pay my funeral and testamentary expenses and debts and the pecuniary legacies hereinbefore bequeathed and all duties whatsoever payable upon my property at my decease and shall invest the residue of the said moneys . . .

The testator was the manager and governing director of J. & K. Connor, Ltd., which carried on the business of wholesale and export manufacturing milliners and hat manufacturers. The capital of the company was £150,000 divided into 105,000 ordinary shares of £1 each and 45,000 preference shares of £1 each carrying a cumulative preference dividend of 7 per cent. per annum. The company's articles contain usual provisions under which a member wishing to transfer his shares must, in effect, offer them to the other shareholders. If the other shareholders between them desire to purchase more shares than are to be sold, the shares offered are to be divided between them rateably according to their respective holdings. If only one shareholder desires to purchase the shares offered he may purchase all of them. Under art. 31 the purchase price is to be determined, in default of agreement of the parties, by arbitration of the company's auditors. At the testator's death, the preference shares were held as follows:—(a) 9,000 were held by the testator; (b) 25,000 were held by the testator and Algernon Lionel Collins as trustees of a trust deed dated Oct. 8, 1931, under which the beneficiaries were the testator's children and their issue; (c) the remaining 11,000 shares were held by J. & K. Connor (Luton), Ltd., a subsidiary of the company. At the date of his death, the testator held 85,000 ordinary shares of the company. After the death of the testator the bank approached the subsidiary company to inquire whether they would be prepared to sell to the bank 1,000 preference shares of the company, and if so, at what price. J. & K. Connor (Luton), Ltd., stated that it would be willing to sell such shares at the proper value thereof to be ascertained under art. 31. The bank also asked the two trustees of the trust deed to which I have referred whether they would be prepared to sell to the bank 1,000 preference shares in the company. They declined to do so, but stated in writing that they would not wish to exercise any right which they might have to buy part of the 1,000 preference shares which J. & K. Connor (Luton), Ltd., would be prepared to sell to the bank.

The question which I have to determine is whether this legacy of 10,000 preference shares of £1 each is a general legacy or a specific legacy, and there are two points in favour of either view. In favour of it being a general legacy is the fact that there is nothing in the language of cl. 5 of the will to indicate that the testator is describing specific property of his. For example, the testator does not use the word "my" or any possessive word at all. The second point, a very strong one, in favour of the legacy being general, is that the testator never had 10,000 preference shares either at the date of his will or at the date of his death, but only 9,000, and, accordingly, if he did intend

by this clause to make a specific disposition of his own property, he must have been misinformed as to the extent of that property. The two points in favour of the legacy being specific are, first, the circumstance that the bequest deals with a private company of which the testator was the manager and governing director and in which the shares were subject to the restrictions usual in the case of a private company, and, secondly—and this is very important—the testator clearly did not include the disposition in cl. 5 of the preference shares among the dispositions which his executors and trustees were to satisfy out of residue. It will be remembered that the direction to the trustees in cl. 8 was that out of the moneys arising from the sale, calling in and conversion they were to pay the pecuniary legacies thereinbefore bequeathed. The property devised and bequeathed in the trust for sale was the property “not hereby otherwise disposed of.” Seeing that the testator introduces cl. 6 by the words, “I bequeath the following pecuniary legacies,” I cannot, as a matter of construction of the will, hold that the testator was treating this bequest of the preference shares as included in the phrase “pecuniary legacy” and as one which was to be satisfied out of residue. I should reach that conclusion notwithstanding that “pecuniary legacy” is so defined in the Administration of Estates Act, 1925, as to include a general legacy. Though it is so defined for the purposes of that Act, as a matter of construction I do not think that that phrase “pecuniary legacy” was intended to include a general legacy in this will.

In the circumstances, what ought I to hold? There is no doubt that the court leans strongly in favour of a general legacy. How strongly is apparent from *Re Willcocks* (1). If the testator, instead of referring to 10,000 preference shares, had referred to 9,000 or less preference shares in cl. 5, I should have held that there was sufficient context here to carry me to the other side of the line, notwithstanding the leaning of the court to which I have referred, but it is impossible to construe this will without doing some violence to some of its language. If the argument of counsel for the second defendant that this is a specific legacy is right, I must treat the 10,000 as a *falsa demonstratio*. If the argument advanced by counsel for the first defendant is right, I must treat the testator as having forgotten to include the bequest in cl. 5 within the description of “pecuniary legacy,” another *falsa demonstratio*. Having regard to the leaning of the court in these matters, between these two *falsae demonstrationes* I decide in favour of the first defendant that this is a general legacy, and that the *falsa demonstratio* lies in the use of the word “pecuniary” and not in the use of the word “ten.”

That brings me to another difficult question. In *Robinson v. Addison* (2) the facts were (2 Beav. 515):

A testator having fifteen and a half Leeds and Liverpool canal shares, which by Act of Parliament were to be deemed personal estate, bequeathed five and a half such canal shares to A, five such shares to B, and five such shares to C. There was no description or reference in the will to show that the testator intended to give the particular shares which he held at the date of his will. At his death he possessed no Leeds and Liverpool canal shares: HELD, that the legacies were general, and not specific.

It is important to observe what was prayed in that case (*ibid.*, 517):

The plaintiffs by this bill insisted, that the bequests of the canal shares were general and not specific legacies; the bill prayed a declaration to that effect, and that they were entitled to have so much money as at the end of one year from the testator's decease would have been sufficient for the purchase of fifteen and a half shares, according to the current market price, with interest thereon.

LORD LANGDALE, M.R., decided that it was a general legacy and he said (*ibid.*, 520):

As to the nature of the property, the canal and lands are vested in a corporation. The lands were purchased, and the canal constructed by means of money raised by subscriptions. The capital so raised is divided into 2,600 shares, which are to be deemed personal estate, and to be transmissible as such; and the shares, though not frequently sold, are nevertheless occasionally bought and sold, and may be had for money, and the question is, whether the legacy, if it be not otherwise specific, is made so by reason of the nature of this property. . . . The testator had no share in the canal at the time of his death, though he had the means by which the shares might have been obtained; and conceiving that the words of his will are not such as to indicate

that he meant to give the particular shares at the date of his will, it is to be considered what he did give. He intended his legatees to have so many canal shares, but not giving the specific shares that he had, he gave nothing which was distinguished or severed from the rest of the testator's estate, but in effect gave such an indefinite sum of money as would suffice to purchase so many shares as he had given, those shares being any such shares as could be purchased, and not certain particular and defined shares.

A Counsel for the third defendant, with the most laudable industry, has obtained from the Record Office the order in that case. It is as follows :

The court declares that the several persons entitled to the legacy are entitled to have so much money paid out of the general estate and effects of the testator as, at the end of the twelve calendar months next after the decease of the testator, would have been sufficient to purchase the said shares.

B That case, and the order made, seem to make it quite clear that the material date for this purpose is twelve calendar months from the death of the testator. The evidence before me indicates the possibility, though not the certainty, that the additional 1,000 shares could have been acquired before the expiration of twelve months, and if it were possible to do so it may be—I do not decide that today—that the legatee is still entitled to say: "I want the shares whatever they cost today." That is a point I reserve for future consideration if it arises. C If, on the other hand, it was not possible to purchase the shares before the end of twelve calendar months after the death of the testator, then it appears to me that the legatee was entitled to such a sum as at that date would have been required to purchase the shares in question with interest at 4 per cent. per annum from that date. I do not think that in the present case there is any difficulty in ascertaining the value of the shares at the date in question because the articles contain a provision which regulates the ascertainment of the price of the shares at any particular date on the footing that D there is a willing vendor and a willing purchaser, but that they are in disagreement as to the price. It seems to me that that machinery is clearly the proper machinery to use to ascertain the price at the appropriate date. It may be that the parties would be able to obviate this difficulty by agreement, but it appears to me that I am really bound to direct an inquiry whether or not it was possible to obtain these shares before twelve months after the death of the testator, E because, if it was, there will arise the difficult question which I reserve for future consideration, whereas, if it was not, that question will not arise. Accordingly, I propose to direct an inquiry whether it was possible to obtain 1,000 shares within twelve months. The testator's estate already includes 9,000 shares and there would be no difficulty in transferring them. I direct an inquiry whether it would have been possible to obtain 1,000 preference shares F within twelve calendar months from the death of the testator and, if so, at what price, and, if it was not possible to obtain the shares in the period aforesaid, what would have been the price which would at the expiration of the said period have had to be paid under the articles of association of the company on the footing that there was a willing vendor and a willing purchaser who were, however, unable to agree as to the price.

G *Order accordingly. Costs of all parties as between solicitor and client payable out of the estate.*

Solicitors: *Wild, Collins & Crosse* (for the plaintiff); *Downer & Lewis* (for the defendants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

PEARSON v. COLEMAN BROTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley and Evershed, L.JJ.),
June 17, 18, 21, 22, 1948.]

Animal—Liability of persons keeping dangerous animals—Lion—Injury to child—Invitee—Child visiting circus—Entering adjoining “zoo” by unauthorised way—Need to relieve herself—No lavatory provided—Child acting reasonably—Insufficient indication of prohibited area.

The plaintiff, a girl aged 7, was visiting a travelling circus owned by the defendants. The circus tent was pitched in an open field and the entrance money was taken, not at the field gate entrance, but at the entrance to the circus tent. In the same field and adjoining the circus, but having its own entrance, was a “zoo” which was an enclosure formed by the waggons belonging to the circus being placed around in a lager, the gaps between the waggons being filled with canvas strips. A lorry, on which there was a lions’ cage, stood in the “zoo” enclosure, close to the circus tent, so that the lions could be brought from the cage into the arena of the circus when they were on show, and, for this purpose, a runway, protected by bars, was provided, leading from an opening in the cage, down an inclined plane into the circus tent. At the lorry end of the runway there was a considerable space underneath it. On the door of the lions’ cage was written in large letters: “Lions, danger.” The cage was faced with bars, but there was a space between, or underneath, the bars, through which the lions could put their paws and claw anyone within reach. While watching the circus, the plaintiff wished to relieve herself and, since no lavatory accommodation was provided, she slipped out of the circus tent, under the canvas behind her seat, to find a quiet corner to which she could retire. Apparently, she went round the circus tent, entered the “zoo” enclosure, not by the authorised entrance, but by crawling under the canvas or fencing, and came to the runway, which she tried to crawl under. As she was passing under the runway, near the lions’ cage, a lion put out his paw from the cage and mauled her. In an action by the plaintiff claiming damages for personal injuries caused by the negligence of the defendants, the defendants contended that they were not liable because the plaintiff was a trespasser when she received the injuries:—

HELD: the proper inference from the evidence was that the only persons whom the defendants were inviting or licensing to enter the “zoo” were persons who entered through the authorised entrance, and, therefore, a person who entered by some other entrance could not, in general, be regarded as an invitee or licensee, but the plaintiff had entered the defendants’ property as an invitee, and, as (a) she was a little girl anxious to relieve herself, (b) no lavatory accommodation was provided, (c) the particular place to which she went was a suitable one for her purpose, and (d) *vis-a-vis* a child in those circumstances, the prohibited area had not been adequately marked off from the area into which she was entitled to go, she must be regarded as an invitee at the time and place that she was injured, and, therefore, the defendants, as keepers of a dangerous animal, were liable to her in damages.

Gould v. McAuliffe ([1941] 2 All E.R. 527), *applied*.

R. Addie & Sons (Collieries) v. Dumbreck ([1929] A.C. 358), *distinguished*.

[AS TO LIABILITY FOR INJURIES BY DANGEROUS ANIMALS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 543, 544, paras. 933, 934; and FOR CASES, see DIGEST, Vol. 2, pp. 236-238, Nos. 238-244.]

Cases referred to:

- (1) *May v. Burdett*, (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 2 Digest 237, 240.
- (2) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 36 Digest 70 453.
- (3) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.
- (4) *Gould v. McAuliffe*, [1941] 2 All E.R. 527; 2nd Digest Supp.

APPEAL by the plaintiff from an order of His Honour DEPUTY JUDGE ELLISTON, at Clacton County Court, dated Oct. 15, 1947, in an action for damages for personal injuries.

The plaintiff, a girl of 7, was mauled by a lion belonging to the defendants, circus proprietors. The defendants were served with the summons, but did not appear at the hearing of the action. The county court judge held that the plaintiff was a trespasser at the time she received the injuries, and dismissed the action. On the appeal by the plaintiff to the Court of Appeal, the defendants applied for a new trial, but their application was refused. The Court of Appeal now held that the plaintiff was an invitee when she received the injuries, and allowed the appeal. The facts appear in the judgment of LORD GREENE, M.R.

Jukes and Caulfield for the plaintiff.

Rees-Davies and J. F. E. Stephenson for the defendants.

LORD GREENE, M.R. : This is a most unusual case and it is important, for its correct decision, to scrutinise the facts very carefully, because there is here a combination of facts which, in my opinion, together lead inevitably to a certain legal conclusion. The result might be different if some of those facts were missing. The infant plaintiff, being then of the age of 7 years, went with her elder sister, aged 12, to visit a travelling circus owned by the defendants, Coleman Brothers, which is the trade name in which the proprietors, a Major and Mrs. Fawset, carry on business as circus proprietors. The circus was at Clacton-on-Sea in June, 1947, when the plaintiff was mauled by a lion belonging to the defendants, and her claim in the action against them was for damages. [The MASTER OF THE ROLLS dealt with an application by the defendants for a new trial, said that to order a new trial now would be to inflict great injustice on the infant plaintiff, and continued :] At the material time the circus was located in an open field at Clacton-on-Sea. There was a gate entrance to the field in which the circus tent was pitched and a "zoo" laid out. From that entrance gate there was a way—whether it was hedged, fenced, roped, or open, I do not know—leading to the entrance of the circus tent. The entrance money was taken at the entrance to the circus tent. The plaintiff and her sister were each in possession of 1s., which they paid at the entrance to the circus. The circus proprietors did not insist on small children being accompanied by adults, but in the ordinary way of the circus business the admission of small children without adults would be a perfectly proper thing. What was called the "zoo" was an enclosure of a rough and ready kind, made up of a sort of lager, in which the waggons belonging to the show were put round, the intervals between them being filled by canvas strips. On the south side of this enclosure, there was a more or less continuous barrier of a rough and ready kind formed by canvas strips, caravans and waggons put close together, and a runged fence. The north side of the "zoo" enclosure, which appears to be called the pony enclosure, was backed with canvas, and contained a large lions' den, faced with bars and protected (as, at any rate, to part of it) by a rope on posts designed to keep the public at some distance from the actual bars of the cage. There was a definite entrance to the "zoo" enclosure, but access to the enclosure was also possible by persons agile enough to crawl under the canvas or under the caravans and waggons. Nevertheless, it is clear that the proper licensed entrance to the "zoo" was the one I have mentioned, and any person who got into the "zoo" by crawling underneath the canvas or the caravans would be doing something that was not authorised by the proprietors. The lions' cage was carried on, or, possibly, built on to the chassis of, a lorry, and, on the east side of the den or cage, there was a door (apparently made of wood) on which was written in large letters "Lions, danger." The lorry on which the lions' cage stood was parked close to the circus tent, the object being to enable the lions to be brought from the cage into the arena of the circus when they were going to be on show. In order that it might be possible to bring them from the cage to the arena, what has been called a runway was provided, leading from an opening in the den itself, down an inclined plane, into the circus tent. This runway was protected by bars. It was inclined at an angle of something like twenty degrees, and at one end there was a considerable space underneath it, the eastern end of the runway leaning on the top of the chassis of the lorry.

Some questions arose in the hearing before us as to the exact area under the control and management of the circus proprietors in connection with the circus and "zoo." It was suggested that control did not extend to the whole of the open field in which the circus and the "zoo" were pitched. That point was mentioned by the learned deputy judge in his judgment, where he said: "There was no evidence that the defendants had any control beyond the confines of their show." That leaves open what the judge held the confines to be. The phrase is obviously a vague one. The circus tent itself was held in position by a number of guy ropes in the usual fashion fastened to pegs put in the ground a considerable distance away from the tent, leaving ample passage for anyone to walk underneath them. The whole of the area covered by that apparatus must have been under the control of the defendants. Photographs also show a lorry parked outside the lions' cage and close to the circus tent, obviously within the area of control of the defendants. It appears to me, therefore, and this is material in my view of the argument, that a person walking round the tent within an area covered by the guy ropes, was within the area which was controlled by the circus proprietors. In my view, when the learned county court judge used the phrase "the confines of their show," he intended to include the area surrounding the "zoo" and the tent which it was necessary for the proprietors to control in order effectively to set up their show.

The plaintiff gave evidence at the trial but she was not able to do so in any great detail, and she could not explain how it was that the accident happened. It did emerge, however, and the judge found, that the actual place where the lion clawed the plaintiff was close to the point where the runway left the lions' cage. There was no question of the plaintiff getting into the cage or into an area where the lions were loose. The accident happened because there was a space between the bars of the lions' cage or underneath the row of bars through which the lions could put their paws and claw anyone within reach. It is said, and I am prepared to believe it, that in the ordinary way the rope surround, to which I have referred, would be sufficient to keep the public from the risk of danger through any such action by the lions. That may well be, but it is perfectly clear that the plaintiff, at the point where the lion struck her, had not the benefit of any adequate protection against the lions which were quite able to reach out with their paws and claw her. From the evidence of the plaintiff's father, who was called on behalf of the plaintiff, it is clear that the plaintiff crawled, or tried to crawl, under the runway, and we must take it that she obtained access to the point near the lions' cage where she was mauled, not by the regular entrance to the "zoo" enclosure, but by crawling in some way to that point through some other orifice. That matter is important in view of a suggestion by counsel for the plaintiff that she may have entered the "zoo" by the authorised entrance.

I now come to another and, in my opinion, most important circumstance in this case. In obtaining access to the point where she was injured, the plaintiff was not merely wandering about or actuated by curiosity. While sitting watching the circus, she had a need to relieve herself, and to do so she got out of the circus tent, very likely by crawling under the canvas body of the tent. Before I read the judge's finding as to how she got to the point where she was, I must say one more word about the lay-out. The "zoo" was laid out to the west of the circus tent. I have mentioned the runway leading from the lions' cage and the piece of fence which, together with the waggons and the canvas strips, formed one side of the "zoo" enclosure. That piece of fence was at the runway end of the enclosure. It was a runged fence, and at one point next to the runway the rungs had either been taken away or, at any rate, had disappeared. The facts, as found by the judge, on the question of how the plaintiff got there are as follows:

During the show she desired to relieve herself and left her place to seek a quiet corner to which she could retire. Apparently, she got out of the circus tent through the canvas at the back of her seat. At any rate, in the course of her search she appears to have followed round the circus tent and the "zoo" lager till she came to a fence which extended up to the runway.

I will pause there for a moment. That hypothesis, which the judge accepts as the probable one, means that she passed round the north of the circus tent, round the north of the "zoo" enclosure, rounded the south side of the "zoo"

enclosure, and approached the runway by means of the runged fence, which is what the judge referred to as the "fence which extended up to the runway." Now comes the second possible view, which he states :

It may be that she did not, in fact, complete the whole outer circuit of the "zoo" lager, but that she approached the runway from the other side, from the back of the lions' cage.

A That would mean that she came in on the north side of the runway, not on the south side as she would have done if she had approached through the runged fence. The judge appears to regard this as the less probable of the two views. The judge then refers to the fact that on the end of the lions' cage "Lions, danger," was painted in conspicuous lettering, and he says :

The difference of approach appears to me immaterial, as in either case she came to the runway through some sort of fencing from one side or the other and attempted to crawl under it.

B I find the judge's reference to "some sort of fencing" on the north side of the runway difficult to follow, because there is, at any rate, no suggestion of it in the evidence. The only fencing which appears, so far as the evidence is concerned, is the runged fence which leads up to the runway on the south, more or less at right-angles.

C As she was passing under the runway, the caged lion put out his paw from the cage front at the side of which the plaintiff was attempting to pass, and she received the injuries for which she is claiming damages.

It is clear, therefore, that she was mauled by the lion at a point which is really the south-eastern corner of the cage, and either when she was trying to get under the runway from the south, or, if she got in from the north, just after she had passed under the runway—the learned judge says it matters not which it was.

D Before I read further, I want to say something about the notice on the lions' cage, because a good deal of argument was based on it. It is clear that, if the hypothesis as to the line of approach which the learned judge preferred was the right one, the plaintiff would not have read that notice, even if she could read. If, on the other hand, she approached not from the south but from the north and had seen the notice, which would have been high up above her head, and could read and understand it, it is right to say that the notice was clearly intended only as a warning to persons who might be minded to open the doors that they would find lions inside. It is clear that it was not intended as a warning to persons that lions in the cage might get their paws through the bars and injure people. In the circumstances of this case, I myself attach no importance to that notice. To read it as a warning to herself, the plaintiff, assuming that she could read it, must have interpreted it as indicating that anywhere near the cage she would be in danger, whether she opened the doors or not. It would have to indicate to her that there were lions there who could get their paws through what, to a child, I should have thought, would have seemed to be an adequate barrier, and, further, it would have meant that she must form a just estimate of the reach of the lion's paw and the extent to which she would be in danger if she passed near it. The notice was not put up for any such purpose, it was not put up to warn people of any such danger, and, in my opinion, it could not have been so interpreted by the plaintiff, even assuming that she went in by the north and even assuming that she could look up and read it.

G I think I have mentioned all the necessary facts except one. Nowhere in the evidence is there any suggestion that the proprietors of the circus had provided any lavatory accommodation for their patrons. The little girl says she looked for a lavatory and could not find one. It is true that the judge does not, in terms, find there was not a lavatory, but the fact that there was no lavatory available for the little girl to go to is implicit in the whole of his judgment. Had there been a lavatory provided, it would, very likely, have afforded a short answer to the whole case.

H The arguments put before us by counsel for the plaintiff were three. First, it was said that this was a case of a dangerous animal, and the fact that the plaintiff was mauled by that animal was sufficient to throw on the defendants the burden of proving that they were not to be held liable for the injury, and if, in fact, the plaintiff was a trespasser, it was for the defendants to prove it.

That argument, in my opinion, does not succeed on the facts, because we have sufficient evidence to enable us to determine whether the plaintiff was or was not a trespasser at that point. The judge held that she was, and, if the true conclusion is that she was a trespasser, the question of *onus* of proof appears to me to be irrelevant. If facts established by the plaintiff herself show her to be a trespasser, then the obligation of the defendants must be treated on that footing, and it is impossible to put on them a greater obligation than the law insists they should be under, with regard to trespassers on their land.

Next it was said: "Here is a 'zoo' enclosure. This little girl was in it. No matter how she got there, when she was in the enclosure she was entitled to be there, because it was a place to which the public was invited, or, at any rate, licensed, to go." It was said that there was no evidence that a separate charge was exacted for persons visiting the "zoo," but that the evidence was consistent with the view that a person who had paid his shilling to go to the circus thereby became entitled to go to the "zoo," and that, therefore, the plaintiff, being in the "zoo," was in a place where she was entitled to be in any circumstances. I do not myself think that that argument can be sustained, and for these reasons. Assuming either that entrance to the "zoo" was free or that the shilling paid for entrance to the circus also secured admission to the "zoo," the proper inference from the plan appears to be that the only persons whom the proprietors were inviting or licensing to enter the "zoo" were persons who entered through the authorised entrance. Therefore, a person who, to visit the "zoo," entered by some other entrance, could not, in general, be regarded as an invitee or a licensee. That is a sensible conclusion, it appears to me, having regard to the lay-out of the "zoo," in which pains have obviously been taken, in a rough and ready way, to stop persons getting into the "zoo" otherwise than by the authorised entrance. It must be remembered, in dealing with a concern of this kind, and, possibly, with a crowd of people, that it is very important that the proprietors should have some entrance where they can station somebody to control the entrants.

The third argument is one on which, in my opinion, the plaintiff is entitled to succeed. It is of this nature. Whatever would have been the position of the plaintiff if she had arrived at that point by the route she took merely out of curiosity or if she were simply wandering, the explanation of her presence at that point is of a very different character. There was no place provided by the defendants where she could relieve herself, and, therefore, it was said, whatever her status would have been in other circumstances, on the facts of this case she must be regarded as being rightfully there by implied licence or invitation, having regard to the facts which I have mentioned, *viz.*, that she was looking for a quiet place in which to relieve herself, that she had sought for one and could not find one, and that the particular place was obviously such a quiet place as one would expect a little girl of seven with ordinary delicacy of feeling to select. There was one argument put forward by counsel for the defendants which attempted to meet that argument half way. He said that there was no evidence that when she was at the point where she was mauled—crawling either under the runway from the north, or through the fence from the south—she had not already done what she left the tent to do. It appears to me that the learned judge entirely destroys that argument by his findings. He makes it clear that she had not done what she wanted to do and that she went to the point where she was injured for the very purpose of performing that act. The judge refers to her coming up to the fence on the south "in the course of her search." The "search" was for a quiet corner to which she could retire, and there is not a particle of suggestion anywhere in the judgment that that search was satisfactorily concluded before she came to the place where she was injured.

This is not a case similar to the common class of case where children, being on A's land or on the public highway, go on to B's land in circumstances where normally they would be trespassers. In that class of case the facts may lead the court to infer an invitation or a licence by the owner of the land to go on to his land. Such an inference is much more easily drawn where, with the knowledge of the landlord, children have been in the habit of trespassing on his land. In cases of that kind, the problem is to find out the point in place or time at which the children become trespassers. Here it seems to me that the problem is entirely different. The problem is not to find out when the little girl became a tres-

passer, but to find out when she ceased to be an invitee. She began as an invitee. She paid her shilling. She was invited to a place where anyone would know that among the spectators in a circus of that kind there would be bound, from time to time, to be people who would find it necessary to go outside somewhere and relieve themselves. No place was provided for that purpose. It does not surprise me to suppose that, at a country circus put down in a field, the patrons are expected to look after themselves and find some place where they can satisfy their needs. This is not a London cinema, and the rustic and primitive method of dealing with such an emergency would be perfectly natural and one could well understand that that was what the proprietors contemplated. That being so, we have got the case, not of an adult, but of a little girl, confronted with such a necessity, doing what was the natural thing for her to do. Going outside the circus tent, she looks, as the judge says, for a quiet place, and she does not find one until she comes to the runway, either from the north or from the south. What does she find when she gets there? She finds what would to a little girl of seven be the ideal place for her purpose, a little space into which she could crawl, do what she wanted to do, and then come out without being seen. I have mentioned what seems to me to be the crucial fact, that she starts by being an invitee, and the argument was that at a certain point she ceased to be an invitee and became a trespasser. That such a thing can happen, of course, is manifest, but the question is: Did it happen in this case?

The learned deputy judge dealt with the first two arguments that I have mentioned. He rejected the first one, *viz.*, that it was sufficient for the plaintiff to prove damage, and he referred to *May v. Burdett* (1) and *Glasgow Corpn. v. Taylor* (2), where the child ate some poisonous berries in a public park. He found that neither of those cases assisted the plaintiff on the first branch of her argument. Then comes what I read as his ground for rejecting the second argument, which he describes in this way:

It was further contended that the plaintiff was an invitee to the whole of the circus and "zoo" outlay.

That second argument was that the child was entitled to be in the "zoo" enclosure because she had paid to go into the circus, quite irrespective of the purpose that led her there. He read *R. Addie & Sons (Collieries) v. Dumbreck* (3) which he said was not referred to in argument, and held, following the well-known words of LORD HAILSHAM, L.C. ([1929] A.C. 358, 364) in that case: "that there was no 'invitation, express or implied' for the plaintiff to approach or pass under the runway." He was finding, really, on the authority of *R. Addie & Sons (Collieries) v. Dumbreck* (3) that the plaintiff must be regarded as a trespasser when she was in the place where she was. *R. Addie & Sons (Collieries) v. Dumbreck* (3) was a case of a quite different character. It was a case of the class to which I referred a little while ago of children, not starting as invitees on the defendant's land, but coming in from outside, at any rate *prima facie*, as mere trespassers. The problem there was that of finding out at what point in time or place they ceased to be trespassers. The problem here is to find out at what point in time or place the plaintiff ceased to be what she started by being, an invitee on the defendants' land. I cannot help thinking that, with all the care which the deputy county court judge obviously paid to this case, he misdirected himself in thinking that *R. Addie & Sons (Collieries) v. Dumbreck* (3) was an authority which, on the facts, justified or compelled him to find that the plaintiff was a trespasser at the material stage of her search. The deputy county court judge said:

There was no invitation express or implied to the plaintiff to approach or pass under the runway. I hold that the plaintiff was not, at the point where the injury occurred, present there with the leave and licence of the defendants. I further hold that, at the time she approached and endeavoured to pass under the runway, the plaintiff became a trespasser and disentitled from recovering damages.

I read that as meaning that, down to the point when she was close to the runway, she was acting in accordance with the original invitation, but, whether or not that is what the learned judge meant, that appears to me to be the only possible conclusion from the facts. She was invited to a place where there was no lavatory, and, seeking for one and moving within the part controlled by the defendants and not finding any place, she arrived near the runway. It seems to me im-

possible to say from that that she was a trespasser the moment she got out of the circus tent. What was she to do? Counsel for the defendants could only suggest that she might have found an attendant. We do not know what attendants were there, where they were located, and whether it was possible for a little child to get hold of one in a crowded circus tent. She could not remain where she was, and, therefore, it seems to me that the only proper inference was (and, I think, the judge is drawing it) that, at any rate up to the crucial point when she decided to crawl under the runway, she was there pursuant to the original invitation.

Now there comes what, to my mind, is the really important point and, from the legal point of view, the most interesting part of this case. The defendants occupied two adjoining pieces of land, the circus and the "zoo." There was an invitation to these children to go to the circus. A person who has two pieces of land and invites the public to come to one of them can, if he chooses, limit the invitation to that one, but, if the other is contiguous to that piece and he does not indicate to his invitees that his invitation is confined to the one piece of land, he cannot be surprised if they treat his invitation as pertaining to both pieces. In my opinion, if a land owner is minded to mark out part of his land as a prohibited area, he must indicate to his invitees by appropriate means that it is a prohibited area. It is no good his coming afterwards and saying: "You were not allowed to go on that piece," if, in point of fact, he had done nothing adequate to show that the second piece of land was a prohibited area. Whether or not proper and sufficient steps have been taken to delimit the prohibited area must depend on the facts of individual cases. Looking at the "zoo," which in this case is said to be a prohibited area, I find what I have described as a rough and ready manner of marking it off and indicating that nobody ought to go in there unless he goes through the proper entrance. To an adult it might well be regarded as sufficient indication that the area of the "zoo" is a prohibited area and is not to be accessible to anyone who does not go through the proper entrance. We are, however, not dealing here with an adult, nor are we dealing with a child who is moving about out of mere curiosity or without any reason. We are dealing with a child in a condition which must have been contemplated as reasonably possible by the proprietors of the circus, namely, the condition of being under an urgent necessity to find a quiet place in which to relieve herself. I ask myself, having regard to the fact that among the invitees of the defendants there were likely to be children needing to relieve themselves, whether, in relation to that class of person, the steps taken at the point in question to delimit the prohibited area of the "zoo" were or were not adequate. In my opinion, the facts speak for themselves. So far from indicating sufficiently to a child bent on such an errand that she must not go in, there is displayed before her what is clearly not a prohibition, but a temptation. It is obvious that, to a little girl seeking for a quiet place, here is the ideal quiet place. It seems to me quite impossible to say that the prohibited area had, *vis-a-vis* a child of that kind in those circumstances, been adequately marked off by the defendants from the area into which the child was entitled to go. On the evidence, however the matter might have stood with regard to someone who merely came on the field as a trespasser and chose to go into that place, the position, in view of the fact that the plaintiff started as an invitee, can only lead to the conclusion that the invitation must be taken as extending impliedly to a place of this kind to which she would reasonably go in the need in which she was.

It will be observed that I have been careful to consider all the relevant facts of the case as they appear to me—the fact of her need, the fact of her age, the fact that no lavatory was provided, the fact that she made a circuit round the tent and found nothing, and the fact that she did find a very attractive place in the end. The combination of all those facts is what leads me inevitably to the conclusion that the defendants cannot succeed. I say nothing of what the position would have been in the case of an adult who had found himself in a similar need. If he had followed the same route as this girl and had crawled through the fence or under the runway, he might very well have been met with the answer: "To you, an adult, it was quite indicated that this was a prohibited area." In the case of adults it can scarcely be necessary to stop up every hole through which they could possibly crawl. Adults are not expected to crawl.

That might have been the answer, but I say nothing about it. I merely refer to it as showing the importance of paying due regard to all the facts of the case. Again, I say nothing about what would have happened if this little girl, being bored with the circus performance, had chosen to go out for no particular reason except curiosity and wandered into the "zoo." In the circumstances, she being under a compelling need, for the satisfaction of which a convenient and inviting aperture was left in what was intended to be an enclosure of the "zoo," she is, in my opinion, justified in saying that the invitation must be taken, in her case, to have extended to this point. I think I have said sufficient to explain why, in my opinion, the appeal is entitled to succeed. The conclusion that I have come to is based on what seems to me to be the only possible inference in law on the facts of this case. Accordingly, the plaintiff is entitled to succeed and to have judgment for the amount which the judge found for damages for what she suffered.

WROTTESELEY, L.J. : I agree. In two respects this case differs from the

facts usually to be found in the cases which have been decided relating to children who are *prima facie* trespassers and in the course of their trespass get hurt. We start with a child who was clearly invited, on terms of paying, to an entertainment provided for children and others by the defendants. At the other end of the story, there was within the general lay-out of the premises where the entertainment was provided a dangerous animal, a lion. If the child was lawfully at the point where she was when she was clawed by the lion, it is not necessary to prove that the injuries were due to negligence on the part of the defendants. To that case the defendants were responsible. Those who keep such animals do so, in that sense, at their peril. On the facts narrated by my Lord, I also have come to the conclusion that the learned county court judge, in finding that there was no invitation express or implied, did not apply his mind to the true test in the peculiar circumstances of this case, the true test being : Did this child, having been invited on to these premises, behave like a normal child and reasonably ? We know that she tried to find what she called a lavatory, and we know that she could not find one. We also know that in the search she came within range of a lion's paw and that she got there either after walking round the north of the circus tent and on round the "zoo" lager (in which case she would come to a hole in the fence, a fence which was a skeleton of a fence without rungs, and that was what the learned judge thought was the more probable course in the circumstances of the case), or else, having gone round the tent, she came to a place by which she could pass under the runway and so reach the spot where she was hurt. In any event, it does not matter, as the learned county court judge said, which route she took. It is clear that she came on what she was looking for, a secluded corner, to which she went, as I think everyone must agree, naturally and reasonably, and there she was mauled.

Of the various cases cited to the court, the one which appears to me to come nearest to the facts of this case is *Gould v. McAuliffe* (4), a decision of this court. That was the case of an adult, while the case which we have before us is the case of a child, and in that sense an *a fortiori* case. If the plaintiff in that case could be said to have behaved reasonably, it seems to me this child must be admitted to have behaved reasonably. Something was said, although I cannot find anything about it in the evidence, about the fact that the plaintiff had with her an elder sister, aged about 12 years. In my view, it does not seem to have affected the judge's mind, but, even if she had an elder sister with her, acting as what is often called a "little mother," there is no reason to suppose that the elder sister would have guided the plaintiff to any spot other than that to which the plaintiff guided herself. Thus, the result was—in the words of SCOTT, L.J., ([1941] 2 All E.R. 527, 528) in *Gould v. McAuliffe* (4)—that "by implication the plaintiff was invited to do what, in fact, she did do," and, if not invited, she was at least licensed to wander and find, if she could, a secluded place. Another argument used by counsel for the defendants was that there was no duty, and none could be found in this case, imposed on the defendants to supply lavatory accommodation. I agree with him, but, with such accommodation failing, owners must expect their patrons to wander and look for a suitable secluded place. It is to be noted that the learned county court judge did not

find that the plaintiff became a trespasser in the course of her search. In fact, he found that she did not become a trespasser until the time at which she approached and intended to pass under the runway. She was, therefore, even on the learned county court judge's view, not a trespasser but an invitee, or, at least, she had a licensed right up to that time. It appears to me clear that the mere fact that the plaintiff passed through the hole in the fence could not render her a trespasser in the circumstances of this case, engaged as she was in the search for a secluded spot. Still less was she a trespasser if she crept under the runway, as she did if she came from the north side of the plan.

EVERSHED, L.J.: I also agree. This case must be decided on its own special and particular facts. Those facts are rendered all the more special and particular by reason of the neglect on the part of the defendants to defend the action or to appear at its trial. The only witnesses, therefore, were the plaintiff, a small child of seven, whose recollection of the incident was not, perhaps naturally enough, very extensive, and her father, not present at the time, who had a sketch plan of the premises. The case must be decided on these limited facts. The questions of fact have been fully stated by the MASTER of THE ROLLS and I do not desire to repeat what he has said. There is no question here of any issue or dispute as to the facts, or of our being asked to depart in any way from a finding of fact by the county court judge. As I follow his judgment, having carefully stated the matters of fact, he decided, as a question of law, that the plaintiff was disentitled to relief by reason of the inference he drew that, at the point where this incident occurred, she was a trespasser. He arrived at that conclusion after stating the classification of LORD HAILSHAM, L.C. ([1929] A.C. 358, 364), of persons visiting premises, in *R. Addie & Sons (Collieries) v. Dumbreck* (3). Having noted the lay-out of the "zoo," the county court judge thought that any person being in there for any purpose must be a trespasser at the point where this accident occurred. If, for example, an adult had crept under the canvas screen to view the lions' cage without going through the proper entrance, so avoiding paying an entrance fee, and had been found to be a trespasser, then it must follow that all persons, whatever their age or purpose, must also be trespassers. In my view, that was an erroneous conclusion of law, with all respect to the county court judge. It seems to me that, if I invite persons on to my land, I cannot say that an invitee becomes a trespasser at some part of that land if he has entered that part in the reasonable and natural course of events, having regard to all the circumstances, including the age of the invitee and the purpose for which he goes to that part of the land. If I take steps clearly to mark off and distinguish that part of my place as what the MASTER of THE ROLLS has called a "prohibited area," then it may well be that any person found thereon would be a trespasser, because it would not be reasonable or natural for that person to have gone there. In this case, however, there was manifestly no such delimitation of a prohibited area as such, and it seems to me, therefore, that the plaintiff, going to this place for the purpose which she did and getting there by means of access which was perfectly natural for a child, and beginning as an invitee, did not become a trespasser. It follows, therefore, in my judgment, that the defendants are liable, as keepers of a dangerous beast, for a breach of their duty to the plaintiff to keep that beast so confined as to be incapable of doing damage.

Appeal allowed with costs.

Solicitors: *Beaumont, Son & Rigden*, agents for *Charles E. White, Reynolds & Beecroft*, Clacton-on-Sea (for the plaintiff); *Vivash Robinson & Co.* (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CLIFTON SECURITIES, LTD. v. HUNTLEY AND OTHERS.

[KING'S BENCH DIVISION (Denning, J.), June 14, 15, 1948.]

Execution—Stay—Effect—Lease determined by notice to quit—Judgment for possession stayed pending appeal as to validity of notice—Subsequent valid notice while stay still in operation—Rights of landlord.

The lessees of a workshop which formed part of a factory had a right of way to it through the factory and received their electricity, gas and water supplies through pipes laid in the factory. On Jan. 13, 1947, the lessors, the owners of the factory, obtained judgment for possession of the premises in the High Court on a notice to quit, the validity of which was disputed, a stay of execution being granted pending an appeal. The lessees did not give up possession. Early in May, 1947, before the Court of Appeal had given judgment affirming the judgment of the court below and while the stay of execution was still in force, the lessors cut off the supply of electricity, gas and water and shortly after barricaded the right of way. The plaintiffs brought an action for mesne profits. The defendants counter-claimed on the ground that they were entitled to undisturbed possession while the stay was in force, and sought damages for the cutting off of the supplies of electricity, gas and water :—

HELD : (i) the stay of execution only prevented the lessors from putting into operation the legal processes of execution on the judgment and did not affect the exercise of any rights and remedies they might have independent of the process of the court.

(ii) the lessees were trespassers and were not entitled to the rights conferred by the lease, and, therefore, they were not entitled to damages for the cutting off of the supplies of electricity, gas and water.

[AS TO STAY OF EXECUTION, see HALSBURY, Vol. 14, p. 31, para. 61; and FOR CASES, see DIGEST, Vol. 21, pp. 442-454, Nos. 252-363.]

Cases referred to :

- (1) *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720; 89 L.J.K.B. 744; 122 L.T. 479; 31 Digest 548, 6945.
- (2) *Jones v. Foley*, [1891] 1 Q.B. 730; 60 L.J.Q.B. 464; 64 L.T. 538; 55 J.P. 521; 31 Digest 548, 6946.

ACTION for mesne profits, and counter-claim for damages for cutting off supplies of electricity, gas and water after a stay of execution of a judgment for possession had been granted pending appeal on the validity of a notice to quit and a second indisputably valid notice had been served. Judgment was given to the plaintiffs on both claim and counter-claim. The facts appear in the headnote and in the judgment.

Scarman for the plaintiffs.

Rees-Davies for the defendants.

DENNING, J. : On May 14, 1935, the plaintiffs let to the defendants a workshop at Leyton, which was part of their own factory premises. They gave the defendants a right of way to the workshop, and the electricity, gas and water for it came through pipes on the plaintiffs' own premises. There was a provision that the plaintiffs could, at the end of seven years or at any time after the seven years determine the lease by three calendar months' notice in writing. On Apr. 21, 1945, the plaintiffs served a notice to quit on the defendants, giving them three months' notice. The defendants did not quit. They made a claim under the Landlord and Tenant Act, 1927, for compensation, or, alternatively, for a new lease. That was heard and compensation in the sum of £150 was granted, but they did not go out. In November, 1946, the plaintiffs brought an action claiming possession and mesne profits. The action was heard before HENN COLLINS, J., on Jan. 13, 1947. He decided that the notice to quit was valid and the lease had been duly determined, and gave judgment for possession forthwith and for mesne profits at the rate of £150 a year up to date. The defendants asked for a stay of execution pending an appeal, which HENN COLLINS, J., granted. In the course of his judgment, however, HENN COLLINS, J., had said that, even if the original notice to quit had been invalid, the plaintiffs were in a position to give another three months' notice at any time, and so, in order to meet the possibility that the original notice to quit might be held by

the Court of Appeal to be invalid, on Jan. 29, 1947, the plaintiffs gave another three months' notice to expire on May 1, 1947. It was then plain beyond doubt that the lease would come to an end on May 1, 1947. The case was not reached in the Court of Appeal by May 1, 1947. It is plain that after that date the defendants had no right to continue in occupation, but they did not quit. They remained in occupation although they had no possible colour of right to do so. Early in May, 1947, therefore, the plaintiffs cut off the gas, electricity and water supplies. Later in the same month they put up barricades across the right of way so that the defendants could not get to the workshop, but about the middle of May the defendants managed to get themselves re-instated in occupation and continued there until the end of June, 1947. The Court of Appeal then heard the appeal from the decision of HENN COLLINS, J., and it was affirmed. It was, therefore, again plain that the defendants had no colour of right to be where they were, but still they stayed. The Court of Appeal ordered them to be out in fourteen days, but they did not quit even then, and a warrant for possession had to be issued on July 15, 1947. Under the due process of the law, the defendants did eventually go from the premises they had occupied wrongly for so long.

The claim in this action is for mesne profits from Jan. 13, 1947—which was the date up to which HENN COLLINS, J., had given mesne profits—until the date when the defendants quitted in July, 1947. There is no doubt that in point of law the defendants were trespassers for that time, and that they can have no answer to this claim for mesne profits up to July 15, 1947. At what rate are the mesne profits to be assessed? When the rent represents the fair value of the premises, mesne profits are assessed at the amount of the rent, but, if the real value is higher than the rent, then the mesne profits must be assessed at the higher value. In this case, the real value of the premises at the material time was £300 a year and the mesne profits are to be taken at that rate. In their counter-claim the defendants say that the action of the plaintiffs in cutting off the gas, electricity and water and in putting up barricades was unlawful and gives them a right to damages. They say that they were entitled under the stay of execution ordered by HENN COLLINS, J., “to remain in undisturbed possession of the premises.” That is a complete misconception of the effect of a stay. A stay of execution only prevents the plaintiffs from putting into operation the machinery of law—the legal processes of warrants of execution and so forth—in order to regain possession. It does not take away any other rights which they have. It does not prevent their exercising any right or remedy which they have apart from the process of the court. In this case, there was no reason why the plaintiffs should not peaceably regain possession if they could. After all, the defendants were trespassers. The plaintiffs must not enter by a strong hand with a multitude of people so as to be guilty of a criminal offence, but, even if they do, it does not give the defendants a civil action for damages: see *Hemmings v. Stoke Poges Golf Club* (1). The plaintiffs are only liable in damages if they used more force than was reasonably necessary for the purpose. The plaintiffs did no wrong by cutting off gas, electricity and water supplies. The defendants had no right to have gas, electricity and water through pipes or cables on the plaintiffs' land. The defendants were not tenants. They were only trespassers. They could only claim a right of passage for gas, electricity and water by reason of the lease, and that had already been determined. If a right to a supply of anything only exists by virtue of a contract and that contract comes to an end, then the supply can be cut off. The plaintiffs did no wrong by putting up the barricades. There was no right of way. That had come to an end when the lease came to an end. There was no reason why the plaintiffs should not put up a barrier to prevent the defendants getting into the premises. I hold, therefore, that the plaintiffs' claim succeeds and there must be judgment for mesne profits at the rate of £300 a year from Jan 13, 1947, to July 15, 1947. The counter-claim I dismiss with costs.

Judgment for the plaintiffs on the claim and counter-claim with costs.

Solicitors: *Lucien A. Isaacs* (for the plaintiffs); *James H. Fellowes* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

CAVENDISH-BENTINCK v. CAVENDISH-BENTINCK.

[COURT OF APPEAL (Tucker and Bucknill, L.JJ., and Pilcher, J.), June 24, 25, 1948.]

Divorce—Alimony pendente lite—Termination of lis by final decree—Revival of lis by appeal—Effect on order for alimony pendente lite—Proper tribunal to extend order for alimony pendente lite—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 27 (1), 190 (3).

By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (3): "On any petition for divorce or nullity of marriage the court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the court has in proceedings for judicial separation." By s. 27 (1): "Subject as otherwise provided in this Act and to rules of court, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court, and for all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court."

A wife petitioned for judicial separation on the grounds of her husband's adultery and desertion, and the husband prayed in answer for a decree of divorce on the ground of the wife's adultery. The court granted the wife a decree, and dismissed the husband's cross-prayer. The Court of Appeal, in the exercise of its discretion, reversed the decision of the court below and granted a decree to the husband. The wife, with leave of the court, gave notice of appeal to the House of Lords. Before the hearing of the petition in the court of first instance, an order for alimony *pendente lite* was made. After the making of the decree in favour of the wife in that court, the husband made voluntary payments to the wife pending the hearing of the appeal. On the granting of the decree in the husband's favour by the Court of Appeal, he stopped the voluntary payments. The wife thereupon took out a summons for permanent maintenance, but the summons was adjourned pending the hearing of the appeal by the House of Lords. The wife then applied to the Court of Appeal for an extension of the original order for alimony *pendente lite*.

HELD: (i) the original order for alimony *pendente lite* came to an end on the decree of the court of first instance, because that was a final decree, and there was no *lis* then pending. The notice of appeal revived the *lis*, but did not revive the order for alimony *pendente lite*.

(ii) the decree of the Court of Appeal in the husband's favour did not revive the order for alimony *pendente lite*, because that order was made on the assumption that the wife was an innocent wife, whereas the Court of Appeal had found her guilty of adultery.

(iii) the Court of Appeal had no power to make an order for alimony *pendente lite*, since the court referred to in s. 190 (3) of the Judicature Act, 1925, was the High Court, and the matter of alimony *pendente lite* was not incidental to the hearing and determination of the appeal from the decree and order of the court of first instance within the meaning of s. 27 of the Act. The proper remedy of the wife was to apply to the Probate, Divorce and Admiralty Division of the High Court for an order for alimony *pendente lite*.

Quaere: whether the husband himself, having committed adultery, was entitled to repudiate his liability to maintain his wife on the ground of her adultery.

[AS TO ALIMONY PENDENTE LITE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 714-720, paras. 1086-1100; and FOR CASES, see DIGEST, Vol. 27, pp. 406-418, Nos. 4057-4231.]

APPLICATION by the wife to the Court of Appeal to extend an order for alimony *pendente lite* made on a petition heard by Hodson, J., in the Probate, Divorce and Admiralty Division. The decree and order of Hodson, J., were reversed

by the Court of Appeal, and the wife, who had obtained leave to appeal to the House of Lords,* contended that the Court of Appeal had power to make an order for alimony *pendente lite*, but the Court of Appeal held that it had no power to do so, either under s. 190 (3) of the Judicature Act, 1925, conferring power on the "court," or under s. 27 of the same Act as being incidental to the hearing and determination of an appeal.

Karminski, K.C., and *Victor Russell* for the wife.

Beyfus, K.C., and *Geoffrey Lawrence* for the husband.

TUCKER, L.J. : I will ask BUCKNILL, L.J., to deliver the first judgment.

BUCKNILL, L.J. : This is an application by the wife to extend an order for alimony *pendente lite* which was made on Nov. 1, 1946. On Mar. 27, 1947, HODSON, J., gave judgment in favour of the wife's prayer for a judicial separation on the ground of her husband's adultery and desertion, and he dismissed the prayer in the husband's answer that he should be granted a decree on the ground of his wife's adultery. It seems to me that the original order for alimony *pendente lite* then came to an end, because that was a final decree and thereafter there was no *lis* which was pending. It was open to the wife then to apply to the court for a permanent allowance under s. 190 (1), of the Judicature Act, 1925. I understand that no application was made because on Apr. 21, 1947, the husband gave notice of appeal. That notice, I think, revived the *lis*, but I do not think it revived the order for alimony *pendente lite*. That had come to an end. The wife could have applied for an order for alimony, but the husband made a voluntary payment to his wife pending the hearing of the appeal. The appeal came on for hearing on Nov. 6, 1947. The court allowed the appeal, reversed the decision of HODSON, J., and granted the husband a decree in the exercise of the discretion of the court. Leave was given to the wife to appeal to the House of Lords, and liberty was given to the wife to apply for an order for maintenance. The order of the Court of Appeal was based on a reversal of the decision of HODSON, J., that the wife had not committed adultery, the Court of Appeal coming to the conclusion on the evidence that she had committed adultery. The husband, having got a finding of the court that the wife had committed adultery, decided to stop the allowance which he had been making. I express no views on the point whether the husband, having himself committed adultery, is entitled to repudiate his liability to maintain his wife on the ground of her adultery. That is a point which has not been argued before us, and will probably have to be considered at some time. The wife then took out a summons for a sum to be fixed by way of permanent maintenance. The hearing of the summons was adjourned pending the hearing of the wife's appeal to the House of Lords.

The question now arises whether this court has power to make an order for alimony *pendente lite*. It has been suggested in the course of argument that this court, having reversed the finding of the learned judge and the grant of a judicial separation to the wife, has in some way revived the order for alimony *pendente lite* which came to an end with the judge's decree of judicial separation. In my view, that is not so, because the order for alimony *pendente lite* was made on the assumption that the wife was an innocent wife. The decree of this court is that she is a guilty wife. Therefore, I think it would be wrong to say that a decree of this court which was based on a finding of the adultery by the wife, revived an order which was made under quite different conditions. It seems to me that at present there is no order in existence for alimony *pendente lite* for the wife. That being so, this court has no power, in my view, to make an order for alimony *pendente lite*, unless it comes within the words of sub-s. (3) of s. 190 of the Judicature Act, 1925, which is as follows :

On any petition for divorce or nullity of marriage the court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the court has in proceedings for judicial separation.

* On July 5, 1948, the wife's appeal to the House of Lords was dismissed by consent, without any order as to costs.

I may point out that the words there are a repetition of the last sentence of s. 32 of the Matrimonial Causes Act, 1867. Is this court "the court" under sub-s. (3)? *Prima facie* I think it is not, because s. 176, which deals with matrimonial causes and matters, starts off by saying "A petition for divorce may be presented to the High Court (in this part of this Act referred to as 'the court')." Section 1 of the Act of 1925 sets out the constitution of the Supreme Court and says that it consists "of His Majesty's High Court of Justice (in this Act referred to as 'the High Court') and His Majesty's Court of Appeal (in this Act referred to as 'the Court of Appeal')." Therefore, I think the words "the court" in s. 190 (3) refer, *prima facie*, not to the Court of Appeal, but to the High Court, in this case, of course, the Probate, Divorce and Admiralty Division.

Then it is said that, although the words "the court" may not include the Court of Appeal, nevertheless under s. 32 of the Judicature Act, 1925, the Court of Appeal has power to make an order for alimony *pendente lite* in a case of this kind. Section 32 is as follows:

The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained.

Section 27 (1), which deals specifically with the jurisdiction of the Court of Appeal, says this:

Subject as otherwise provided in this Act and to rules of court, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court, and for all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court.

It is argued on behalf of the wife that this matter of alimony *pendente lite* is one which is incidental to the hearing and determination of this appeal. I myself think that that is not so, because the decree and order of HODSON, J., from which the appeal lies to this court makes no reference to the question of alimony *pendente lite*. It is not a matter which is incidental to the hearing of the appeal and the determination of it.

The proper remedy for the wife, in my view, is to apply to "the court," which, in my opinion, means the Probate, Divorce and Admiralty Division, for an order for alimony *pendente lite*. In my view, the Court of Appeal has no power in this case to make such an order.

TUCKER, L.J.: I agree. I only desire to add that I am expressing no view at all whether on the merits an order for alimony *pendente lite* should be made if and when the case comes before the registrar for that purpose.

PILCHER, J.: I agree.

Application dismissed. No order as to costs.

Solicitors: *Clifford-Turner & Co.* (for the wife); *Gordon, Dadds & Co.* (for the husband.)

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

*Re HATCH (deceased). PUBLIC TRUSTEE v.
HATCH AND OTHERS.*

[CHANCERY DIVISION (Roxburgh, J.), June 4, 9, 10, 1948.]

Will—Construction—Absolute gift cut down by engrafted trusts—Defeasance clause—“Any event whereby any [person] entitled to any life interest would if such life interest belonged to him absolutely be deprived of the personal enjoyment thereof”—Beneficiary in German occupied territory against his will—Whether an “enemy.”—Operation of defeasance clause—Trading with the Enemy Act, 1939 (c. 89), s. 2 (1) (b).

By his will, dated Jan. 27, 1905, a testator, who died on Nov. 10, 1907, gave his residuary real and personal estate to his trustees on trust for sale with power to postpone such sale and out of the moneys so produced to pay his funeral and testamentary expenses, debts and legacies. He directed his trustees to divide the residue into as many equal shares as the number of his sons, A., E., D., and W., who should survive him or should have died in his lifetime leaving issue surviving the testator, and the trustees “shall appropriate one of such shares to each such son who shall survive me or shall have died leaving issue as aforesaid . . . but so nevertheless that such respective shares shall be held by my trustees upon the trusts and subject to the powers and provisions hereinafter declared . . . my trustees shall hold the share appropriated to each such son of mine from and after such division and appropriation and shall during the life of each such son pay the income of his share to him and shall after the death of any such son (if such son shall by will so direct) pay the income of such share to any wife whom he may leave surviving him during the life of such wife.” Subject thereto the trustees were directed to hold each share for the issue of the respective sons. By cl. 15 of the will the testator provided: “I hereby declare that in case any event whatever shall happen in my lifetime or after my decease whereby any male or any female not under coverture entitled to any life interest in personal estate or to any annuity under any of the trusts or dispositions hereinbefore contained would if such life interest or annuity belonged to him or her absolutely be deprived of the personal enjoyment thereof or any part thereof then such life interest or annuity shall cease as if he or she were dead. And in the case of a life interest so ceasing the income which shall be so forfeited shall during the remainder of the life of the person incurring the forfeiture thereof be held upon the trusts upon which the same would for the time being be held if such person were dead. Provided also and I declare that in case any event whatever shall happen whether in my lifetime or afterwards before the time hereby appointed for the vesting in possession of any legacy or share of personal estate hereby given to or in trust for a male or a female not under coverture (other than a settlement of such legacy or share or some part thereof made before or after the marriage of the legatee with the consent in writing of my trustees) whereby the person entitled thereto under the trusts or provisions hereinbefore contained would if the said legacy or share belonged to him or her absolutely be deprived of the personal enjoyment thereof or any part thereof then such legacy shall sink into my residuary estate and such share shall be disposed of as if the legatee incurring such forfeiture had died in my lifetime without leaving issue.” On Sept. 18, 1909, D. had married, but had no child capable of benefiting under the will. On Apr. 12, 1916, D. made a voluntary settlement (to which the trustees of the will did not give consent in writing) whereby he purported to settle, *inter alia*, all property coming to him “absolutely under any settlement made by or under the will of his father [the testator] or under the will of his mother.” In 1940, D. was on a visit to Jersey, having no intention of settling there, when the island was occupied by the Germans. He was forced to remain in Jersey, and returned to England in 1946. It was conceded that if D. became an “enemy” within the meaning of the Trading with the Enemy Act, 1939, his interest under the will ceased.

Held: (i) the rule in *Hancock v. Watson* ([1902] A.C. 14) applied to

the will to bestow on D. the whole beneficial interest in the share of residue appropriated to him, except in so far as it was cut down by effective engrafted trusts, and it was not so cut down by a gift of a life interest in favour of D.

A.-G. v. Lloyds Bank, Ltd. ([1935] A.C. 382), *applied*.

(ii) the phrase "deprived of the personal enjoyment thereof" in cl. 15 meant "deprived of the right to receive it and hold it for his own purposes" and involved a sufficient degree of certainty, and, therefore, cl. 15 was not void for uncertainty.

Clavering v. Ellison (1859) (7 H.L. Cas. 707) and *Clayton v. Ramsden* ([1943] 1 All E.R. 16), *applied*.

(iii) in view of the fact that the testator had plainly been of the view that each son had been given a life interest only, the defeasance clause (cl. 15) must be construed on that basis, and, therefore, at the time of the execution of the voluntary settlement, any interest which D. had, other than a life interest, must have been one which had not vested in possession within the meaning of the proviso to that clause, which, accordingly, was brought into operation by the execution of the settlement.

(iv) D. was resident in enemy territory, and, therefore, an "enemy" within the meaning of the Trading with the Enemy Act, 1939, s. 2 (1) (b) as from the time of the German occupation of Jersey, and thereupon, under the terms of cl. 15, his share should for the remainder of his life be held on the trusts on which it would be held if he were dead. Having regard to the operation of cl. 15 consequent on the execution of the settlement, and to the facts that D. had no issue capable of benefiting and that no appointment to a wife was possible until D.'s will, if any, were operative, the income of D.'s share should, during the remainder of his life and pending the birth of issue, fall back into residue.

Vandyke v. Adams ([1942] 1 All E.R. 139), *distinguished*.

[AS TO CUTTING DOWN AN ABSOLUTE INTEREST, see HALSBURY, Hailsham Edn., Vol. 34, pp. 327-329, para. 377; and FOR CASES, see DIGEST, Vol. 44, pp. 554-556, Nos. 3714-3724.]

Cases referred to:

- (1) *Hancock v. Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; *affg.*, S.C. *sub nom.*, *Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482, C.A.; 43 Digest 644, 792.
- (2) *A.-G. v. Lloyds Bank, Ltd.*, [1935] A.C. 382; 104 L.J.K.B. 523; 152 L.T. 577, H.L.; Digest Supp.
- (3) *Clavering v. Ellison*, (1859), 7 H.L. Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; H.L.; *affg.*, (1857), 8 De G.M. & G. 662, L.J.J.; *affg.*, (1856), 3 Drew. 451; 44 Digest 440, 2667.
- (4) *Clayton v. Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 86 Sol. Jo. 384, H.L.; 2nd Digest Supp.
- (5) *Vandyke v. Adams*, [1942] 1 All E.R. 139; [1942] 1 Ch. 155; 111 L.J.Ch. 110; 166 L.T. 117; 86 Sol. Jo. 56; 2nd Digest Supp.

ADJOURNED SUMMONS to determine the nature and extent of the interest bequeathed to Andrew Dreweatt Hatch by the will of a testator of the same name; whether a defeasance clause in the will had come into operation so as to destroy the interest so bequeathed, by reason of his *de facto* residence in enemy-occupied territory; and, if so, what trusts took effect on the cesser of his interest. The facts appear in the judgment.

Wilfrid Hunt for the Public Trustee.

Milner Holland, K.C., for the first defendant, Andrew Dreweatt Hatch, a son of the testator interested in residue.

G. A. Rink for the second defendant, one of the trustees of a voluntary settlement made by the first defendant.

M. J. Albery for the third defendant, the executrix of Andrew Basil Hatch, a deceased son of the testator.

Denys B. Buckley for the fourth defendant, the executor of the executrix of Edgar Clifton Heath, another deceased son of the testator.

Winterbotham for the fifth and sixth defendants, William Hatch, also a son of the testator, and his son, Stephen Hatch-Barwell.

ROXBURGH, J.: The testator, Andrew Dreweatt Hatch, by his will, dated Jan. 27, 1905, appointed Clara Hatch and Frank Howard Hatch executors and trustees thereof. By cl. 11 he bequeathed his residuary estate to his trustees on trust for sale and conversion and directed them to divide it into as many equal shares as the number of his sons, Andrew Basil Hatch, Edgar Clifton Hatch, the defendant Andrew Dreweatt Hatch (hereinafter referred to as "the first defendant"), and the defendant William Hatch, who should survive him or should have died in his lifetime leaving issue surviving him, and to appropriate one of such shares to each such son so that any reference thereafter contained to the shares of his respective sons in the said trust premises should be deemed to apply to the shares thereinbefore directed to be appropriated to them respectively, but so, nevertheless, that such respective shares should be held by his trustees on the trusts and subject to the powers and provisions thereafter declared and concerning the same respectively, that is to say, his trustees should hold the share appropriated to each son and should pay the income of his share to him during his life, and after his death (if such son should by will so direct) pay the income of such share to any wife whom he might leave surviving him during her life, and subject thereto they should hold such share and the future income thereof on trust for the children or remoter issue of such son as he should by will or codicil appoint, and, subject to any such appointment, on trust for the child or children of such son who should be living at his death or born at any time afterwards, who, being male should attain the age of 24 years before the expiration of 21 years from the death of the survivor of the testator and his said sons, or being female should attain the age of 24 years or marry before the expiration of the said 21 years, or whether male or female be living at the expiration of the said period of 21 years, and if more than one in equal shares. By cl. 15 of the will—and this is an important clause—the testator declared that, in case any event whatever should happen in his lifetime or after his decease whereby any male or female not under coverture entitled to any life interest in personal estate would, if such life interest belonged to him or her absolutely, be deprived of the personal enjoyment thereof or of any part thereof, then such life interest should cease as if he or she were dead, and the income which should be so forfeited should during the remainder of the life of the person incurring the forfeiture be held on the trusts on which the same would for the time being be held if such person were dead, provided also that, in case any event whatever should happen before the time thereby appointed for the vesting in possession of any share of personal estate thereby given (other than a settlement of such share or some part thereof made before or after the marriage of the legatee with the consent in writing of his trustees) whereby the person entitled thereto under the trusts or provisions thereinbefore contained would, if the said share belonged to him or her absolutely, be deprived of the personal enjoyment thereof or any part thereof, then such share should be disposed of as if the legatee incurring such forfeiture had died in his lifetime without leaving issue.

The testator died on Nov. 10, 1907, and the Public Trustee is now sole trustee of his will. The testator's wife, Laura Hatch, and his sons, Andrew Basil and Edgar Clifton, survived him, but are now dead. Any part of the estate of the testator undisposed of by his will falls into and forms part of their respective estates. The said Andrew Basil Hatch died on Oct. 10, 1914, and the defendant, Laura Eveline Gertrude D'Arcy Irvine Hatch, is his executrix. The said Edgar Clifton Hatch died on Oct. 11, 1915, and his will, dated Aug. 5, 1915, was proved by his mother, the said Laura Hatch, the sole executrix therein named. Laura Hatch died on June 5, 1921, and her will was proved by the defendant, Ernest Green, the sole executor therein named. The defendant, William Hatch, has so far had three children, namely, the defendant, Stephen Hatch-Barwell, Tony Hatch-Barwell, and Dawn Margery Hatch-Barwell, all of whom have attained 21. The first defendant, Andrew Dreweatt Hatch, married Violet Wilson, on Sept. 18, 1909, and has not up to the present had any child who is capable of benefiting under the will of the testator. On Apr. 12, 1916, the first defendant made a voluntary settlement, but the trustees of the will of the testator did

not give the consent in writing required by cl. 15 of the will. The first defendant and the second defendant, Rose Beizley, are the present trustees of that voluntary settlement.

The first question for decision relates to the nature and the extent of the interest bequeathed to the first defendant in the testator's residuary estate. Here I have guidance from an order of SARGANT, J., dated June 7, 1916, which declared :

A . . . that in the events which have happened of the testator's sons Andrew Basil Hatch and Edgar Clifton Hatch having respectively died without issue the one equal quarter part or share of and in the testator's residuary estate directed to be appropriated to his son Andrew Basil Hatch now belongs to the defendant Laura Eveline Gertrude D'Arcy Irvine Hatch as executrix of the will of the testator's said son Andrew Basil Hatch absolutely and one other equal quarter part or share of and in the testator's residuary estate directed to be appropriated to the testator's son Edgar Clifton Hatch . . .

B This order can only have been made on the footing that the rule in *Hancock v. Watson* (1) applies to this will. Counsel for the third defendant has pointed out that a share is here directed to be appropriated to any member of the class who predeceased the testator leaving issue, and, as it would have been impossible to apply the rule in *Hancock v. Watson* (1) to two members of that class in that particular event—because two of the sons were illegitimate, C and, accordingly, any gift to them would lapse if they predeceased the testator—he submits that the rule ought not to be applied in any event to any member of the class under this will. This is an important submission. It certainly raises a doubt, but I am not prepared to hold that it is so clearly right as to justify me in disregarding the decision of SARGANT, J., and I feel that I ought to follow it. It is a decision of a judge of co-ordinate jurisdiction on this very will. D The consequences of holding that the rule in *Hancock v. Watson* (1) applies is to bestow on the first defendant the whole beneficial interest in the share of residue appropriated to him, except in so far as it is cut down by effective engrafted trusts. What is the first effective engrafted trust? I venture to think that even an instructed reader who read the will before making a prolonged study of the rule in *Hancock v. Watson* (1) and the case of *A.-G. v. Lloyds Bank, Ltd.* (2) would immediately reply that the first effective E engrafted trust was a life interest in favour of the first defendant himself subject to a provision for defeasance, but I am inclined to think that that is not the true position in law. It seems to me that the reasoning in *A.-G. v. Lloyds Bank, Ltd.* (2) would compel me to hold that the entire F beneficial interest bestowed on the first defendant by the rule in *Hancock v. Watson* (1) could not be cut down by any lesser disposition in favour of the first defendant himself, and that, accordingly, during the period during which he received the income of his share—before the happening of the events to which I will refer later—he received it not by virtue of the express life interest, subject to defeasance, which the will purported to confer on him, but by virtue of the entire beneficial ownership which he acquired under the rule in *Hancock v. Watson* (1) and which, up to that time, had not been cut down by any effective engrafted trust. But, although that is my view of the legal position, G it is plainly not the view which the testator had in mind. Clearly be thought that the effect of the will was to confer on his son a life interest subject to defeasance with divers remainders over, and I am satisfied that I ought to construe the defeasance clause on that footing.

The next question which arises is whether the defeasance clause is void for uncertainty. Here I must apply the principles enunciated in *Clavering v. Ellison* (3) and *Clayton v. Ramsden* (4). To do this I must first construe the H clause in its context and then I must see whether any phrase, when so construed, embodies a concept which lacks a sufficient degree of certainty. In my judgment, the relevant phrase “deprived of the personal enjoyment thereof” in its context in cl. 15 means, in substance, deprived of the right to receive it and hold it or spend it for his own purposes, and I think that such a concept involves a sufficient degree of certainty. Indeed, I think that the concept involved in the phrase is clear and distinct. It is true that cases can be propounded which to one mind may seem to fall within the ambit of the phrase and to another mind may seem to fall outside it. Several such

cases have been propounded during the argument, but, on analysis, they all seem to me merely to raise doubts which can be resolved by properly applying the ordinary principles of construction to the phrase employed in the circumstances supposed. I do not think they point to any inherent uncertainty in the phrase itself. Accordingly, in my judgment, the defeasance clause is not void for uncertainty.

The next question is whether the defeasance clause has come into operation so as to destroy the interest which the first defendant was enjoying at the time of the events to which I am now about to refer. I have already indicated that, although that interest was not in law a life interest, I ought to treat the first defendant, for the purpose of applying the first part of cl. 15, as having an express life interest subject to defeasance with certain remainders over.

On Apr. 9, 1940, the first defendant went on a visit to the island of Jersey. He was then aged 61 years, and for some time he had been in indifferent health and his visit was made in the hope that the change would be beneficial to him. His visit was intended to be only temporary, and he had no intention of settling permanently in Jersey. Soon after his arrival, a Volunteer Defence Corps was formed in Jersey, which he joined, and he was appointed a section leader. This force undertook certain patrolling activities and was, in fact, armed, but no resistance was made to the German invasion when it came, and the force was dissolved when the Germans occupied Jersey. He was at no time required by the Germans, during their occupation, to work for them in any way, nor did he, in fact, work for them or render any assistance of any nature to the German occupation forces. In fact, his name was placed on a list for deportation to a concentration camp in Germany, but, owing to the state of his health, this was not done. For a substantial part of the German occupation he was under medical treatment in a nursing home since he had been taken seriously ill in December, 1940. In April, 1946, he was once more fit to travel and he returned to this country.

It has been conceded that if the first defendant became an enemy within the meaning of the Trading with the Enemy legislation, what I will call his life interest—I have already described its nature fully—ceased. The question is whether he was an enemy within that legislation. "Enemy" is defined (by the Trading with the Enemy Act, 1939, s. 2), for that purpose, as "any individual resident in enemy territory," and it has been submitted that in the circumstances aforesaid he was not resident in Jersey. As the Trading with the Enemy legislation has to be applied and acted on during war and under warlike conditions it would be surprising if "residence" meant anything more complicated than *de facto* residence irrespective of circumstances, for it would, in most cases, be impossible to investigate the circumstances during a war. The first defendant naturally relies on the decision of FARWELL, J., in *Vandyke v. Adams* (5), in which the defendant, an officer in the army, was taken prisoner by the Germans, and at the date of the summons was detained by them either in Germany or in German-occupied territory. FARWELL, J., said ([1942] Ch. 157):

... the question arises whether the defendant is an "enemy" within the meaning of the Trading with the Enemy Act, 1939. At first sight, it sounds fantastic to suggest that a soldier in His Majesty's army who has been taken prisoner and is detained in Germany or German-occupied territory is an enemy, but it is argued that the defendant is resident in enemy territory, although against his will, and that the terms of s. 2 (1) of the Trading with the Enemy Act, 1939, which defines "enemy," are so wide that he comes within it, and so r. 14B (1), applies and service of the writ on him should be dispensed with. No doubt, it is true in one sense that the defendant is resident in enemy territory, but he is so resident only under *force majeure*. If the language of the definition in the Act alone fell to be considered, it might be thought wide enough to include a soldier who is detained as a prisoner of war in enemy territory, but when the whole scope of the Act and the purposes for which it was passed are regarded it appears plain that such a person does not fall within the definition and is not to be deemed to be an "enemy," for the purposes of the Act. In my judgment, a soldier in His Majesty's army who has been taken prisoner during war and is detained in enemy territory, is not an enemy in any sense of the word.

Though the facts in *Vandyke v. Adams* (5) are somewhat obscure, it seems plain that the defendant was embodied in the armed forces before his capture. Nothing is said as to where he was captured, but after capture he was taken

as a prisoner of war either to Germany or to German-occupied territory. FARWELL, J., I think, arrived at his conclusion, not because he thought that such a person could not be "resident" within the meaning of the definition clause, but because such a person did not come within the scope and purpose of the Act. I do not find it possible to apply this reasoning by analogy to persons in the different position in which the first defendant found himself. To extend the decision in *Vandyke v. Adams* (5) so far, would, in my judgment, sap the very foundation of that legislation, and I cannot see my way to make that extension. In my judgment, the first defendant was resident in enemy territory within the meaning of the Act as from the time of the German occupation of Jersey. Accordingly, the first part of the clause comes into question, and during the remainder of his life his share had to be held on the trusts on which the same would be held if he were dead. I have reached the conclusion that this is not at the moment an ineffective trust, although I cannot yet explain my reasons. I will revert to it at the last. After the death of the first defendant, subject to any appointment which may be made by his will in favour of a widow and in default of issue, there would be no further effective engrafted trust and, accordingly, his beneficial interest would no longer be defeasible.

This brings me to the voluntary settlement which the first defendant made on Apr. 12, 1916. It is made between him, of the one part, and himself and two other persons thereafter called the trustees, of the other part, and it recites, among other things: "That the said Andrew Dreweatt Hatch"—that is the first defendant—"may be or become entitled to other property as mentioned in part 3 of the said first schedule." The description of that property is significant and I will read it:

All other property (except estates for life) coming to the said Andrew Dreweatt Hatch absolutely under any settlement made by or under the will of his father Andrew Dréweatt Hatch, or under the will of his mother Clara Hatch.

After the recitals the deed continues:

... the said Andrew Dreweatt Hatch as beneficial owner doth hereby grant convey and assign unto the trustees their heirs and assigns ... all other the property (except life estates) to which he is entitled at the present time or may hereafter become entitled to under any settlement or will as mentioned in part 3 of the said First Schedule.

Clearly this document would operate to assign any absolute interest which the first defendant had under the will of his father. I must now consider more closely the further provisions of the forfeiture clause in the will which are as follows:

Provided also and I declare that in case any event whatever shall happen whether in my lifetime or afterwards before the time hereby appointed for the vesting in possession of any legacy or share of personal estate hereby given to or in trust for a male or a female not under coverture ... whereby the person entitled thereto under the trusts or provisions hereinbefore contained would if the said legacy or share belonged to him or her absolutely be deprived of the personal enjoyment thereof or of any part thereof ...

I think I am bound to construe the words "before the time hereby appointed for the vesting in possession" on the footing that the testator regarded the first defendant as having a life estate, though I have given reasons for thinking that was not the true position, and if the testator so regarded him he would, of course, regard any other estates or interests as estates or interests in remainder. Accordingly, I think I am bound to hold that any interest which the first defendant had at the date when he executed the voluntary settlement—other than his supposed life interest—must have been, at that date, an interest which had not yet vested in possession within the meaning of the second part of the forfeiture clause. Accordingly, the execution of the voluntary settlement was an event which happened before the vesting in possession of that interest whereby if it had been an absolute interest it would have been assigned to the trustees and, of course, that would have resulted in depriving the first defendant of the personal enjoyment thereof or some part thereof. Accordingly, I must hold that the voluntary settlement brought this part of the forfeiture clause into operation. The result of that conclusion is that, as from the death of the first defendant, by reason of the operation of the forfeiture clause, but

subject always to such interest as he may appoint in favour of the widow, and subject always to the rights of issue (if there are any), his share would sink back into the residuary estate, and thus become an accretion to the other three shares.

That, I think, brings me to the point to which I promised to return, namely, what is to happen during the rest of the life of the first defendant? There is, as I have already indicated, an express trust to deal with that situation. His share is to be held on the trusts on which the same would for the time being be held if he were dead. As events stand now, that is to say, as the first defendant cannot appoint to his wife except by will and as he has as yet no issue, by virtue of the operation of the forfeiture clause, if he were dead, his share would sink into the residuary estate and become an accretion to the other three shares. Accordingly, it appears to me that during the remainder of the life of the first defendant, and pending the birth of issue, the income of his share must sink back into the residuary estate and be re-divided in thirds as I have indicated.

Order accordingly. Costs as between solicitor and client payable out of the estate.

Solicitors: *Smiles & Co.* (for the plaintiffs and the second defendant); *Rider, Heaton, Meredith & Mills* (for the first defendant); *Reid Sharman & Co.* (for the third defendant); *Bennett, Ferris & Bennett* (for the fourth defendant); *Barton and Hanning* (for the fifth and sixth defendants).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

BAIN v. MOSS HUTCHISON LINE, LTD.

[KING'S BENCH DIVISION (Birkett, J.), June 29, 1948.]

Evidence—Admissibility—Statement in document—"Person interested"—Officers of ship—Action for negligence against shipowners, "their servants or agents"—Evidence Act, 1938 (c. 28), s. 1 (3).

By the Evidence Act, 1938, s. 1 (1), a court may in the circumstances specified order that a written statement shall be admissible as evidence notwithstanding that the maker thereof is not called as a witness, but by sub-s. (3) nothing in the section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

In an action for negligence brought against shipowners in which allegations were made, *inter alia*, of a faulty system under which men were compelled to work on board a ship, it was sought to put in as evidence for the defence under s. 1 (1) of the Act of 1938 the proofs of evidence of the master, second officer and third officer of the ship taken after the issue of the writ:

HELD: "person interested" in sub-s. (3) was not confined to a person who was pecuniarily interested in the action, but included a person who, like the officers in question, had an interest in the result of the action in view of the allegations made, and, therefore, the statements were inadmissible.

[FOR THE EVIDENCE ACT, 1938, s. 1, see HALSBURY'S STATUTES, Vol. 31, p. 145.]

Cases referred to:

- (1) *Friend v. Wallman*, [1946] 2 All E.R. 237; [1946] K.B. 493; 175 L.T. 147; 2nd Digest Supp.
- (2) *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.*, [1941] 1 All E.R. 311; [1941] Ch. 248; 110 L.J.Ch. 180; 165 L.T. 119; 2nd Digest Supp.
- (3) *The Atlantic, The Baltyk*, (1946), 62 T.L.R. 461; 2nd Digest Supp.
- (4) *Holton v. Holton*, [1946] 2 All E.R. 534; 2nd Digest Supp.

ACTION for damages by the widow of a purser employed by the defendants in one of their ships, who, in the course of his employment, was asphyxiated when a fire broke out in the ship and as a result died. The plaintiff alleged that death was due to the breach of duty and/or negligence of the defendants,

their servants or agents, in providing a faulty system under which the men were compelled to work on board and in failing, *inter alia*, to take adequate precautions and to provide adequate fire appliances. Counsel for the defendants tendered for admission, under the Evidence Act, 1938, s. 1 (1), proofs of evidence of the master and the second and third officers of the ship on the ground that they were beyond the seas and it was not reasonably practicable to secure their attendance, but BIRKETT, J., ruled that the documents were not admissible.

A *Gradwell* for the plaintiff.

Berryman, K.C., and *H. Salter Nichols* for the defendants.

BIRKETT, J. : Counsel for the defendants is unable to call three of his witnesses, namely, the master of the ship and the second and third officers. He, therefore, submits that proofs of the evidence which it was hoped they would have given had they been called are admissible in evidence under the Evidence Act, 1938. It is said that these witnesses had personal knowledge of the matters dealt with by their statements and one may, no doubt, accept that as being proved. It is also said that they cannot be called because they are beyond the seas and it is not reasonably practicable to call them. For the purpose of my judgment on this submission I will assume all these things to be established.

C The relevant section of the Act is s. 1, which, in so far as material, reads as follows :

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—(i) if the maker of the statement . . . (a) had personal knowledge of the matters dealt with by the statement . . .

D (ii) if the maker of the statement is called as a witness in the proceedings : Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if . . . he is beyond the seas and it is not reasonably practicable to secure his attendance . . . (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in sub-s. (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence—(a)

E notwithstanding that the maker of the statement is available but is not called as a witness . . . (3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

F The only point before me is that which comes under sub-s. (3). It is clear that these three statements were made after the issue of the writ in this action and while proceedings were pending. I have not seen the statements, but it is reasonable to assume that those statements, which the witnesses would have made had they gone into the box, would establish a fact or facts which have been and are in dispute. Therefore, am I to hold that the master, the second officer, and the third officer, are “persons interested” as mentioned in this sub-section ?

G I need not discuss the pleadings in detail. It is manifest that the allegations which are made on behalf of the plaintiff, if established, would not reflect very favourably on those who were in charge of this ship. Among other allegations, it is said that there was here a faulty system under which the men were compelled to work. The question which I have to decide has been considered by the Court of Appeal on one occasion only, and that was in *Friend v. Wallman* (1). That case dealt with many points under the Evidence Act, 1938, with which I am not concerned, and, so far as relates to the one point with which I am concerned, the only sentence that seems to be germane is a sentence of SOMERVELL, L.J., delivering the judgment of the court, in which he says ([1946] 2 All E.R. 237, 240) :

H Counsel also submitted that the soldiers were “interested persons” within s. 1 (3) of the Act. We can find no evidence of this. “Interested” clearly means personally interested in the result of the proceedings.

The report does not tell us the nature of the statements made by the soldiers, but, as the action was one for damages for negligence, presumably the soldiers

were witnesses of the accident. The Court of Appeal decided that they were not persons interested.

I must determine whether the three witnesses in this case were "personally interested." The view which has been suggested that the words must be limited to financial interest is one which I would find difficulty in accepting. I do not think it carries the matter much further, but among the observations which were made by MORTON, J., in *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.* (2), he said ([1941] 1 All E.R. 311, 314):

It may be that there are circumstances in which it might be said that a servant of the company was not a person interested. As to that, I express no opinion. However, I think that the general intention of the section is that, if a statement is put in as evidence, to which, of course, no cross-examination can be directed, it should be either a statement made at a time when proceedings are not pending or anticipated involving a dispute as to any fact which the statement might tend to establish or a statement made by what I may perhaps conveniently describe as an independent person. By an independent person the learned judge meant a person not personally interested, in the sense that the Court of Appeal has laid down.

I need not deal at length with the other cases which were cited to me, but I must refer to the judgment of BUCKNILL, L.J., in *The Atlantic, The Baltyk* (3). In that case there was a collision between two ships, and certain statements had been made before a notary public in New York about a month after the collision had taken place. The statements had been made by the master, two engineers and the look-out man in one of the ships involved. Objection was taken, and BUCKNILL, L.J., ruled that the statements made by the engineers and the look-out man were admissible, under s. 1 (2) of the Evidence Act, 1938, and that they were not interested persons within s. 1 (3), but he ruled that when the master made the statement he was a person interested because he might be personally liable. In *Holton v. Holton* (4), which was argued before BARNARD, J., judgment on the facts was short, but the argument by counsel for the petitioner is set out, a full, careful and most helpful argument. BARNARD, J., said ([1946] 2 All E.R. 534, 535):

Those words must mean a person who has a pecuniary or other material interest in the result of the proceedings—a person whose interest is affected by the result of the proceedings, and, therefore, would have a temptation to pervert the truth . . . It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It means an interest in the legal sense, which imports something to be gained or lost.

The learned judge admitted the statement with which he was there concerned without giving any detailed reasons. The only other matter to which I need refer is the Merchant Shipping Act, 1894, s. 470 (1), which reads as follows:

The certificate of a master, mate, or engineer may be cancelled or suspended (a) by a court holding a formal investigation into a shipping casualty under this Part of this Act, or by a naval court constituted under this Act, if the court find that the loss or abandonment of, or serious damage to, any ship, or loss of life, has been caused by his wrongful act or default . . . (b) by a court holding an inquiry under this Part of this Act into the conduct of a master, mate, or engineer, if they find that he is incompetent, or has been guilty of any gross act of misconduct, drunkenness, or tyranny, or that in a case of collision he has failed to render such assistance . . .

I must, of course, consider all the facts before me, but I think it is open for me to say that I can very well concede that anybody in the position of master, or second officer, or third officer in this ship would be personally interested in the result of this action. Although it is manifest that these three witnesses have no financial or pecuniary interest in the direct sense at all, I think they are "personally interested" in the result of this action because of its nature and because of the allegations made. Therefore, I shall reject the three statements which are sought to be admitted by counsel for the defendants.

Admission of the statements refused.

Solicitors: *Field, Roscoe & Co.*, agents for *Neville, Piercy & Co.*, Liverpool (for the plaintiff); *Botterell & Roche* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PEEK v. PEEK.

[COURT OF APPEAL (Tucker, Bucknill and Somervell, L.JJ.), June 28, 29, 1948.]

Divorce—Appeal—Court of Appeal—Appeal from Divisional Court—Jurisdiction to entertain—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 27.

Divorce—Practice—Divisional Court—Interlocutory order—Order setting aside decree nisi and directing new trial—R.S.C., Ord. 58, r. 15—“Error of court at hearing”—Evidence withheld from court—Matrimonial Causes Rules, 1944, r. 36.

The Court of Appeal has jurisdiction under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27, to hear an appeal from an order of the Divisional Court of the Probate and Divorce Division setting aside a decree *nisi* of divorce and ordering a re-hearing.

An order of the Divisional Court setting aside a decree *nisi* of divorce and directing a new trial is an interlocutory order within R.S.C., Ord. 58, r. 15.

Isaacs & Sons v. Salbstein ([1916] 2 K.B. 139), *applied*.

A husband petitioned for divorce on the ground of his wife's desertion. The wife was in Australia and did not appear to defend the action, but she sent certain letters to the registrar of the court, indicating that the husband had deserted her and not she the husband. The evidence of the husband, was that in 1920 he had left Australia to work in South Africa, and he had made his permanent home in England. His wife refused to accompany him, and in 1924 he began to cohabit with a woman with whom he had lived ever since. In respect of his adultery with this woman he asked the court to exercise its discretion. On June 18, 1947, a decree *nisi* was granted, and on that date the wife's application for a poor person's certificate was pending. On July 22, 1947, the certificate was granted to the wife. She applied to the Divisional Court for a re-hearing under the Matrimonial Causes Rules, 1944, r. 36, which provides: “(1) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division.” In her affidavit in support of her application she alleged that she had in her possession a number of letters which would show that the husband had at all material times deserted her. The Divisional Court ordered a re-hearing, and from that order the husband appealed on the ground that an error of the court at the hearing was alleged or involved in the application made to the Divisional Court, which, therefore, had no jurisdiction.

HELD: the application for re-hearing was not based on a suggested error of the court in dealing with the material before it, but raised the point that the court had not been given the opportunity of considering certain material which, had it not been concealed, might have led it to come to a different decision, and, therefore, there had been alleged “no error of the court at the hearing” within r. 36.

Petty v. Petty ([1943] 2 All E.R. 511), *distinguished*.

Decision of the Divisional Court ([1947] 2 All E.R. 578), *affirmed*.

[AS TO APPLICATIONS FOR RE-HEARING, see HALSBURY, Hailsham Edn., Vol. 10, p. 779, para. 1233; and FOR CASES, see DIGEST, Vol. 27, p. 490, Nos. 5220-5233.]

Cases referred to:

(1) *Westhead v. Westhead*, (1876), 2 P.D. 1.

(2) *Isaacs & Sons v. Salbstein*, [1916] 2 K.B. 139; 85 L.J.K.B. 1433; 114 L.T. 924; 30 Digest 136, 141.

(3) *Bozson v. Altrincham Urban District Council*, [1903] 1 K.B. 547; 72 L.J.K.B. 271; 67 J.P. 397; 30 Digest 135, 137.

(4) *Shubbrook v. Tufnell*, (1882), 9 Q.B.D. 621; 46 L.T. 749; 30 Digest 129, 71.

(5) *Salaman v. Warner*, [1891] 1 Q.B. 734; 60 L.J.Q.B. 624; 30 Digest 135, 136.

(6) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; Digest Supp.

(7) *Petty v. Petty*, [1943] 2 All E.R. 511; [1943] P. 101; 112 L.J.P. 97; 169 L.T. 224; 2nd Digest Supp.

APPEAL by the husband from an order of the Divisional Court of the Probate Division ([1947] 2 All E.R. 578), ordering a re-hearing of a petition by the husband for dissolution of his marriage on the ground of the wife's desertion. A decree *nisi* had been granted to the husband by BARNARD, J. The Court of Appeal decided that it had jurisdiction to entertain the appeal, and, after disposing of the preliminary point that the husband's notice of appeal was out of time, dismissed the appeal, holding that the Divisional Court had jurisdiction to order a re-hearing. The facts appear in the judgment of TUCKER, L.J.

E. Holroyd Pearce, K.C., Fairweather and Travers for the husband.

J. Montgomerie for the wife.

THEIR LORDSHIPS delivered the following judgments on the preliminary point.

TUCKER, L.J.: This is an appeal by a husband from an order of the Divisional Court of the Probate and Divorce Division setting aside a decree *nisi* which had been made by BARNARD, J., in favour of the husband, who was petitioning for divorce on the ground of his wife's desertion.

Preliminary objection was taken to the hearing of this appeal on the ground that notice of appeal had not been given within the time required by R.S.C., Ord. 58, r. 15, namely, within 14 days of the making of the order. In discussing this point we have been taken through the history of the jurisdiction of this court in dealing with appeals from the Divisional Court on such orders as this, and with regard to the jurisdiction of the Divisional Court to entertain these applications. I do not propose to go through the matter in detail because it is not now in controversy between the parties that this court derives its jurisdiction in a matter such as that with which we are now dealing from the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27, which provides:

(1) Subject as otherwise provided in this Act and to rules of court, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court, and for all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court.

In this connection I might refer to s. 30, which provides:

(1) Every motion for a new trial, or to set aside a verdict, finding or judgment, in any cause or matter in the High Court in which there has been a trial thereof or of any issue therein with a jury, shall be heard and determined by the Court of Appeal.

In 1857 applications for the re-hearing of a trial without a jury were made to the judge ordinary and a right of appeal from his decision was given to the full court. In 1873, the whole of the jurisdiction with regard to these matters was transferred to the High Court, and the Judicature Act, 1875, provided that all existing rules of the Divorce Court should apply until altered or annulled by rules of the Supreme Court. By the Judicature Act, 1881, s. 9, it was provided that appeals which had previously gone to the full court should go to the Court of Appeal, an enactment necessitated by the decision in *Westhead v. Westhead* (1). The Matrimonial Causes Rules, 1924, contained a rule which is the equivalent of the present r. 36 in the Matrimonial Causes Rules, 1944, which reads as follows:

An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division.

The jurisdiction conferred on the Court of Appeal by the Judicature Act, 1925, s. 27, was subject to rules of court, and that Act finally repealed the provisions of the Act of 1857 giving the right of appeal to the full court. The result, as it appears to me, is that this court has jurisdiction to entertain this appeal from the Divisional Court, and, as it is not contended that r. 36 of the Matrimonial Causes Rules, 1944, is *ultra vires*, it also appears clear that an application for the re-hearing of a cause heard by a judge alone, where no error of the court at the hearing is alleged, should properly be made to the Divisional Court.

The only matter which remains in doubt is as to the time within which notice of appeal must be given. That depends on whether the order appealed from is an interlocutory order within the meaning of Ord. 58, r. 15, or whether it is an "other" appeal within the meaning of those words in that rule. We

have been referred to *Isaacs & Sons v. Salbstein* (2), which was a decision of this court. The headnote is as follows, so far as is material ([1916] 2 K.B. 139) :

The test of whether an appeal is final or interlocutory is the nature of the order immediately under appeal. Where, therefore, on appeal from a final judgment of a county court, a Divisional Court made an order for a new trial : HELD, that an appeal from the Divisional Court to the Court of Appeal was an appeal from an interlocutory order and was rightly entered in the interlocutory list.

A SWINFEN EADY, L.J., in his judgment said (*ibid.*, 146), quoting from the judgments in *Bozson v. Altrincham Urban District Council* (3) :

THE EARL OF HALSBURY, L.C., said ([1903] 1 K.B. 548) : " I think the order appealed from was a final order, and the appeal is therefore brought within the prescribed time." LORD ALVERSTONE, C.J., said (*ibid.*) : " It seems to me that the real test for determining this question ought to be this : Does the judgment or order, as made, finally dispose of the rights of the parties ? If it does, then I think it ought to be treated as a final order ; but if it does not, it is then, in my opinion, an interlocutory order." Applying the test there so clearly laid down, the order in the present case is an interlocutory order. In my opinion this settles the case.

PICKFORD, L.J., in agreeing, said (*ibid.*, 148) :

C It was decided in *Shubrook v. Tufnell* (4) that if the decision of the Court of Appeal was a final decision it made the order under appeal a final order. But *Salaman v. Warner* (5) decided that it was only final if it put an end to the litigation, whichever way it was decided. In *Bozson v. Altrincham Urban District Council* (3) the Court of Appeal declined to follow *Salaman v. Warner* (5), and said they preferred *Shubrook v. Tufnell* (4), but although LORD HALSBURY, L.C., said he preferred it I do not think he altogether followed it. He followed it so far as to say that *Salaman v. Warner* (5) was not right in saying that an order was final if it would, whichever side won, finally determine the litigation ; he further said that the thing to be looked at was the order appealed from. In the present case the order appealed from does not put a final end to the action, and this is an appeal from an interlocutory, and not from a final, order.

D In my view, that decision governs this case, unless counsel for the husband is right in saying that a distinction should be drawn between it and the present proceedings. His contention was that the order setting aside the judgment which had pronounced a decree *nisi* altered the status of the parties, and was, therefore, final, that is to say, it restored the husband to the status which he had had before he started his divorce proceedings, which status had been altered by the pronouncement of the decree *nisi*. I do not think that argument is sound. The status of the parties in a divorce suit is not altered until a decree absolute is made, but, none the less, the decree *nisi* is a final order because it disposes of the issues between the parties. On the authority of the case that I have just cited, I think it is clear that the order of the Divisional Court setting aside the decree *nisi* and ordering a new trial was an interlocutory order within the meaning of Ord. 58, r. 15, but having regard to the fact that the provisions with regard to this matter are by no means clear—in fact, they are wrapped in a considerable degree of obscurity—and, furthermore, having regard, as I think we are entitled to do, to the note which appears in RAYDEN ON DIVORCE, 4th ed., p. 389, para. 15, note (a), which I think tends to make the matter appear even more obscure than it already is, in all the circumstances of the case it is proper that we should extend the time for giving this notice of appeal, and I think the time should be extended by a period of two weeks, which would cover the date at which this notice was given.

F BUCKNILL, L.J. : I agree. It seems to me that this is an appeal from a judgment or order of the High Court, and, therefore, comes within the words of s. 27 of the Act of 1925, which gives the Court of Appeal jurisdiction over the matter. I also agree with what my Lord has said about the judgment being interlocutory.

G SOMERVELL, L.J. : I agree.

H Their Lordships delivered the following judgments on the appeal.

TUCKER, L.J. : This is an appeal from a decision of the Divisional Court of the Probate, Divorce and Admiralty Division in which they ordered a rehearing of a petition by the husband against his wife, founded on desertion, in which BARNARD, J., had granted the husband a decree *nisi*. The application

to the Divisional Court was made pursuant to r. 36 of the Matrimonial Causes Rules, 1944, which, so far as material, reads as follows :

An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division.

The husband's appeal from the decision of the Divisional Court is based on the submission that the Divisional Court had no jurisdiction to order a re-hearing under this rule because, it is said, on investigation it is apparent that error of the court at the hearing was alleged or necessarily involved in the application which had been made for the re-hearing. A

The parties were married in Australia in 1905, and two children of the marriage were born in 1906 and 1907. The husband at that time was serving in Australia with a British company as an engineer. In 1920 he got an offer of employment in Nigeria which necessitated his making his permanent home in England. B His evidence before BARNARD, J., was that he had asked his wife to come and make her home in England with him, but she had refused. Accordingly, he came alone. His home was in England, which he visited on his periods of leave, and his work was in Nigeria. His case was that, having been deserted by his wife until 1924, in that year he met a woman with whom he committed adultery and with whom he had continued to live. With regard to her, he asked the court to exercise its discretion in his favour. His evidence was that in 1923 he had asked mutual friends to intervene on his behalf with his wife, and there was evidence that in 1927 a friend of his had visited the wife and asked when she was coming over to her husband and that she said she would not come. C During the trial, two letters were brought to the notice of the court by learned counsel for the husband in the performance of his duty to place all relevant material before the court. One dated Aug. 1, 1926, from the wife in which she complained of having received "an insulting letter from that woman and also to send back the photo of our children with a child of shame," and saying : "There will come a time when you both will have to pay. I do not want the divorce, but you are making me get one, and I will only do it on two conditions." She demanded payment of a capital sum of money, and said : D

I am putting letters sent by you and also letters sent by that woman together ready to go into the Home Secretary's hands. I have been advised to do so. I will give this letter time to get to you and a reply by cable before I do so, and remember never come to Brisbane with that woman because she will never leave here again. I can promise you that somebody must pay and why not her. Remember, life makes its claim but exacts its penalty. E

At the top of the letter there is a postscript : "I am still willing to forgive and forget." The other letter is from the husband to his wife dated Jan. 29, 1945, which says : F

Some years ago you wrote me that you would not divorce me so long as my mother was alive. As she has been dead for some years, there is no reason why if you feel so disposed, you should not now do so. You can, I understand, divorce me in Queensland, on the ground of desertion. We have been separated for 25 years, and you have known for a great portion of that time, that I have no intention of returning to live with you.

Those two letters, put before BARNARD, J., clearly called for an explanation. G In addition to that the learned judge had before him a letter which had been addressed to the registrar by the wife in Queensland. It said :

You have a divorce for desertion in your High Court the petitioner being Mr. F. J. Peek and the respondent being Jennie Peek. I am the respondent in this case. If this case is allowed to go through the court it will be on perjury ; the evidence I am enclosing will explain this better than I as I am no good at letter writing and I hope you will be able to follow this. I was 35 years old when deserted and have devoted my life to the welfare of my children. H

She is in substance alleging that her husband had deserted her and she had not deserted him. There is one sentence in the letter in which she says :

Mr. Peek never at any time definitely said to come to England but was always complaining about the place and said he hated it and was only longing to get back to Australia. The letters I am sending you are only the last two as I am sending this by airmail and have to get my daughter to pay it ; it would cost too much to send

more. I am enclosing a money order to pay for the fee and also enough to post this evidence back to me by service mail. I have enclosed a copy of a letter sent to Mr. Peek's solicitor showing them they was telling them lies when I had proof that Mr. Peek was the deserter.

The learned judge, having this letter before him, made known to learned counsel that he had it, and he appears to have directed some questions to the husband with a view to clearing up the position.

A The husband on his own showing having been guilty of adultery, it was the duty of the court to be satisfied that the wife's refusal to join him was irrespective altogether of the question of his adultery. In *Herod v. Herod* (6) SIR BOYD MERRIMAN, P., said ([1938] 3 All E.R. 732) :

B If it is left in doubt whether the respondent knew of the adultery, or, if known, whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. If, on the other hand, it were established that the respondent's intention to withdraw from co-habitation was formed entirely independently of the petitioner's misconduct, the offence would be proved. The question is to be determined according to the circumstances of each case.

C In this case the husband, having said that his wife had definitely and permanently refused to come to England with him at the start, and that her decision had remained unaltered throughout, there was, I think, material on which the learned judge could come to the decision that in all the circumstances the desertion had continued down to the date of the petition and that it was not affected by the husband's adultery. The case was one which was clearly not free from difficulty and required investigation. Furthermore, the learned judge had to be satisfied that it was the wife who had deserted the husband and not the husband who had deserted the wife. The letter from the wife contains sufficient material to put him on his guard with regard to that matter. D He had before him the sworn testimony of the husband that he had asked his wife to come to England, and she, on her part, had definitely refused to do so. Therefore, I think it is impossible to say on the material before him that there was any error on the part of the learned judge. It is quite true that he might have thought fit to adjourn the case for investigation by the King's Proctor, but that is a matter entirely within his discretion. I think it is impossible to say that on this material he should have dismissed the petition, and I do not think E there was anything erroneous in what he did.

The trial took place on June 18, 1947. The previous material dates are as follows. On Dec. 10, 1946, the wife was served with the petition. On Jan. 14, 1947, she wrote a letter to the registrar. On Mar. 26 of that year she received a reply. On Apr. 1 she wrote to the King's Proctor. On Apr. 28 she applied to the Poor Persons' Committee and was refused. On June 17 she again wrote to the Committee and on July 22 she was given a poor persons' certificate. F So, on June 18, 1947, when the decree *nisi* was made, her second application for a poor persons' certificate was pending, and it was actually granted a month or so after the decree. Her affidavit in support of the application for re-hearing is based on her allegation that she had in her possession a number of letters which will show clearly that her husband was at all times deserting her. That is summed up in the concluding paragraph in which she says :

G I have always been willing to reside with my husband either in England, Africa or Australia, and am still in love with my husband. I have never refused to set up home with him and in point of fact he has never made any effort for me to live and cohabit with him in England. He has deserted me without cause and lived separate and apart from me since early in the year 1920.

In the preceding paragraph of the affidavit she refers to and exhibits correspondence which on the face of it, if accepted and unexplained, would appear H to lend strong support to the statement which she makes in the concluding paragraph. After perusal of this new material, which was not brought to the notice of BARNARD, J., the Divisional Court came to the conclusion that this was a proper case in which to order a re-hearing. They also came to the conclusion that this was not a case in which error was disclosed on the part of the court.

In the Divisional Court LORD MERRIMAN, P., dealt with the matter very thoroughly, and I only desire to refer to those passages in his judgment where he states his conclusion. He indicates, I think, that, if he had had to deal

with the matter as it presented itself to BARNARD, J., he would have been disposed to invite inquiry into the matter by the King's Proctor, but he comes to the conclusion that there had been no error. After dealing with the matters with which it was incumbent on the learned judge to deal, he says ([1947] 2 All E.R. 585) :

It seems to me that the real point, bearing in mind that the question whether error is alleged is a question of substance and not a question of form, as I said earlier in this judgment, is this : Is the allegation which is made against the decision an allegation that the court went wrong on the materials before it, or is it an allegation that the court went wrong because evidence on a vital matter was concealed from the court ? To my mind, it cannot make the slightest difference, logically, whether that question falls to be decided in an undefended or a defended case. To bring the thing to a point, can there be any true distinction between cases, both of them undefended, in the first of which the petitioner says : " I assert desertion, but I ask for the discretion of the court," and a case in which the petitioner presents a case of desertion without confessing any adultery ?

In a later part of his judgment, he says (*ibid.*) :

I reject altogether the argument that this matter depends solely on the question whether the case is defended or undefended, and I come back to what I said just now, for, in my opinion, this case is an illustration, not of a case in which the court went wrong on the materials before it, but rather of a case in which it is alleged that the court went wrong because evidence on a vital point was concealed from it. I repeat and desire to emphasise that every case coming within this rule must be considered on its own merits, and, in my opinion, when one analyses this case, the only thing which can be said to be error on the learned judge's part is a failure to appreciate, in the light of the documents which were not produced before him, the full possible implications of those which were produced before him. But, when one has said that, it still remains that it was the husband's concealment of those documents, of the existence of which we are now aware, which may induce some other tribunal to come to a different conclusion.

WALLINGTON, J., in the course of his judgment, said (*ibid.*) :

The effect of the rule, as I understand it, is this : If a party to a motion comes to this court and, either expressly or by necessary implication, alleges that the judge who heard the case to which the motion relates made such a mistake or error as resulted in a wrong conclusion, then the matter is not one for this court but is one that must go to the Court of Appeal in the ordinary way. On the other hand, where the applicant on the motion comes to this court and says in effect, *e.g.*, " There was no error on the part of the court below in dealing with the material then before it, or any other error of the court, but I was not able to attend at the trial, I had much material in my hands that I would have put before the court, and I desire an opportunity of having the real case tried," and if, added to that, as in this case, it is plain that the petitioner has concealed from the judge who tried the case very material—indeed, vital—facts affecting the real case between the parties, it seems to me to be plain that this court has both the jurisdiction and the duty to deal with the matter.

I find myself entirely in agreement with what was said in the Divisional Court both by the learned PRESIDENT and by WALLINGTON, J. We have been referred to *Petty v. Petty* (7), but I do not get much assistance from that authority. That had been a contested suit and a re-trial was granted based on fresh evidence which had been obtained. It was held ([1943] P. 101) :

... that the application was not one in which " no error of the court at the hearing " was alleged; that it did not fall within r. 36 (1) of the Matrimonial Causes Rules, 1937; and, therefore, that it could not be dealt with by the Divisional Court.

The basis of the decision was that, if the fresh evidence were accepted, it followed that there had been error on the part of the court in believing the evidence adduced by the petitioner in preference to that adduced by the respondent. I do not think there is anything in that case which assists in the decision of the present appeal.

There is only one other matter to which I desire to refer for the purpose of keeping it open. I have up to now dealt with this case on the basis that no error of the court appears after careful investigation of the course the trial took. I should desire to keep open the question whether or not it may be immaterial to consider what, in fact, happened before the court, provided the applicant who is seeking a re-hearing is basing his whole case on something quite irrespective of the course the case in fact took on the material before the court. I think there may be a good deal to be said for the proposition that, in a case like the present, the application is really founded on the suppression of evidence and that the re-hearing might have been granted on that ground,

irrespective of whether or not the learned judge took the right course on the material which was presented to him. I am not to be taken as suggesting that the mere allegation that the applicant makes is conclusive. It is always necessary to investigate the reality of the case that he is putting forward, but, if the case that he is putting forward is one which would lead the court to grant a re-hearing irrespective of the course which the case took at the trial on the then available material, I think it may be that he could bring himself within r. 36 in any event. As I say, I merely mention that in order to preserve consideration of the point if it should arise. For these reasons I think this appeal fails.

BUCKNILL, L.J. : I agree that the appeal should be dismissed.

SOMERVELL, L.J. : I only wish to add that I entirely agree with the construction which the learned PRESIDENT and WALLINGTON, J., applied to this rule. It seems to me that the highest that counsel for the husband could put the alleged error here is that another judge might not have been satisfied that the husband had discharged the onus, or another judge might have thought it a proper case to refer to the King's Proctor. I agree with the learned PRESIDENT's final conclusion where he says the real point is whether the allegation which is made against the decision is an allegation that the court went wrong on the material before it or is an allegation that the court went wrong because evidence on a vital matter was concealed from it. I entirely agree with the court below that this was a case which could be dealt with under r. 36, and I also agree with the order which, under that rule, the court made. I would like to say one word on the last point to which TUCKER, L.J., referred. I associate myself with him in his references to the desirability of keeping the point open. I think there is certainly something to be said for the view that, giving the proper meaning to the word "alleged," the rule should be applicable where the applicant both in form and in substance is seeking to succeed irrespective of any examination of the question whether the judge went wrong in accepting one set of witnesses and not accepting another. That matter can be dealt with when it arises, and I should like to keep it open.

Appeal dismissed with costs.

Solicitors : *Enever & Co.* (for the husband) ; *G. Parry Jones*, Services Divorce Department (for the wife).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Re HICKMAN'S WILL TRUSTS. HICKMAN AND OTHERS v. HICKMAN AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), June 29, 1948.]

Will—Construction—Presumption of early vesting—Gift of necklace "to the wife of my grandson," A. E. H., subject to prior life interest of M.W.H.—Gift over "in the event of my grandson not marrying"—Grandson unmarried at date of will and at death of testatrix—Subsequently married twice—First marriage dissolved—Second marriage during lifetime of M.W.H.—Gift to first person answering description of being wife of grandson.

By a codicil to her will, dated July 12, 1914, the testatrix, who died on Sept. 13, 1914, gave a pearl necklace to her daughter-in-law, M.W.H., "so that she may have the use and enjoyment thereof for her life and at her death I bequeath the same to the wife of my grandson," A.E.H., "absolutely or in the event of my . . . grandson not marrying then and in that case I bequeath the same" to a grand-daughter. A.E.H. was not married at the date of the codicil or at the death of the testatrix. His first marriage, which took place in 1919, was dissolved, and in 1940 he married again. M.W.H. died in 1946, and A.E.H. died on Mar. 11, 1947. The question was whether the former wife of A.E.H. or his widow was entitled to the necklace :—

HELD : on the true construction of the codicil, the gift was to the first person who answered the description of being the wife of the grandson, since there was no controlling context to displace the presumption in favour of early vesting, and, accordingly, the former wife of A.E.H. was entitled to the necklace.

Principle in Radford v. Willis (1871) (7 Ch. App. 7), applied.

[AS TO GIFT TO "WIFE" OF PERSON, see HALSBURY, Hailsham Edn., Vol. 34, p. 326, para. 375, and pp. 265, 266, paras. 314, 315; and FOR CASES, see DIGEST, Vol. 44, pp. 872-875, Nos. 7283-7310.]

Case referred to :

- (1) *Radford v. Willis*, (1871), 7 Ch. App. 7; 41 L.J.Ch. 19; 25 L.T. 720; 44 Digest 875, 7313.

ADJOURNED SUMMONS to determine whether the former wife or the widow of the grandson of the testatrix was entitled to a pearl necklace given by the testatrix, subject to a prior life interest therein, to "the wife of my grandson . . . absolutely." HARMAN, J., held that the former wife was entitled to the necklace. The facts appear in the judgment.

Jopling for the trustees.

A. C. Nesbitt for the first defendant (the widow).

Wigan for the second defendant (the former wife).

HARMAN, J. : By a second codicil to her will, Dame Lucy Owen Hickman, who died on Sept. 13, 1914, bequeathed a valuable necklace, and the question which arises now on the death of the person to whom it was given for life is : To whom does it devolve, having regard to the terms of the codicil ? With the will, which was made in 1913, I am not concerned except to say that the plaintiffs are trustees (by representation) by virtue of an appointment contained in it. Nor need I trouble with the first codicil, which was made on Jan. 15, 1914. By the second codicil, made on July 12, 1914, the testatrix expressed herself in these terms :

I revoke the bequest of the following pearls and pearl ornaments to my daughter Lilian Hickman : pearl necklace with diamond clasps pearl rope and pearl collar. I bequeath my pearl necklace with diamond clasps to my daughter-in-law Mary Whitby Hickman so that she may have the use and enjoyment thereof for her life and at her death I bequeath the same to the wife of my grandson Sir Alfred Edward Hickman Baronet absolutely or in the event of my said grandson not marrying then and in that case I bequeath the same to my grand-daughter Phyllis Deane.

When the testatrix died, her grandson, Sir Alfred Hickman, was unmarried. There was not, either at the date of the codicil or at the date of the death of the testatrix, a person answering the description of "the wife of my grandson, Sir Alfred Edward Hickman." Mary Whitby Hickman was the holder until her death on Oct. 19, 1946, but in the meanwhile the following events had happened. Sir Alfred married twice, first on Jan. 16, 1919, the second defendant, now Lilian Brenda Williams, and that marriage was dissolved. Sir Alfred married again in 1940 the first defendant, now his widow, Dame Nancy Beryl Hickman. He himself survived the tenant for life and died on Mar. 11, 1947. The contest is between the former wife and the widow.

Counsel for the widow submits that the whole object of the bequest in this case was to give the necklace to someone who could use and enjoy it as an adornment ; it was not meant, he says, to maintain anyone nor was it an investment which would produce any benefit other than pleasure to a person who could hang it round her neck ; and, therefore, it was extremely unlikely that it was intended to be given to anyone except a person who could say at the relevant date—which, counsel says, was the date of the death of the tenant for life—"I am the wife of Sir Alfred Hickman and it is my neck, and no one else's, which this necklace was intended to adorn." This is a forcible argument, and, when one first looks at the codicil, it seems that, if the testatrix could have been asked in 1946 what she wished, her answer would have been : "I mean the wife of my grandson, Alfred, now." He adds, I think, *a fortiori* that the necklace was not meant to be stretched round the collective neck of personal representatives. The testatrix, however, did not live until 1946 and it is most unlikely that she contemplated the series of events which has happened, or that she attempted to provide for all of them. Counsel for the former wife argued that one must not look at what would have been the intention of the testatrix if she had been able to foresee the future, as that is mere speculation, but one must consider the established principles in these matters and decide in favour of an early vesting, which the law has always favoured. He said that the former wife was the person who first answered the description in the codicil, and, therefore, acquired an indefeasible interest which nothing could divest, neither divorce, nor death, nor the death of her former husband. He pointed

particularly to the gift over, which in terms is expressed to operate only in the event of the grandson not marrying, with the result that directly the grandson married the gift over was extinguished, and, therefore, the person to whom he was married and whose marriage to him caused the gift over to cease to be operative must be the person to take the indefeasible interest, because only thus could one marry the gift over to the primary gift. The retort to that is that the phrase, "in the event of my grandson not marrying," is an inaccurate expression. All it means to indicate is a failure of the former trust "in the event of my grandson not being a married man at the relevant date." Even that leaves out the possible event of the grandson being unmarried at the death of the life owner, but marrying after that date.

The principle to be applied is not in doubt. It is stated in JARMAN ON WILLS, 7th ed., p. 374, where, after dealing with persons who would satisfy the description of wife at the date of the will, or at the date of the death, the author continues :

... thirdly, if there be no such person either at the date of the will, or at the death of the testator, it [*i.e.*, the description of "wife"] applies to the woman who shall first answer the description of wife, at any subsequent period.

Counsel for the former wife relies on the illustration of that principle to be found in *Radford v. Willis* (1), the leading case on this subject. This principle was relied on by both sides, counsel for the widow arguing that a context would displace that which was in doubt. In *Radford v. Willis* (1) SIR W. M. JAMES, L.J., said (7 Ch. App. 7, 10) :

I have no hesitation in saying that, in the absence of a controlling context, a gift to an unmarried woman for life, with remainder to her husband in fee, vests an indefeasible estate of inheritance in the person who first answers the description of her husband. The case is one in which the broad general principle that the court favours vesting more than contingency seems to me to be eminently applicable.

There were before him in that case circumstances which made improbable the result thus reached. SIR W. M. JAMES, L.J., asked himself (*ibid.*) whether there was a sufficient controlling context, and decided that there was not. So, here, it is not, I think, really in dispute that, in the absence of a controlling context, the early vesting principle would apply and the first person to answer the description would take an indefeasible interest. Counsel for the widow recognises that, but says that the context lies in two things. First, this is not an estate of inheritance or anything of that kind, but an article meant for adornment, to support the dignity of the wife of the testatrix's grandson. Secondly, he says that, if one could ask the testatrix what she meant, could one doubt but that she would have said "the wife of her grandson at the time when the jewels became free?" I recognise that those would be matters of context, if one could extract them from the codicil. I do not know whether the words, "so that she may have the use and enjoyment thereof," which is the description of the way in which the first taker is to have this string of pearls, apply also to "the wife of my grandson." But it seems to me that, if I follow counsel for the widow down that attractive path, I end in a bed of nettles, which I can avoid by staying on the sure ground of principle. There are many difficulties into which one is led, if one leaves the construction which favours early vesting, and I do not feel that I am able to do so in this case. I think the principle must apply that the first person who answers the description of being the wife of the grandson is the one who takes the jewels and that there is nothing that can divest her of them. In saying that, I am impressed by the terms of the gift over which, if they are to be made to fit at all, can only mean that, as soon as the grandson marries, the testatrix regards the necklace as being, as it were, at home, and it is not necessary to provide further for its possible destination. I, therefore, decide in favour of the former wife and propose to declare that the pearl necklace with diamond clasps is a gift to her.

Declaration accordingly. The costs of the plaintiffs and the first defendants, as between solicitor and client, to be awarded on taxation (if not agreed), the second defendant submitting to pay the costs.

Solicitors : Gregory, Rowcliffe & Co., agents for Fowler, Langley & Wright, Wolverhampton (for the trustees and first defendant); Wigan & Co. (for the second defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

SMITH v. LONDON TRANSPORT EXECUTIVE.

[CHANCERY DIVISION (Vaisey, J.), June 29, 30, July 1, 1948.]

Street Traffic—Omnibus service—Powers of Transport Executive—Service started by Executive in competition with private transport operator—Power of Executive to provide service where London Passenger Transport Board not so empowered—Road Traffic Act, 1930 (c. 43), s. 72 (1)—Transport Act, 1947 (c. 49), ss. 2 (1); 3 (1); 65 (1).

By the Transport Act, 1947, s. 1, there was set up a public authority called the British Transport Commission with power, under s. 2, *inter alia*, to carry goods and passengers by road within Great Britain. By s. 3, the duty was imposed on the Commission of providing or securing an efficient, adequate, economical and properly integrated system of public inland transport. Section 5 provided that there should be public authorities, known as "Executives," to assist the Commission, and that each Executive should, as agents for the Commission, exercise such functions of the Commission "as are for the time being delegated to them by or under a scheme made by the Commission and approved by the Minister" of Transport. As respects matters falling within the scope of any such delegation, any rights, powers and liabilities of the Commission should be treated as rights, powers and liabilities of the Executive only, and every Executive was to have power at the request of the Commission to do, as agent for the Commission, anything which the Commission had power to do.

The defendants, the London Transport Executive, were an Executive constituted under the Act of 1947. On Jan. 1, 1948, under s. 12 of the Act and sched. III thereto, the undertaking of the London Passenger Transport Board vested in the Commission, which, under s. 14 (2), had thenceforward all the rights and was subject to all the liabilities of the Board. The Board had been set up under the London Passenger Transport Act, 1933, with power to provide road services in specified areas, to one of which, known as "the special area," the Road Traffic Act, 1930, ss. 72-76 did not apply. Section 72 of the Act of 1930 provided: "(1) Subject to the provisions of this section the [Traffic] Commissioners may grant to any person applying therefor a licence . . . to provide such a road service as may be specified therein, and a vehicle shall not be used as a stage carriage . . . except under such a licence." The plaintiff held a licence under s. 72 and ran a motor omnibus service between H. and W., a route not within "the special area." The defendants began to run a service of omnibuses in competition with the plaintiff's service, and the plaintiff claimed to restrain them from so doing, or a declaration that in so doing they were acting *ultra vires*. Section 65 (1) of the Act of 1947 provides: "Sections 72 to 76 of the Road Traffic Act, 1930, . . . shall not apply to any passenger road transport service provided, whether under a scheme under . . . this Act or otherwise, by the Commission or by any person acting as agent for the Commission, but neither the Commission nor any such person as aforesaid shall use any public service vehicle for the conveyance of passengers for hire or reward at separate fares except— (a) on a route approved, as respects so much thereof as falls within any traffic area, by the licensing authority for public service vehicles for that area; and (b) in accordance with such restrictions as may be imposed by that authority . . ." with regard to certain matters. Route approval under s. 65 had been secured by the defendants. The British Transport Commission in exercise of the powers conferred by s. 5 of the Act of 1947, made a Scheme of Delegation of Functions which provided: "(1) . . . 'the Executive' means the London Transport Executive . . . (2) This Scheme applies to . . . (a) activities which the Commission are empowered to carry on by virtue of the transfer to them . . . of the undertaking of the London Passenger Transport Board; (b) activities which the Commission are empowered to carry on by virtue only of the powers conferred upon them by s. 2 (1) of the Act so far as those activities are carried on in connection with the activities referred to in sub-para. (a) of this paragraph or are ancillary to such activities; . . . (3) Subject

to the provisions of this Scheme, the Commission hereby delegate to the Executive the functions of the Commission in relation to their activities set out in sub-para. (a) and (b) of para. 2 of this Scheme to the intent that . . . all the rights, powers and liabilities of the Commission in connection with those activities shall be exercisable and dischargeable by the Executive . . .”

A HELD: the provision of road services between H. and W. was within the powers of the British Transport Commission, and, having regard particularly to para. (2) (b) of the Scheme, those powers were effectively delegated under para. 3 by the Commission to the defendants.

ACTION.

B The plaintiff sought an injunction to restrain the defendants, the London Transport Executive, from operating an omnibus service in competition with the plaintiff's service, or a declaration that such operation was *ultra vires*, with consequential claims for damages and costs. No witnesses were called and by agreement between the parties affidavit evidence was read. VAISEY, J., dismissed the action. The facts appear in the judgment.

G. R. F. Morris for the plaintiff.

Fox-Andrews, K.C., and J. P. Ashworth for the defendants.

Cur. adv. vult.

C July 1. VAISEY, J., read the following judgment. The plaintiff in this action, Mr. Wilfrid Herbert Smith, carries on business as a road transport operator at Buntingford, in the county of Hertford, and runs a service of motor omnibuses between Hitchin and Weston in that county. He holds the necessary licence to do so from the appropriate licensing authority, namely, the Licensing Authority for Public Service Vehicles (Metropolitan Area) acting under the Road Traffic Act, 1930, s. 72. That Act, (to which I will refer as the Act of 1930) is the first of three Acts to which I shall have to refer in this judgment. The two others are the London Passenger Transport Act, 1933, (which I will call the Act of 1933), and the Transport Act, 1947, (which I will call the Act of 1947), and through the tortuosities of those three statutes I have to find, or, perhaps, grope, my way to a solution of the issues raised in this action. The defendants are the London Transport Executive, which is a public authority constituted as one of the agents for another public authority called the British Transport Commission under the provisions of the Act of 1947, to which I must later more particularly refer. The defendants are running another service of motor omnibuses between Hitchin and Weston in competition with the plaintiff's service, and the plaintiff's claims are to restrain them from so doing or to have it declared that they are acting *ultra vires* in so doing, with consequential claims for damages and costs. No witnesses were called at the trial, and by agreement between the parties I read or treated as read the affidavits which were filed on the motion which came before me on Apr. 6, 1948, together with a further affidavit sworn on June 29.

D The facts are not really in dispute. What I have to decide is the question of *ultra vires*. If the plaintiff is to succeed he must establish that what the defendants are doing is unauthorised, either because the necessary powers were not vested in and available to the British Transport Commission itself, and could not, therefore, be delegated to the defendants, or, alternatively, that such powers, although vested in, available to, and capable of being delegated by the British Transport Commission, have not, in fact, been so delegated to the defendants.

E I turn to the Act of 1947, and will read so much of its title as is relevant to the present case, that is to say, it is described as :

F An Act to provide for the establishment of a British Transport Commission concerned with transport and certain other related matters, to specify their powers and duties, to provide for the transfer to them of undertakings, parts of undertakings, property, rights, obligations and liabilities, to amend the law relating to transport, . . . and for purposes connected with the matters aforesaid.

Section 1 (1) is as follows :

G For the purposes of this Act, there shall be a public authority to be called the British Transport Commission (in this Act referred to as “the Commission.”)

Section 2 provides :

(1) Subject to the provisions of this Act, the Commission shall have power—(a) to carry goods and passengers by rail, road and inland waterway, within Great Britain . . . (f) to provide in Great Britain such other amenities and facilities for passengers and other persons making use of the services provided by them as it may appear to them requisite or expedient to provide.

Section 3 (1) is important. It reads as follows :

It shall be the general duty of the Commission so to exercise their powers under this Act as to provide, or secure or promote the provision of, an efficient, adequate, economical and properly integrated system of public inland transport and port facilities within Great Britain for passengers and goods with due regard to safety of operation ; and for that purpose it shall be the duty of the Commission to take such steps as they consider necessary for extending and improving the transport and port facilities within Great Britain in such manner as to provide most efficiently and conveniently for the needs of the public, agriculture, commerce and industry.

Section 4 deals with the powers of the Minister (that is, the Minister of Transport) in relation to the Commission. Section 5 (1) says this : " There shall be public authorities known as Executives to assist the Commission in the discharge of their functions in the manner specified in this section," and in sub-s. (3) it is provided that one of the Executives is the London Transport Executive, the defendants to this action. Section 5 proceeds :

(4) Each Executive shall, as agents for the Commission, exercise such functions of the Commission as are for the time being delegated to them by or under a scheme made by the Commission and approved by the Minister . . . (6) Any delegation effected by or under such a scheme may be expressed by the scheme or by the relevant instrument issued thereunder to be subject to conditions and limitations, and, whether or not the relevant delegation is expressed to be subject to any conditions or limitations, every Executive shall, in the exercise of their functions, give effect to any directions which may from time to time be given to them by the Commission . . .

(9) As respects matters for the time being falling within the scope of any such delegation, the following provisions shall have effect except as between the Executive and the Commission, that is to say—(a) any rights, powers and liabilities of the Commission shall be treated as rights, powers and liabilities of the Executive, and the Executive only . . . (10) In addition to the powers exercisable by an Executive by virtue of any such delegation, every Executive shall, except so far as the Commission may otherwise direct, have power, at the request of the Commission or of any other Executive, to do, as agent for the Commission or that other Executive, anything which the Commission or that other Executive have power to do.

Section 12 provides :

(1) Subject to the provisions of this Act, the whole of the undertakings of the bodies of persons specified in sched. III to this Act, being the bodies who fall within the class described in the next succeeding section, shall, on Jan. 1, 1948 . . . vest by virtue of this Act in the Commission.

One of the bodies specified in sched. III to the Act is the London Passenger Transport Board.

Section 14, of which the marginal heading is " General effect of vesting of undertakings," is as follows :

(1) The provisions of this section shall, subject to the other provisions of this Act, have effect where, under the preceding provisions of this Part of this Act, the whole of the undertaking of any body is to vest in the Commission. (2) Subject to the provisions of this section, all the property of the body immediately before the date of transfer shall vest in the Commission and, as from the date of transfer, the Commission shall, to the exclusion of the body, have all rights and be subject to all liabilities which the body had or to which the body were subject immediately before the date of transfer.

At this point I think I may conveniently turn to the Act of 1933, which contains many provisions comparable to the provisions of the Act of 1947. Thus, s. 1 (1) of the Act of 1933, enacts : " For the purposes of this Act there shall . . . be established a public authority to be called the London Passenger Transport Board." Section 3 describes the general duty of the Board as to passenger transport, and s. 15, of which the marginal heading is : " Power of Board to run public service vehicles " reads, so far as is material, as follows :

(1) Subject to the provisions of this section, it shall be lawful for the Board to provide road services of stage and express carriages on any of the following roads,

but not otherwise, that is to say—(a) on any road within the area described in pt. I of sched. VII to this Act (in this Act referred to as the “London Passenger Transport Area”); (b) on any road outside that area, being a road specified in pt. II or pt. III of that schedule.

and there are further directions, including a proviso that the Board shall not both pick up and set down a passenger on any road specified in pt. III of the schedule or within the borough of Luton. Section 15 further provides :

- A (3) Sections 72 to 76, both inclusive, of the Road Traffic Act, 1930, shall not apply to a road service provided by the Board wholly within such portion of the London Passenger Transport Area as lies within the London Traffic Area (which portion is in this Act referred to as “the special area”) and, in the case of a road service provided by the Board partly within and partly without the special area shall not apply to that service in so far as it is within the special area. (4) The Traffic Commissioners appointed under the said Act, in considering whether they will grant or back a road service licence to the Board in respect of any route or part of a route which is outside the special area shall, in addition to the matters to which they are required to have regard by virtue of s. 72 of the said Act, have regard to the general duty imposed on the Board by this Act of securing the provision of an adequate and properly co-ordinated system of passenger transport for the London Passenger Transport Area.

- B The Hitchin-Weston road is admittedly not within the special area, and, therefore, any road service provided by the London Passenger Transport Board along that route prior to Jan. 1, 1948, would have been subject to the provisions of ss. 72 to 76 of the Act of 1930, to which I will now briefly refer. The Act of 1930 contains a number of sections, all of which are still in force, and which I can pass over quite shortly by reading their marginal headings. For example, s. 62 : “Constitution of traffic areas”; and s. 63 : “Traffic commissioners.” Section 67 provides :

- D (1) No person shall cause or permit a motor vehicle to be used on any road as a stage carriage an express carriage or a contract carriage unless he is the holder of a licence (in this Act referred to as “a public service vehicle licence”) to use it as a vehicle of that class in accordance with the provisions of this Part of this Act.

Section 72 provides :

- E (1) Subject to the provisions of this section the commissioners may grant to any person applying therefor a licence (in this Act referred to as a “road service licence”) to provide such a road service as may be specified therein, and a vehicle shall not be used as a stage carriage or an express carriage except under such a licence.

I need not, I think, trouble to refer to the definition section dealing with the expression “stage carriage or as an express carriage” which has no relevance to the present case. Section 72 further provides :

- F (3) The commissioners shall not grant a road service licence in respect of any route if it appears to them from the particulars furnished in pursuance of sub-s. (5) of this section that the provisions of pt. I of this Act relating to the speed of motor vehicles are likely to be contravened, and . . . shall . . . take into consideration any representations which may be made by persons who are already providing transport facilities along or near to the routes or any part thereof or by any local authority in whose area any of the routes or any part of any of the routes is situate.

- G I need not, I think, refer in detail to sub-ss. (4) and (5), which relate to the particulars which have to be supplied and the considerations which have to be taken into account in connection with the grant of a road service licence. Section 73 of the same Act of 1930 provides for the validity of licences in other areas and backing licences. Section 74 gives power to revoke or suspend licences for non-compliance with conditions, and there are other provisions in the same fasciculus of sections which relate to the granting or withholding or withdrawing of road service licences.

- H I must now return to the Act of 1947. Section 63 provides :

(1) The Commission may, at any time, prepare and submit to the Minister a scheme as to the passenger road transport services serving such area as may be specified in the scheme, being a scheme devised for the purpose of promoting or facilitating the promotion of the co-ordination of the passenger transport services serving the area, whether by road or by rail, and the provision of adequate, suitable and efficient passenger road transport services to meet the needs of the area, and the Commission shall as soon as may be review the passenger road transport services operating in Great Britain with a view to determining the areas with respect to which schemes

shall be prepared and submitted as aforesaid. (2) The Commission, in considering what scheme to submit to the Minister with respect to any area, shall consider any representations which have been made to them by any local authority whose area or any part of whose area is within the area to which the scheme will relate, and, without prejudice to the preceding provisions of this sub-section, before submitting a scheme to the Minister, the Commission shall consult every local authority whose area or any part of whose area is within the area to which the scheme relates . . . and any other person providing passenger transport services who, in the opinion of the Commission, is likely to be affected by the scheme.

Section 64 (4) of the Act provides for the payment of compensation in certain cases to any person who was at the date of the passing of the Act, that is to say, I suppose, on Aug. 6, 1947 :

. . . carrying on an undertaking the activities of which consisted wholly or partly of operating passenger road transport services within or partly within the area to which the scheme relates.

I now come to s. 65 of the Act of 1947 which in sub-s. (1) provides :

Sections 72 to 76 of the Road Traffic Act, 1930, (which relate to road service licences), shall not apply to any passenger road transport service provided, whether under a scheme under the preceding provisions of this Part of this Act or otherwise, by the Commission or by any person acting as agent for the Commission, but neither the Commission nor any such person as aforesaid shall use any public service vehicle for the conveyance of passengers for hire or reward at separate fares except—(a) on a route approved, as respects so much thereof as falls within any traffic area, by the licensing authority for public service vehicles for that area ; and (b) in accordance with such restrictions as may be imposed by that authority as to the class or description of vehicles which may be used on the route and as to the portions of the route on which, and the points at which, passengers may be taken up or set down.

Then there is a proviso for an appeal to the Minister against the refusal of the authority to give their approval—that is approval of the route and so forth—or against any restrictions as to the matters aforesaid, and the decision of the Minister is to be final.

It is under s. 65 of the Act of 1947, combined, no doubt, with the provisions of s. 2 (1) and s. 3 (1) of the Act of 1947, that the defendants say that what they are doing is lawful. I was at one time doubtful whether a letter dated Feb. 5, 1948, from the clerk to the licensing authority was, in view of its rather conditional terms, a sufficient route approval to satisfy the requirements of s. 65. On the whole, I think that it was, and that the plaintiff cannot avail himself of that particular objection, which I hold to be unfounded. I am by no means prepared to say that the British Transport Commission has no right to run road services outside the special area except by acquisition of undertakings by agreement (under s. 7 of the Act of 1947) or by means of a vesting of undertakings (s. 12) or under a road transport scheme (s. 63), and I think that they—that is, the Commission—have such a right, namely, under s. 2 (1) and s. 3 (1) and s. 65. The effect of s. 65, as it seems to me, is to substitute a different measure of control from that to which the London Passenger Transport Board was formerly subject. I confess to thinking it somewhat strange that the plaintiffs and others in a similar position should have no possibility of claiming compensation when persons similarly affected by the operation of an area road transport scheme possess it, and no satisfactory explanation justifying such a differentiation was given me. But there it is, the Act seems to provide for the payment of compensation in the one case and not in the other.

On the whole, if the action had been brought against the British Transport Commission and the London Transport Executive as co-defendants, I should, I think, have been prepared to hold without question that one of those bodies was entitled to do that of which the plaintiff complains, without deciding which of them was so entitled, but that is not the position. The London Transport Executive are the only defendants, and the issue is not as to the powers of the British Transport Commission, but as to the powers of the defendants. That question depends on the terms of the relevant Scheme of Delegation of Functions which was sealed by the British Transport Commission on Dec. 5, 1947, and approved by the Minister on Dec. 11, 1947. To that document I must now refer. It says that :

The British Transport Commission in exercise of the powers conferred upon them by s. 5 of the Transport Act, 1947, and of all other powers enabling them in that behalf, hereby make the following Scheme: (1) In this Scheme the following expressions have the meanings hereby respectively assigned to them, that is to say "the Minister" means the Minister of Transport; "the Commission" means the British Transport Commission; "the Executive" means the London Transport Executive; "the other Executives" means the Railway Executive, the Docks and Inland Waterways Executive, the Road Transport Executive, and, as from the appointed day, the Hotels Executive; "the Act" means the Transport Act, 1947; and, except where the context otherwise requires, other expressions have the same meanings as in the Act. (2) This Scheme applies to the following activities of the Commission: (a) activities which the Commission are empowered to carry on by virtue of the transfer to them under pt. II of the Act of the undertaking of the London Passenger Transport Board; (b) activities which the Commission are empowered to carry on by virtue only of the powers conferred upon them by s. 2 (1) of the Act so far as those activities are carried on in connection with the activities referred to in sub-para. (a) of this paragraph or are ancillary to such activities; . . . (3) Subject to the provisions of this Scheme, the Commission hereby delegate to the Executive the functions of the Commission in relation to their activities set out in sub-paras. (a) and (b) of para. 2 of this Scheme to the intent that, subject as aforesaid, all the rights, powers and liabilities of the Commission in connection with those activities shall be exercisable and dischargeable by the Executive; and the Executive shall have power to perform any of the functions delegated to them through agents.

I do not think there is anything very much in the rest of the Scheme, which bears the seal of the British Transport Commission authenticated by the chairman and chief secretary, and is also sealed as approved by the Minister of Transport.

It is said on behalf of the defendants that the effect of the Scheme was to transfer to the defendants the powers or activities which could have been exercised by the London Passenger Transport Board freed (by s. 65 of the Act of 1947) from the restrictions (under s. 72 of the Act of 1930) to which the London Passenger Transport Board was previously subject, but subject to the substituted "route approval" restrictions imposed by s. 65 of the Act of 1947. The plaintiff, on the other hand, says that nothing in the Act of 1947 extends the power of a vested undertaking, that the running of omnibuses on the route in question would not have been within the powers of the London Passenger Transport Board except subject to the restrictions (that is to say, under s. 72 of the Act of 1930) which would have given the plaintiff at least a right to be heard, and that the powers of the British Transport Commission to run a road service on the route in question are not derived from the London Passenger Transport Board at all, but arise (if they exist) from another source altogether, and that there is nothing in the Scheme of Delegation in which alone the defendants' powers are contained to transfer those powers to the defendants.

The choice between these conflicting submissions is, in my judgment, difficult to make. If the defendants' view is right, why did not the British Transport Commission delegate in comprehensive language the whole of their powers so far as exercisable in and over one of the many areas to which statutory meanings are attached, such as the London Passenger Transport Area, the London Traffic Area, or the Metropolitan Traffic Area? The language of the Scheme is, in my judgment, obscure and confusing when it might easily have been made clear and plain. For instance, if, at the end of para. 2 (a) of the Scheme, there had been added some such words as "by the combined operation of the transfer and the provisions of the Act" the meaning would have been at least somewhat clearer than it is. It is easy to be critical of the obscurities in Acts of Parliament, but it is only fair to remember the difficult circumstances of debate and discussion in which those Acts have passed into law. No such excuse can be offered for the Scheme of Delegation which I am now considering. I am sure that the Ministry of Transport could have enlisted the services of some person, whether calling himself a draftsman or not, who was capable of achieving something better than this clumsy and confused production. On the whole, I have come to the conclusion that the provision of road services along the Hitchin-Weston Road is within the powers of the British Transport Commission, and regard being had in particular to the terms of para. 2 (b) of the Scheme I have come (though with considerable hesitation)

to the further conclusion that those powers were effectively delegated by the British Transport Commission to the defendants by para. 3 of the Scheme. I must, therefore, dismiss the action. It is unusual to deprive successful defendants of their costs, but in all the circumstances of the present case I shall dismiss the action without costs.

Action dismissed. No order as to costs.

Solicitors: *Mawby, Barrie & Letts* (for the plaintiff); *Solicitor to the London Transport Executive.*

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*] A

BOSTEL BROTHERS, LTD. v. HURLOCK.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.J.J.), June 4, 7, 8, 29, 1948.] B

Building—Control—Permitted cost of work exceeded—Defences open to alleged offender—Cost of supplying article—Inclusion in permitted cost—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended by S.R. & O., 1941, Nos. 1596 and 2011, 1945, No. 502), reg. 56A (2), (6), (8).

By an oversight in failing to apply for a supplementary licence, the plaintiffs supplied material and did repair work on the defendant's house in excess of the cost covered by licences from the Minister of Works. In an action by the plaintiffs to recover the balance due for the additional work:—

HELD: (i) if a licence is granted to do certain work at a specified cost and the cost is exceeded, that is *prima facie* a contravention of reg. 56A, para. 2, of the Defence (General) Regulations, 1939, and the defences provided by provisos (a) and (b) of para. 6 of the regulation are available to the alleged offender, and it matters not that there is also an offence under para. 8 of the regulation as for a breach of a condition of the licence; in the circumstances there had been a contravention of the regulations; and the defendants could not bring themselves within proviso (a) or proviso (b), and, therefore, the plaintiffs' action must fail. C

Dictum of LORD ELLENBOROUGH, C.J., in Langton v. Hughes (1813) (1 M. & S. 593, 596); *Brightman & Co. v. Tate* ([1919] 1 K.B. 463); and *Re Mahmoud & Ispahani* ([1921] 2 K.B. 716), *applied*. D

(ii) if the cost of the work for which a licence was obtained included the cost of providing and fixing an article and the licensed cost was exceeded, it was not permissible to deduct the actual cost of the article from the excess and seek to reduce the apparent excess to that extent. E

Quaere: whether, if a builder already has an article, or if the article is obtainable without a licence, the building licence must cover its cost as well as the cost of fitting it. F

[AS TO CONTRACTS MADE VOID OR ILLEGAL BY STATUTE, see HALSBURY, Hailsham Edn., Vol. 7, pp. 164-169, paras. 235-239; and FOR CASES, see DIGEST, Vol. 12, pp. 269-274, Nos. 2200-2244.]

FOR DEFENCE (GENERAL) REGULATIONS, 1939, reg. 56A, see HALSBURY'S STATUTES, Vol. 39, p. 1001.] G

Cases referred to:

- (1) *Langton v. Hughes*, (1813), 1 M. & S. 593; 12 Digest 270, 2214.
- (2) *Brightman & Co. v. Tate*, [1919] 1 K.B. 463; 88 L.J.K.B. 921; 120 L.T. 512; 12 Digest 271, 2217.
- (3) *Re Mahmoud and Ispahani*, [1921] 2 K.B. 716; 90 L.J.K.B. 821; 125 L.T. 161; 12 Digest 271, 2220.

APPEAL, by the defendant, from an order of His Honour JUDGE ARCHER, K.C., made at Brighton County Court, and dated Aug. 1, 1947, allowing the plaintiffs' claim for the balance for work done and materials supplied, the work in respect of which the claim was made being in excess of the cost covered by licences from the Minister of Works. The appeal was allowed. The facts appear in the judgment of the court. H

Gardiner, K.C., and *W. Gumbel* for the defendant.

Beney, K.C., and *Dutton Briant* for the plaintiffs.

Cur. adv. vult.

June 29. **SOMERVELL, L.J.**, read the following judgment of the court. By a writ issued in the High Court the plaintiffs claimed a sum of £203 2s. 5d., as the balance due for work done and materials supplied. The account submitted by the plaintiffs to the defendant on which the claim was based showed £260 covered by an estimate and further itemised sums making up a total of £408 12s. 5d. The defendant, as appeared from the writ, had paid £200, and there was an agreed credit of £5 10s. 0d. Application was made for judgment under R.S.C., Ord. 14. The defendant filed an affidavit. He alleged a tender of, and admitted liability for, £60, the balance of the estimate. He admitted that there might be some further sum due, but in respect of any amount over £260, or substantially all of it, his first defence was that the extras claimed for over and above the work covered by the estimate had never been ordered by him. Alternatively, in respect of such extras, he alleged that the work was done "without any licence from the Minister of Works being in force in respect thereof and that such additional work was unlawful," and the plaintiffs could not recover. The master gave the plaintiffs liberty to sign judgment for £104 18s. 4d. with leave to defend as to the residue and remitted the action to the county court. The licences in fact issued, which are referred to later, covered £293. We were told which items in addition to the £60 made up the £104 18s. 4d. It would seem that these were items as to which the defendant did not sustain or withdrew his allegation that they had not been ordered, and in respect of the balance over the £293 the question of illegality was not raised. The learned county court judge held that the defence that the extras were not ordered failed, and the defendant before us accepted this finding. The learned judge found that the defence of illegality was not made out, and from this part of his judgment the defendant appeals.

Before referring to the statutory provisions as to the necessity for licences it will be convenient to recapitulate the main facts, and the principle of law which has to be applied. All the work in question was work on a house called "Hay Tor," at Saltdean, near Brighton. This house had been bought by the defendant, and the plaintiffs were instructed by the defendant to prepare an estimate for putting it into habitable condition. It had been vacant for some time, and was to be inhabited by a Mr. and Mrs. Pierson who were friends of the defendant. The estimate dated Mar. 15, 1945, was for £260. It covered the ordinary items that one would expect. The electric light and power installation was to be inspected and defects made good. In respect of this item a provisional sum of £10 was referred to which was to be deducted from the estimate if no defects were found. The estimate was accepted and a licence was applied for on Apr. 4, 1945. On May 2 a licence was issued to Mrs. Pierson to carry out repairs and decorations and overhaul the electrical installation at a total cost not exceeding £278. The application form and the specification accompanying it have been lost. The work was carried out between June and September. The electric light installation was found to be considerably defective, and from time to time, as often happens in these circumstances, further work on other matters was found to be necessary and was ordered and done. On July 5 a further licence was applied for and was granted on Aug. 7, covering the repair of a fence and gate and the overhaul of electric light installation at a cost not exceeding £15. The total cost of the electrical work according to the plaintiffs' bill was about £50.

The principle of law relied on was stated concisely and in a form appropriate to the present issue by **ELLENBOROUGH, C.J.**, in *Langton v. Hughes* (1) (1 M. & S. 593, 596): "What is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action." We are concerned with a defence regulation which has the same force as an Act of Parliament. In *Brightman & Co. v. Tate* (2), the general subject-matter was similar to that in the present appeal. The plaintiff, a builder, claimed for the balance of an account. There was a prohibition of the carrying on of building work above a certain cost without a licence. The defendants asserted that as from a certain date the work done by the plaintiff was outside the licence granted and was illegally performed. It was held that the work in respect of which the claim was made was outside the licence, and having regard to the terms of the Order was illegal, and the sum could not be recovered. The same principle was considered and applied by this court in *Re Mahmoud and Ispahani* (3). In

that case the plaintiff had sold the defendant a certain quantity of linseed oil. There was an Order, the effect of which was that buyers and sellers of linseed oil must be licenced. The plaintiff had a licence and the defendant had not, though he had, in fact, told the plaintiff that he had a licence. It was held that the contract was prohibited by the Order and the plaintiff could not recover. In *Brightman & Co. v. Tate* (2) ([1919] 1 K.B. 463, 472), McCARDIE, J., had expressed some doubt whether the principle applied if the plaintiff had reason to believe there was no illegality. The decision in *Re Mahmoud & Ispahani* (3) made it clear that any such doubt was not well founded. The principle is, of course, only applicable if the contract or the work done under the contract is illegal.

I will now turn to the relevant provisions of the Defence (General) Regulations, 1939. The regulation with which we are concerned is reg. 56A, which was substituted by Order No. 1596 of 1941, amended later by Order No. 2011 of 1941, and continued in force up to July 1, 1945, when further amendments came into force under Order No. 502 of 1945. As will be seen under the code which we have to apply there were certain provisions authorising work to be done without a licence. The learned county court judge held that the work sued for was covered by these provisions, and the main issue is whether there was any evidence on which he could so find. Paragraph (2) of reg. 56A in its original form is as follows :

Subject to the provisions of this regulation, the execution in the United Kingdom of any operation begun at any time on or after Jan. 1, 1942, which involves the doing of any description of any work specified in pt. III of sched. VI to these regulations, not being an operation executed for a purpose specified in the first column of the table set out in pt. I of that schedule, shall be unlawful except in so far as there is in force in respect thereof a licence granted by the Minister : Provided that no licence shall be required by virtue of this paragraph if the total cost of the work of that description involved in the operation does not exceed such sum as may be prescribed by order of the Minister in relation to work of that description involved in an operation begun at that time.

The relevant words of pt. III of sched. VI are :

Work done in the construction, re-construction, alteration, demolition, repair, or decoration of a building or of any such works as are mentioned in pt. II of this schedule . . .

The relevant words of pt. II are :

. . . works required for the purpose of providing water, light, heating or other services for a building . . .

The next relevant paragraph is para. (6) which I will read as amended by Order No. 2011 of 1941, which substituted a new para. (b) in the proviso :

If any operation is executed or work is carried out in contravention of any of the first three paragraphs of this regulation the person at whose expense the operation is executed or the work is carried out, and (where he is not the same person) the person undertaking the execution of the operation or the carrying out of the work, and (in either case) any architect, engineer or other person employed in an advisory or supervisory capacity in connection with the execution of the operation or the carrying out of the work shall each be guilty of an offence against this regulation : Provided that— (a) where it would be a defence for a person charged with an offence against this regulation to prove that the cost of an operation or of any relevant work did not exceed a particular amount, it shall also be a defence for him to prove that at the time when the operation in respect of which he is charged was begun or the work in respect of which he is charged was carried out he had reasonable grounds for believing that the said cost would not exceed that amount ; (b) it shall be a defence for a person charged with a contravention of any of the first three paragraphs of this regulation to prove that the acts done without authorisation or licence were urgently necessary and were done in circumstances of emergency which rendered it impracticable to obtain authorisation thereof or a licence therefor.

The next relevant paragraph is para. (8) :

If any condition attached to an authorisation or licence granted for the purposes of this regulation is contravened or not complied with, then, whether or not the authorisation or licence is revoked, the person undertaking the execution of the operation, or the carrying out of the work, in respect of which the authorisation or licence was granted and any architect, engineer or other person employed in an advisory or supervisory capacity in connection with the execution of the operation or the carrying out of the work shall each be guilty of an offence against this regulation.

The relevant amendments made by Order No. 502 of 1945 are as follows :

1. For paras. (2) and (3) of reg. 56A of the Defence (General) Regulations, 1939, there shall be substituted the following paragraph : “ (2) Subject to the provisions of this regulation, the carrying out in the United Kingdom, except for a purpose specified in the first column of the table set out in pt. I of sched. VI to these regulations, of any work specified in pt. III of that schedule or of any maintenance work on a building or on any such works as are mentioned in pt. II of that schedule, shall be unlawful except in so far as there is in force in respect thereof a licence granted by the Minister :
A Provided that the Minister may by order authorise the carrying out of such work without a licence within such limits of cost as may be specified in the order, and may prescribe different limits of cost for different classes of work or for different classes of property or for different areas, and any such order may, without prejudice to the generality of this provision, limit the cost of the work, or of the work of any class, that may be carried out in any period specified in the order on any single property as defined in the order.” 2. Any licence granted by the Minister of Works under para.
B (2) or para. (3) of the said regulation as it had effect before the date on which this Order comes into operation, being a licence in force immediately before the said date, shall continue in force and shall have effect as if it had been granted under para. (2) of the said regulation as amended by this Order.

By para. (4) of Order No. 502 of 1945 :

In para. (8) of the said regulation after the word “ revoked ” there shall be inserted
C the words “ the person at whose expense the operation is executed or the work is carried out in respect of which the authorisation or licence was granted and (where he is not the same person), ” and the words “ in respect of which the authorisation or licence was granted ” shall be omitted.

So far as para. (8) is concerned it will be seen that the amendment adds to the offenders the person at whose expense the work is carried out. The work contemplated was, in our view, work for which, under the regulation, a licence
D was necessary. It has been thought right to set out these amendments, but, in our opinion, if the work done was an offence under the original or amended code the principle referred to in the earlier part of this judgment is plainly applicable. There was no material alteration, so far as this case is concerned, by the amendments made in 1945. If the work in respect of which the claim is made was, as it clearly was, in excess of the cost covered by the licences, and cannot be brought within the proviso of para. (6) if applicable, then, in
E our opinion, it was illegal, the principle referred to applies, and the plaintiffs cannot recover.

The first licence issued is as follows :

Subject to the conditions hereafter set out licence is hereby granted to carry out repairs and decoration, also overhaul electrical installation in accordance with application dated Apr. 4, 1945, and relative specification lodged with the Ministry at “ Hay
F Tor,” Arundel Drive, Saltdean, Sussex, at a total cost not exceeding £278.

Then there are conditions, of which the fifth condition is :

In the carrying out of the work authorised by this licence the total cost specified above shall not be exceeded and no work shall be carried out in purported exercise of the authority conferred by this licence except as specified above.

The second licence was as follows :

Subject to the conditions hereafter set out licence is hereby granted to incur additional expenditure to that authorised under Licence No. 0/12/45/4181 to repair fence and gate and overhaul electric light installation in accordance with application dated July 5, 1945, lodged with the Ministry at “ Hay Tor,” Arundel Drive, Saltdean, Sussex, at a total cost not exceeding £15.

and there was a similar condition to that which I have already read.

If a licence is granted to do certain work at a certain cost and the cost is
H exceeded, is this *prima facie* a contravention of para. (2) of the regulation, and, therefore, within para. (6), or is there no contravention of para. (2), the matter falling to be dealt with solely under para. (8) as a breach of a condition attached to the licence ? The importance of this is that para. (8) contains no exception. If, therefore, the matter had to be considered solely under para. (8) the question whether the plaintiffs can justify not obtaining a further licence does not arise. In our opinion, it is *prima facie* a breach of para. (2). The proviso to that paragraph shows that the licensing system operates on cost. If the cost covered by a licence is exceeded there is, we think, no licence in force

in respect of the work covered by the excess. The words of para. (6) including the provisos apply to such a case. It may be that there has also been a breach of a condition within para. (8). It is unnecessary to analyse this point further, as we think the defendant succeeds on the assumption more favourable to the plaintiffs, *viz.*, that the proviso to para. (6) is applicable.

The learned county court judge proceeded on the basis that there was no illegality if the case can be brought within the provisos or one of them. We think this is plainly right. Paragraph (2) begins with the words "Subject to the provisions of this regulation," and the regulation must be read as a whole to find out what is prohibited. Some time in 1946 the fact that the amounts stated in the licences had been exceeded was brought to the attention of the authorities, and on Aug. 13, 1946, the following letter was written to the plaintiffs:

Dear Sir, Defence Regulation 56A, Hay Tor, Saltdean. With reference to work carried out by your firm on the above property under licence from the Brighton Corporation, I am informed that the cost of the work exceeded the permitted sum under the licence by £130. The circumstances under which you came to do this work have been fully discussed with the local authority. It would seem that there was a genuine oversight on your part in your failure to make an application for a supplementary licence. This department is prepared to accept your explanation and take no further action on the contravention of the regulation.

At the trial the learned judge, with the approval of both parties, heard counsel instructed by the Ministry, and a Mr. Cooper from the regional office of the Ministry gave evidence. Unfortunately, the file dealing with the matter had been lost, but Mr. Cooper stated that the matter had been fully investigated. There is, obviously, a question as to the admissibility of the letter and of this evidence and its effect assuming the parties took no objection to its being before the judge. It is desirable to read certain paragraphs from the judgment. After referring to the letter of Aug. 13 the learned judge says:

To me this means that, though the papers are missing from the file, a matter left to the department had been fully investigated and considered to be within the provisos of the regulations. The letter ends by saying that "no further action will be taken." That seems to be a necessary corollary to what appears before it. This case is not at all as if there might or might not have been a doubtful prosecution. The explanation was accepted. The courts have, no doubt, always construed the regulations themselves, and are on the watch to see that they are not departed from by the department itself. Except for the loss of the file I see no failure. The details of the investigation I do not know. I would much rather have seen the file, but there is no reason for doubting what Mr. Cooper says, and, if what he says was done was done, it seems to me it was exactly what the regulations require. Whether the form of letters might be more satisfactory from the point of view of the man who wants to be paid is another matter. It was strongly urged on me that the letter was a mere intimation that no proceedings would be taken by the Ministry to prosecute for an offence. I cannot so read it. The Ministry afforded me the assistance of counsel, for which I am very grateful. What Mr. Bristowe did was to draw my attention to the clauses of the regulations which are relevant and he then stated what the practice of the Minister is and has been under them, leaving me to hear the arguments of counsel for the parties as to the construction of the regulations. He very properly did not state the Minister's view of the regulations, their construction being a matter entirely for this and the higher courts. He gave me a very clear statement of the practice of the Minister, and the following is the substance of it. The Minister recognises that in some circumstances it is impossible for either the builder or owner to give a firm estimate of the cost. He recognises that strictly the builder should stop whenever he sees that the costs will be exceeded. This would not be practicable because of the loss of time. In practice, therefore, the Minister expects the builder to report as soon as possible; and if, in the process of work, to get a fresh licence. If, however, the builder reports excess the circumstances are fully investigated and, if the Minister is satisfied that the conduct of the builder and those concerned is *bona fide*, and that the excess is due to some sufficient cause, such as fluctuation or discovery of unexpected circumstances, then instead of prosecuting the Minister takes the view that it would be wrong to take proceedings and causes to be written a letter such as that exhibited in the present case. The view is acted on that proviso (b) covers excess of operations and permits (a) excess of costs. In a case when the Minister comes to the conclusion that the facts are within the provisos how can he reasonably act otherwise? It, then, is my duty for me to say whether that conclusion of his is right. I hold that I have no evidence to the contrary, that I have some evidence which is affirmative, and that in a matter such as this the maxim *omnia esse rite acta presumuntur* should have one of its rather rare applications.

In the first place, we find it impossible to construe the letter in this way. The reference to a genuine oversight and the reference to a contravention of the regulations are, as it seems to us, quite inappropriate if the writer intended to say that the authorities were satisfied that an application was unnecessary by reason of the proviso. There was a reasonable explanation of an "oversight" in that Mr. Bostel senior became ill while the work was in progress and the business was taken over by his son who had just returned from the

A Forces. The natural construction of the letter, in our view, is that there had been a breach, that it was due to an innocent oversight, and that it was, therefore, proper not to take criminal proceedings. The view of the writer of the letter is, of course, irrelevant, but the learned judge's mind was clearly influenced by the construction which he put on it, and which, in our view, was a wrong construction. The learned judge does not find any specific facts to support his conclusion either that at the time the work was done the plaintiffs had
B reasonable grounds for believing that the cost would not exceed the amount of the licence, or that the works were urgently necessary for the purpose for which the operation was undertaken and were done in circumstances of emergency which rendered it impracticable to obtain authorisation. It is, therefore, necessary to consider whether on the evidence the learned judge's conclusion can be justified. [HIS LORDSHIP reviewed the evidence.] In our opinion,
C there is no evidence which justifies a finding that the case falls within either proviso (a) or proviso (b).

Counsel for the plaintiffs made a final submission based on an argument that, if in the original estimate or in the extras an article was to be *supplied* and fixed, the cost of *supplying* the article did not have to be covered by the licence. In the present case the estimate which was the basis of the application for the first licence covered two new grates which were to be supplied and fixed. From the
D account delivered it appears that these were estimated to cost £30. The account also shows that the grates were bought at a total cost of £31 10s. 0d. This, however, is irrelevant. If the cost of the work for which a licence is obtained includes the cost of providing and fixing an article and the licensed cost is exceeded it is not, in our view, permissible to deduct the actual cost of the article from the excess and seek to reduce the apparent excess to that extent. Therefore, in the present case it is not permissible to deduct the £30. A somewhat different
E issue may arise with regard to the extras. This point was never raised and investigated below, but counsel for the plaintiffs is, of course, entitled to support the judgment on any point which is open to him on the facts found. In the present case the relevant facts are not found in that counsel for the plaintiffs has to ask us to estimate what proportion of a composite figure, *e.g.*, for supplying and fixing a cistern, should be regarded as the cost of the cistern. There
F are other difficulties. If a builder already has an article, must the building licence cover its cost as well as the cost of fixing it? If he has not the article, it certainly is not at all clear that the cost should not be covered by the licence.

We express no opinion on the question, obviously an important one, whether the cost of all articles to be used in the work in respect of which a licence is applied for must, as a matter of law, be included even if, in fact, apart from this
G regulation, the article has been already obtained or is obtainable without a licence. It may depend on what the article is. If the point had been raised below, this could have been gone into and the plaintiffs could themselves have given evidence as to the circumstances in which these articles were obtained. In our opinion, even assuming the point could have been maintained as to the cost of one or more of the articles in question—a boiler, a cistern and some roofing felt—it is too late to seek to raise it at this stage. For these reasons,
H the appeal must be allowed.

Appeal allowed with costs.

Solicitors : *Clifford-Turner & Co.* (for the defendant) ; *R. L. Mason*, agent for *Gates & Co.*, Brighton (for the plaintiffs).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re DIPLOCK'S ESTATE, DIPLOCK AND OTHERS *v.*
WINTLE AND OTHERS (AND ASSOCIATED ACTIONS).

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley and Evershed, L.JJ.),
February 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, March
1, 2, 8, 9, 10, 11, 12, July 9, 1948.]

Mistake—Mistake of law—Money paid under mistake—Recovery—Money had and received—Personal claim in equity—Construction of will—Residue of testator's estate paid to charitable institutions by executors—Directions in will void for uncertainty—Right of those entitled under intestacy to recover from institutions sums paid.

Limitation of Action—Recovery of sums paid under invalid residuary bequest—Action by next of kin—Limitation Act, 1939 (c. 21), s. 20.

Money—How far money can be followed—Money paid to charitable institutions by executors under a mistake as to the construction of a will—Directions in will void for uncertainty—Right of those entitled under an intestacy to trace.

By his will, dated Nov. 3, 1919, a testator, who died on Mar. 23, 1936, directed his executors to apply his residuary estate "for such charitable institution or institutions or other charitable or benevolent object or objects in England" as they in their absolute discretion should select. By 1939, pursuant to that direction the executors had paid over £200,000 to 139 charitable institutions, and in that year certain of the testator's next of kin challenged the validity of the direction. Accordingly, on Oct. 18, 1939, the executor's solicitors wrote to each of the said charitable institutions informing them of the challenge and calling on them not to deal with the distributed sums until they had further heard from them. In 1944 the House of Lords held that the residuary bequest was void for uncertainty. In actions begun by the testator's next of kin in 1940 and 1945 to recover the sums paid to the charitable institutions:—

HELD: (i) it was impossible to contend that a disposition which, according to the general law, was held to be invalid could yet confer on those who, *ex hypothesi*, had improperly participated under the disposition some moral or equitable right to retain what they had received against those whom the law declared to be properly entitled.

(ii) the next of kin had an equitable right to recover the money paid by mistake by the executors to the charities, and a claim thereunder was not liable to be defeated merely (a) in the absence of administration by the court, or (b) because the mistake under which the original payment was made was one of law rather than fact, or (c) because the charity concerned in any particular claim had no title and was a stranger to the estate. In the first instance the right was against the executors, and the extent of the claim against the charities was limited to the amount not recovered from the executors.

David v. Frowd (1833) (1 My. & K. 200), considered.

Re Hatch, Hatch v. Hatch ([1919] 1 Ch. 351), criticised.

Re Mason ([1929] 1 Ch. 1), explained.

Per cur: the absence or exhaustion of the beneficiary's right to go against the wrongdoing executor or administrator ought properly to be regarded as the justification for calling on equity to come to the aid of the law by providing a remedy which would otherwise be denied to the party who has been deprived of that which was justly his.

(iii) the actions were "in respect of" claims to personal estate within the Limitation Act, 1939, s. 20, and, therefore, the limitation period applicable to the equitable claims *in personam* was 12 years, and the claims were not barred.

Re Blake, Re Minahan's Petition of Right ([1932] 1 Ch. 54), considered.

(iv) equity recognised the right of the next of kin to the money as a proprietary interest, and when once that proprietary interest had been created as a result of the wrongful dealing with the funds by the executors, it would persist and be operative against an innocent third party who was

a volunteer provided only that means of identification in or disentanglement from a mixed fund remained. There could be no difference in principle between a case where the mixing had been done by the volunteer and one where the mixing had been done previously by the fiduciary agent.

Sinclair v. Brougham ([1914] A.C. 398), *applied*.

(v) where a defendant institution had mixed with its own money money received from the executors and employed the mixed fund in the purchase of property (*e.g.*, land or stock), the next of kin would be entitled to a charge on the property, but where the money from the executors had been used in the alteration or improvement of assets which the institution already owned, the money could not be traced in any true sense and a declaration of charge would not produce an equitable result and was, therefore, inapplicable. The position was similar where the money had been given for the purpose of the payment off of an existing incumbrance on land.

(vi) where moneys from the executors had been mixed in an active banking account by a defendant institution, withdrawals thereout should not be attributed rateably to the "Diplock money" and the charity money. The rule in *Clayton's* case (1816) (1 Mer. 529, 572) should be applied, but that rule should not be applied by analogy to the purchaser and sale of war stock.

Decision of WYNN-PARRY, J. ([1947] 1 All E.R. 522) *reversed in part*.

[AS TO MISTAKE OF LAW, see HALSBURY, Hailsham Edn., Vol. 23, pp. 131, 132, paras. 181, 182; and FOR CASES, see DIGEST, Vol. 35, pp. 91-95, Nos. 9-44.

AS TO RIGHT TO FOLLOW ASSETS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 200-202, paras. 192, 193; and FOR CASES, see DIGEST, Vol. 43, pp. 1017-1023, Nos. 4580-4624.]

Cases referred to :

- (1) *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J.Ch. 225; 171 L.T. 141; 2nd Digest Supp.
- (2) *Re Hallett's Estate, Knatchbull v. Hallett*, (1880), 13 Ch.D. 696; *sub nom.*, *Re Hallett's Estate, Knatchbull v. Hallett, Cotterell v. Hallett*, 49 L.J.Ch. 415; 42 L.T. 421; 43 Digest 1021, 4614.
- (3) *Sinclair v. Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; *varying S.C. sub nom.*, *Re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. 183; 35 Digest 167, 8.
- (4) *Gillespie v. Alexander*, (1827), 3 Russ. 130; 23 Digest 432, 5035.
- (5) *David v. Frowd*, (1833), 1 My. & K. 200; 2 L.J.Ch. 68; 24 Digest 793, 8240.
- (6) *Mohan v. Broughton*, [1900] P. 56; 69 L.J.P. 20; 82 L.T. 29; 23 Digest 248, 3035.
- (7) *Nelthrop v. Hill*, (1669), 1 Cas. in Ch. 135; 22 E.R. 730; 23 Digest 428, 4983.
- (8) *Grove v. Banson*, (1669), 1 Cas. in Ch. 148; 22 E.R. 736; 44 Digest 291, 1229.
- (9) *Chamberlain v. Chamberlain*, (1675), 1 Cas. in Ch. 256; Freem. Ch. 141; 22 E.R. 788; 25 Digest 161, 103.
- (10) *Noel v. Robinson*, (1682), 1 Vern. 90; 2 Vent. 358; 23 E.R. 334; 23 Digest 428, 4988.
- (11) *Anon.*, (1683), 1 Vern. 162; 23 E.R. 388; 23 Digest 432, 5031.
- (12) *Newman v. Barton*, (1690), 2 Vern. 205; 23 E.R. 733; 23 Digest 428, 4989.
- (13) *Anon.*, (1718), 1 P. Wms. 495; 24 E.R. 487; 23 Digest 430, 5010.
- (14) *Orr v. Kaines*, (1750), 2 Ves. Sen. 194; 28 E.R. 125; 23 Digest 430, 5013.
- (15) *Walcott v. Hall*, (1788), 2 Bro. C.C. 305; 23 Digest 430, 5015.
- (16) *Greig v. Somerville*, (1830), 1 Russ. & M. 338; 23 Digest 432, 5036.
- (17) *Sawyer v. Birchmore*, (1837), 2 My. & Cr. 611; 1 Keen, 825; 6 L.J.Ch. 277; 24 Digest 794, 8241.
- (18) *Thomas v. Griffith*, (1860), 2 De G. F. & J. 555; 30 L.J.Ch. 465; 3 L.T. 761; 20 Digest 268, 287.
- (19) *Davies v. Nicolson*, (1858), 2 De G. & J. 693; 27 L.J.Ch. 719; 31 L.T.O.S. 374; 23 Digest 432, 5038.
- (20) *Re Rivers, Pullen v. Rivers*, [1920] 1 Ch. 320; 88 L.J.Ch. 462; 121 L.T. 57; 24 Digest 596, 6298.
- (21) *Fenwick v. Clarke*, (1862), 4 De G. F. & J. 240; 31 L.J.Ch. 728; 6 L.T. 593; 23 Digest 329, 3957.
- (22) *Peterson v. Peterson*, (1866), L.R. 3 Eq. 111; 36 L.J.Ch. 101; 23 Digest 431, 5025.
- (23) *Hilliard v. Fulford*, (1876), 4 Ch.D. 389; 46 L.J.Ch. 43; 35 L.T. 750; 23 Digest 431, 5020.

- (24) *Re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502; 104 L.T. 331; *sub nom.*, *Re Robinson, McLaren v. Robinson*, 80 L.J.Ch. 381; 43 Digest 960, 4002.
- (25) *Re Hatch, Hatch v. Hatch*, [1919] 1 Ch. 351; 88 L.J.Ch. 147; 120 L.T. 694; 35 Digest 95, 36.
- (26) *Rogers v. Ingham*, (1876), 3 Ch.D. 351; 35 L.T. 677; 35 Digest 93, 25.
- (27) *Re Mason*, [1929] 1 Ch. 1; 97 L.J.Ch. 321; 139 L.T. 477; Digest Supp.; *affg.*, [1928] Ch. 385.
- (28) *Re Blake, Re Minahan's Petition of Right*, [1932] 1 Ch. 54; 100 L.J.Ch. 251; 145 L.T. 42; Digest Supp.
- (29) *Hodges v. Waddington*, (1683), 2 Vent. 360; 23 Digest 430, 5011.
- (30) *Gittins v. Steele*, (1818), 1 Swan. 199; 23 Digest 429, 4998.
- (31) *Re Johnson, Sly v. Blake*, (1885), 29 Ch.D. 964; 52 L.T. 682; 32 Digest 402, 808.
- (32) *Banque Belge Pour L'Etranger v. Hambrouck*, [1921] 1 K.B. 321; 90 L.J.K.B. 322; 35 Digest 168, 9.
- (33) *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray*, (1884), 9 App. Cas. 519; 53 L.J.Ch. 745; 51 L.T. 462; *revsg.*, S.C., *sub nom.*, *Re Guardian Permanent Benefit Building Society (The Crace-Calvert Case)*, (1882), 23 Ch.D. 440; 7 Digest 515, 367.
- (34) *Devaynes v. Noble, Clayton's Case*, (1816), 1 Mer. 529, 572; 12 Digest 483, 3961.
- (35) *Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433; 73 L.T. 207; 43 Digest 1022, 4616.

APPEALS from a judgment of WYNN-PARRY, J., delivered on Mar. 11, 1947 and reported, [1947] 1 All E.R. 522.

The actions were brought by persons entitled to share in such part of an estate as to which the testator died intestate to recover certain sums of money paid to the defendants, various charitable institutions, by the executors of the testator's will under a direction which was subsequently declared by the House of Lords to be void for uncertainty (*Chichester Diocesan Fund v. Simpson* ([1944] 2 All E.R. 60)). WYNN-PARRY, J., held, *inter alia*, that the rule that money paid under a mistake of law was irrecoverable was of general application and that the plaintiffs could not maintain a claim for the return of the money as money had and received. The Court of Appeal allowed the appeals on the general grounds: (i) that the plaintiffs had a right *in personam* in equity against the recipients which was not liable to be defeated by the fact that the payment to them had been made under a mistake of law by the executors, and (ii) that the plaintiffs had a right *in rem* to the money recognised by equity which would enable them to trace the money, providing only that it was possible to identify or disentangle it where it had been mixed with assets of the recipients.

Pascoe Hayward, K.C., J. L. Arnold and Cockle for next of kin.

John Monckton for the judicial trustee.

Neville Gray, K.C., and Dunbar for the National Institute for the Deaf and Dr. Barnardo's Homes.

Gerald Upjohn, K.C., and Dunbar for Prince of Wales' Hospital, Plymouth, and Leaf Homeopathic Hospital.

Pennycuik, K.C., and J. F. Bowyer for St. George's Hospital.

Pennycuik, K.C., and J. H. Stamp for Westminster Hospital, Queen Alexandra Cottage Homes, Guy's Hospital and the Heritage Craft Schools.

R. W. Goff for the Royal Sailors' Orphan Girls' School and Home.

Danckwerts (D. H. McMullen with him) for the Attorney-General.

Cur. adv. vult.

July 9. LORD GREENE, M.R.: We do not propose to deliver this judgment. It would take too long and would unduly occupy the time of the court. We shall, therefore, hand down copies of the judgment, keeping for the court one authenticated copy.

The judgment of the court was as follows.

LORD GREENE, M.R.: These appeals, ten in number, which have been heard together, are from a reserved judgment of WYNN-PARRY, J., delivered on Mar. 11, 1947, in those actions together with nine others (all of which were also tried by him together), and from orders made in the actions on Apr. 1, 1947, following further discussion on that day before the learned judge pursuant to his judgment. It will be necessary at a later stage to refer in some detail to the facts of the several cases. At this stage it will be convenient and sufficient to refer in general terms to the circumstances, common to all of them, which

have given rise to these actions, and to state briefly the nature of the claims made in the present appeals (which amount together to some £54,760) and to the effect of the orders appealed from.

The considerable litigation, of which these appeals form but a part, arises out of the will, dated Nov. 3, 1919, and proved on May 16, 1936, of Caleb Diplock who died on Mar. 23, 1936. By the terms of this will the testator's executors were directed to apply his residuary estate :

A . . . for such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may in their or his absolute discretion select and to be paid to or for such institutions and objects if more than one in such proportion as my executors or executor may think proper.

B The total amount of the residuary estate proved, we were told, to be approximately £263,000, but, notwithstanding the size of the estate and the trap which, at least to a lawyer, might have been discerned in the testator's language, the executors proceeded, without any application to the court, to distribute during 1936, 1937 and 1938 £203,067 10s. among 139 charitable institutions of their choice. All payments were made by cheque and in each case a letter was sent to the recipient of the testator's money which emanated from an address in Eastbourne and had printed at the top left-hand corner the words "Wintle & Hodgson, Solicitors." The letter was in the following form ;

C Dear Sir, *Estate of Caleb Diplock deceased. Grants to London and other charities.* The above named deceased by his will bequeathed his residuary estate for distribution amongst such hospitals and institutions or other charitable or benevolent objects in England as his executors might in their absolute discretion select, and in such proportion as they might think proper. The executors have decided to allocate a grant of £— to ——. We have pleasure in enclosing you herewith a cheque for this amount. We shall be obliged if you will sign and return us the enclosed form of receipt. Yours faithfully, (*sd.*) Wintle & Hodgson.

D Nothing turns on the form of the enclosed receipt. There is no doubt that when the executors made these distributions they *bona fide* believed that the testator's directions in regard to his residuary estate were valid and effectual. The letter quoted above did not, as will be observed, exactly transcribe the relevant part of the will, though its language did comprehend the ill-omened disjunctive—"charitable or benevolent objects." It is, however, also clear and conceded by the plaintiffs that each of the defendants in these appeals accepted their respective cheques in the full faith and belief that the executors were properly entitled so to distribute the residuary estate.

E In 1939 certain persons claiming to be next of kin of the testator, having learnt of the contents of his will, challenged the validity of the residuary bequest and intimated their challenge to the executors. Accordingly, on Oct. 18, 1939, the executors' solicitors wrote to each of the institutions who had participated in the distribution of Mr. Diplock's residuary estate (including the defendants in the present cases), informing them of the challenge and calling on them not to deal with the distributed sums in their hands until they had further heard from the executors' solicitors. Whatever be the effect as regards notice of the formal letters which accompanied the distribution, it is conceded by all the defendants that from the time of the receipt by them of the so-called "warning letter" of Oct. 18, 1939, they must be treated as having had notice of the invalidity of the testator's residuary bequest and that, accordingly, his residuary estate had from the date of his death properly been distributable among the persons entitled as his next of kin by virtue of the Administration of Estates Act, 1925.

G On Jan. 3, 1940, the writ was issued in the first of the actions (1940—D.—14) the subject of these appeals. This action has been referred to as "the main action." Originally, the sole plaintiff was John Henry Diplock, one of the claimants as next of kin. He died in 1940. As a result of amendments, the parties to this action (which was intituled "In the matter of the estate of Caleb Diplock deceased") later consisted of the following : as plaintiffs, three persons (in addition to J. H. Diplock) all of whom were subsequently found (by certificate made in the action) to be of the number of those (48 in all) entitled as next of kin to the residuary estate, and as defendants, the three surviving and proving executors, Messrs. Wintle, Handson (both of whom have died) and Thomas, one Johnson (who, with the defendant, Thomas, was trustee of a certain piece

of land and a sum of consols formerly part of the residuary estate). St. George's Hospital and three other charitable institutions. H.M. Attorney-General, Mrs. Handson (the widow and personal representative of the defendant, Handson) and one C. G. Connolly who had (by an order in the main action dated Dec. 8, 1943) been appointed judicial trustee of the estate. Of these defendants only St. George's Hospital (against whom the plaintiffs' claim is for the sum of £8,000 received by it from the executors), the Attorney-General and Mr. Connolly are before this court. The claim against St. George's Hospital was wholly rejected by WYNN-PARRY, J., who ordered the plaintiffs to pay the hospital's costs of the action. A

In all the other nine actions which are the subject of these appeals, the writs were issued on July 28, 1945. All were entitled: "In the matter of the statutory trusts affecting the residuary estate of Caleb Diplock deceased by virtue of the Administration of Estates Act, 1925." In each case there are four plaintiffs, namely, the three claimants as next of kin who with J. H. Diplock are plaintiffs in the main action, together with Mr. Connolly. In each there is but one defendant. The following catalogue of the actions (referred to by their respective appellations used in the appeals) identifies the several defendants and states the amounts of the respective claims and the effect of the relevant orders made in regard to them by the learned judge. In action I.E the plaintiffs claimed the sum of £3,000 paid by the executors to Dr. Barnardo's Homes. This action was dismissed with costs. In action I.F the plaintiffs claimed from G. W. Lilburn, acting secretary of the National Institute for the Deaf, the sum of £1,500 paid to that institution by the executors. This action was dismissed with costs. In action II.A the plaintiffs claimed the sum of £1,000 paid by the executors to the Prince of Wales' Hospital, Plymouth. This action was dismissed with costs. In action II.C the plaintiffs claimed from Sir R. J. S. Dodd, as chairman, and E. Haigh, as honorary secretary, of the Leaf Homeopathic Hospital, the sum of £7,500 paid by the executors to that hospital. In this case WYNN-PARRY, J., ordered the defendants to pay to the plaintiff Connolly (the judicial trustee) the agreed sum of £250, rejected the rest of the claim and ordered the plaintiffs to pay one-half of the defendants' costs. In action III.C the plaintiffs claimed from F. R. D'O. Monro, the secretary of the Royal Sailors' Orphan Girls' School and Home, the sum of £2,000 paid by the executors to that institution. This action was dismissed with costs. In action IV.A the plaintiffs claimed from the president, vice-presidents, treasurer and governors of the Westminster Hospital the sum of £4,000 paid to that hospital by the executors. This action was dismissed with costs. In action IV.B the plaintiffs claimed from Col. J. R. Warren, the chairman, and two deputy chairmen of the Heritage Craft Schools the sum of £2,000 paid by the executors to that institution. This action was dismissed with costs. In action IV.D the plaintiffs claimed from J. C. Smith and others, as the committee of management of Queen Alexandra Cottage Homes, the sum of £4,760 paid by the executors to that institution. In this case the learned judge ordered payment by the defendants to Mr. Connolly of the sum of £1,035 12s. (being the proceeds of redemption of a like nominal amount of 3 per cent. local loans purchased for the sum of £1,000, part of the sum of £4,760), together with interest earned thereon from Jan. 6, 1939, to the date of payment, but he rejected the balance of the claim and ordered the plaintiffs to pay to the defendants 5 6ths of their costs. Finally, in action IV.E the plaintiffs claimed the sum of £21,000 paid by the executors to Guy's Hospital. In this case the learned judge ordered the defendants to pay to Mr. Connolly the sum of £5,052 19s. together with £70 6s. 3d. for interest. He rejected the rest of the plaintiffs' claim, but held the plaintiffs entitled to recover 3 4ths of their costs of the action less those costs relating to the application to speak to the minutes of the judgment, the defendants' costs of that application to be paid by the plaintiffs with the usual provision for set-off. Against all the orders thus briefly described (so far as they are not in their favour) the plaintiffs have appealed to this court. There are no cross-appeals. B
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When the main action was instituted, there had been no determination by the court on the question of the validity of the testator's residuary dispositions, but, pursuant to a direction given by BENNETT, J., in the main action, an originating summons was, in June, 1940, issued by the executors for the purpose of obtaining the court's determination whether or no those dispositions were

valid. This summons (1940—D.—1041) came before FARWELL, J., who decided the question in favour of the validity of the bequest, but his decision was reversed by this court in 1941, and the House of Lords (LORD WRIGHT *dissentiente*) in 1944 (*sub nom.*, *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson* (1)), affirming the decision of the Court of Appeal, finally held the dispositions to be wholly invalidated by the uncertainty introduced by the use of the disjunctive "or benevolent."

A To complete this general statement of facts, reference must be made to an order made by SIMONDS, J., in the main action on Apr. 5, 1944, whereby certain terms of compromise were approved of all claims by the plaintiffs as next of kin of the testator against the estates of the two deceased executors, Messrs. Wintle and Handson, and also against the surviving executor, Mr. Thomas, and against Mrs. Handson, as personal representative of her late husband. The precise terms of the compromise are not material to be here set
B out but the learned judge ordered that such compromise should be binding on all the persons beneficially entitled to any property of the testator as to which he died intestate other than the then surviving plaintiffs (who were parties to the compromise), and he further ordered that all further proceedings should be stayed against the defendants, Thomas and Mrs. Handson. It follows that, from the date of the order of Apr. 5, 1944, no right remained in any person claiming as next of kin of the testator to claim against any of the executors
C of the testator or against any of the estates of any of the executors in respect of *devastavit* or other misapplication of the testator's residuary estate.

Against this general background of fact it is now possible to state the nature of the plaintiffs' claims in these appeals. These claims fall broadly under two heads which have been compendiously described as claims *in personam* and claims *in rem*. The former (which, as will be seen, must be sub-divided) are
D personal claims which, it is said, the plaintiffs are able to make in equity against each of the defendants. If it be held that, in accordance with this argument, there is a good foundation for such equitable claims, then further questions will arise whether, and to what extent, the Statutes of Limitation—particularly the Limitation Act, 1939—directly or by analogy apply to defeat such claims, but, save possibly for the bearing of the dates of the several payments and of
E certain other dates upon these statutory defences, the special facts relating to the application by the several defendants of the sums respectively paid to them have no relevance to the claims *in personam*. In other words, since it is conceded for the purposes of the appeals that all the respondents must be treated as solvent, they will each of them be bound, if the personal claims are made good on the part of all the next of kin, to repay or account for the full amount of the sums received by them (less a due proportion of what has already been
F recovered from the executors or their estates by virtue of the order of Apr. 5, 1944), with or without interest, subject only to the defence of limitation. It is to be noted that WYNN-PARRY, J., wholly rejected the claims of the plaintiffs *in personam*. In so far as the learned judge ordered any of the defendants to pay any sum to the judicial trustee (as appears from the recital already made), those orders were based on the plaintiffs' claims *in rem*. The claims
G *in rem* rest on the application of the principles alleged to underlie the well-known case of *Re Hallett's Estate*, *Knatchbull v. Hallett* (2), explained and expanded (as it is said) in *Sinclair v. Brougham* (3), so as to enable the plaintiffs to "follow" or "trace" the moneys paid to the several defendants into the various assets held by such defendants wholly or partly attributable to those moneys. In considering these claims *in rem* (as distinct from the claims *in personam*) it will be necessary to examine in detail the facts relating to the disposal by each of the defendants of the several sums paid to them by the
H executors. As regard these facts, there is, fortunately, no dispute, and in every case except the main action agreed statements of facts have been prepared for the use and convenience of the court.

We turn, however, first to the claims *in personam*. Before analysing the nature of those claims it is convenient to deal with one general matter of defence raised by Mr. Neville Gray, on behalf of the defendants. It was said by him that the formulation of any equitable claim against any of the defendants must at least postulate that the consciences of the defendants must in some degree be affected by their retention of the moneys paid to them which should properly

have been paid to the plaintiffs and other next of kin of the testator. *Mr. Neville Gray* sought to defeat these claims, as it were, *in limine*, by denying altogether the postulate, for, said he, notwithstanding the formal invalidity of the bequest, at least it must be taken that *Mr. Caleb Diplock* intended the defendants, or similar institutions, to enjoy the residuary estate in preference to his blood relations, and it does not lie, accordingly, in the mouths of the next of kin to allege any unconscientiousness on the part of those whose claim is in accordance with the wishes that the testator had expressed, albeit ineffectually. This argument appears to us to be wholly untenable. It is, in our opinion, impossible to contend that a disposition which, according to the general law of the land, is held to be entirely invalid can yet confer on those who, *ex hypothesi*, have improperly participated under the disposition some moral or equitable right to retain what they have received against those whom the law declares to be properly entitled. We add also that, in determining the difficult questions which the appeals have raised, it is immaterial that the defendants are charitable institutions of the most deserving character. In considering the application of the principles of equity, it does not seem to us that there is any different standard of conscientiousness for charitable or other corporations from that appropriate to an individual.

As already indicated, the plaintiffs' claims *in personam* must be sub-divided and fall under two quite distinct heads. First, it is argued that by the terms of the letters which accompanied all the executors' payments the defendants were given notice of the invalidity of the trusts declared of the testator's residuary estate, or, at least, were put on inquiry as regards their validity, so that the defendants (who were, in any event, pure volunteers) were subjected to a constructive trust of the moneys they received in favour of the next of kin. Secondly, it is argued that, apart from any notice which the defendants may have had of the true effect of the testator's will, they had in truth no right to receive any of the moneys paid to them, and that, in the circumstances of the case already set forth, the unpaid next of kin have a direct claim, recognised and established by the courts of equity, to recover from the defendants the sums improperly paid to the defendants and properly belonging to the next of kin.

The first of these claims was not argued in the court below and has been somewhat faintly argued in this court. As already observed, the form of letter on which the plaintiffs rely for this part of their case does not purport to quote, and does not, in fact, accurately reflect, the exact language of the will, but it does in its paraphrase retain the essential vice of the original in its use of the disjunctive formula "charitable or benevolent objects." It is conceded by the defendants that, from the moment that they received, by the later letter of Oct. 18, 1939, notification of the plaintiffs' challenge, they must be taken to have been so affected with notice of the claim of the next of kin as to be accountable in respect of any balance of the sums originally paid to them which remained in their hands unexpended or undisposed of. It is said by the plaintiffs that a corresponding liability attached to them from the moment of the original receipt by them of the sums paid by the executors since, even without any actual challenge, they cannot be heard to allege ignorance of the invalidity which, by the general law, attached to the words used in the letter no less than to the words used in the will, and, alternatively, that the defendants, having received letters which purported to state the substance of the material part of the will, and being volunteers and unable to plead lack of knowledge that the substance, so stated to them, was without legal effect, were put on inquiry and, not having inquired, took what they received subject to the risk of having to account and repay, if it turned out that they had been improperly paid. The argument has, it must be confessed, some attraction. For to the eye of the lawyer, particularly one made wise after the event of the decision of the House of Lords in *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson* (1), it may seem plain enough that the executors had embarked on an entirely irregular execution of their duties, but we have come to the conclusion that this branch of the plaintiffs' claim ought not to succeed. As we have already stated, each of the defendants, in fact, accepted the moneys paid to them in good faith and in the belief that they were properly entitled to receive what the executors handed to them. As a matter of general principle, the plaintiffs' argument would, indeed, lead to startling results, for, if the defendants can be said to be

A put on inquiry, then they must have been under some duty to inquire. What, on the basis of this contention on the part of the plaintiffs (which is, of course, wholly distinct from the other branch of their personal claim, later dealt with), would be the duty of one who is told by executors that he is a legatee under a testator's will and paid that which he is told he has been given? Must he call for and examine the will to satisfy himself of its validity? Must he inquire whether all claims ranking in priority to his own have been satisfied? In the present case it is to be noted that the letter which the defendants received came, on the face of it, from the executors' solicitors. Moreover, even though the language used in the letter might be said to convey to the tutored mind some suspicion of the validity of the disposition, it would not follow that such language, though taken *verbatim* from the will, would necessarily in its context result in invalidity. In our judgment, persons in the position of the defendants, themselves unversed in the law, are entitled in such circumstances as existed in the present case to assume that the executors are properly administering their estate, and if, as is admitted in this case, they took the money *bona fide* believing themselves to be entitled to it, they should not have imposed on them the heavy obligations of trusteeship. We do not think it necessary or desirable to attempt an exhaustive formulation of the law applicable as regards notice in case of payments to legatees, save to say that every case of this kind will depend on its own facts and that the principles applicable to such cases are not the same as the principles in regard to notice of defects in title applicable to transfers of land, where regular machinery has long since been established for inquiry and investigation. For these reasons we reject this part of the plaintiffs' claim.

D The second branch of the plaintiffs' personal claim, however, is one of far greater difficulty and complexity. It has involved considerable research into cases over a period of more than 250 years and we have been much indebted to counsel for the help which their industry and argument have given to the court. It is to be noted that WYNN-PARRY, J., in the court below did not have the advantage, afforded to this court, of an examination of the cases prior to 1800. It will be convenient at this stage not to attempt any formulation of the plaintiffs' argument under this head beyond that already indicated, *viz.*, that, in the circumstances and having regard to the facts of the present case, the plaintiffs have a direct claim in equity against the defendants to recover the sums improperly paid to the defendants, or to recover such proportion of such sums as may be required to make good to the plaintiffs and the other persons entitled as next of kin, after bringing into account what has been recovered from the executors or their estates by virtue of the compromise order of Apr. 5, 1944, what should have been received by them from the testators' residuary estate. F According to the judgment of the learned judge, the point was put before him in somewhat wider and more general terms (see [1947] 1 All E.R. 522, 527), but, however the proposition be restricted by reference to the particular facts of the case, the reasoning of the learned judge in rejecting the proposition will, if well founded, be necessarily fatal to it. For after an examination of the various cases relied on before him, beginning with *Gillespie v. Alexander* (4) G in 1826 (the earlier 17th and 18th century cases, as we have already observed, not having been cited to him), the learned judge concluded that an unpaid beneficiary could only sue the wrongly-paid recipient of the testator's money in equity in the same circumstances as those which would enable him in the name of or by joining the personal representative to sue at law, *i.e.*, when the wrong payment had been made under a mistake of fact. He said ([1947] 1 All E.R. 522, 533):

H In my judgment, the authorities establish that, so far as a mere money demand is concerned (and I am, as regards this part of the matter, dealing only with a money demand) where the executor or administrator has paid money or transferred property, part of the estate of the deceased, to a person not entitled thereto in such circumstances as not to make the recipient an express trustee, the only remedy open to the legatee or next of kin rightfully entitled against the recipient is either to pursue a common law claim for money had and received in the name of the executor or administrator or to pursue in equity a claim analogous to the common law action for money had and received in which it would be unnecessary to join the executor or administrator as plaintiff. In either case, however, as I have shown, it would be essential to demonstrate

that the money was paid under a mistake of fact and not a mistake of law, a mistake in construing a will being regarded for this purpose as a mistake of law.

On the question whether the mistake here made was one of fact or of law we think the learned judge was clearly right in deciding that it was the latter, and we cannot usefully add anything to what fell from him on that point. Equally we agree with him that, as regards common law claims for money had and received, the action will not lie where the money has been paid under a mistake of law. It may, we think, be taken to be clearly established that the common law claim is founded on an implied promise to pay and that—whether by an application of the principle *ignorantia juris non excusat*, or on other grounds—no such promise will be implied where the payment was made under mistake of the general law. It is, no doubt, true that for certain purposes (e.g., the purposes of the application of the Statutes of Limitation) the direct equitable claim by the unpaid beneficiary against the wrongly paid, or overpaid recipient of part of the testator's estate—for it is conceded that in certain circumstances such direct claims will lie—has hitherto been regarded as analogous to the common law claim for money had and received. Both are, after all, money claims. But the common law claim, as may now be taken to be established, is in no sense derived from equity but has a lineage altogether independent of it. Moreover, as the plaintiffs forcibly pressed on us in argument, in other respects there are marked and important differences between the claim here put forward on the part of the plaintiffs and a claim at common law for money had and received. In the latter, the proper claimant is normally the person who originally made the payment, or is that person's principal or representative, and the claim is made against him who received the money or his representative. It is, indeed, difficult to see how, save between the parties to the original transaction, or between parties linked by a relationship such as that of principal and agent, any implied promise to repay could be imported. In the present case, the payments were originally made by the executors, and it is, in our judgment, impossible to say that in making the payments the executors were acting as agents or in any way on behalf of the next of kin, of whose rights and existence the executors were entirely ignorant. Plainly, nothing that the next of kin have done can be said to have involved any ratification or acceptance on their part of the executors' acts. Further, whatever may have been the nature of the mistakes made by the executors, the next of kin have never made any mistake at all, whether of law or of fact.

For these reasons it seems to us that, in approaching the question of the existence and characteristics of the direct equitable cause of action, there is not, unless the authorities otherwise establish, any necessity in logic for regarding the claim as being clothed, as it were, with all the attributes or limitations appropriate to the common law action for money had and received. Nor, on similar grounds, does it appear that there is any conflict involved between law and equity. Equity here, as in other places, comes in, as MAITLAND ON EQUITY (1936 ed., p. 17) has observed, "not to destroy the common law, but to fulfil it." Since (for so runs the plaintiffs' argument) the common law can only recognise the two parties to the transaction, payer and payee, or, at most, third parties asserting the rights of one or other of them, the common law does not, to borrow again from the language of MAITLAND (*ibid.*, 18) comprehend "the whole truth." For the payers in the present case (*viz.*, the executors) were handling, not their own money, but the money of others who had a proprietary interest unknown to and unrecognised by the executors and who from the moment when they became aware of their own rights and the transactions of the executors immediately challenged and repudiated what the executors had done. Nevertheless, if the claim in equity exists, it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that because we may think that the "justice" of the present case requires it, we should invent such a jurisdiction for the first time. It becomes, therefore, necessary to examine carefully the numerous decided cases from the days of BRIDGMAN, Lord Keeper, and FINCH, Lord Keeper (afterwards LORD NOTTINGHAM, L.C.), and to see what principle has been established by them. As we have already observed, that such a jurisdiction does exist in some circumstances and in some cases is clearly established and, indeed, conceded. But it is said on the part

of the defendants that the jurisdiction is subject to the limiting principle that equity acts on the conscience of the defendant which is affected where (and only where) the defendant has the necessary knowledge or the necessary knowledge can be imputed to him, and that the necessary knowledge can be imputed in cases of the administration of an estate from the fact that in all of them the recipient of the money knows or ought to know that he takes it under a title which is in its very nature defeasible in favour of other interested persons. Thus, according to the defendants' argument, every beneficiary takes subject to the rights of creditors, every residuary legatee takes subject to the rights of pecuniary legatees and other residuary legatees, and a next of kin takes subject to the rights of other relatives of equal or nearer degree. But it is contended that the present case is outside the ambit of the jurisdiction on the ground that the defendants (who were paid on the footing of their being entitled as residuary legatees) cannot in their assumed capacity as residuary legatees be said to have taken subject to the rights of the next of kin. It would appear, therefore, to follow from the defendants' argument that the equity will apply and fasten, as it were, on the conscience of a recipient who has some legitimate interest in or right to the estate in question (however remote), but will have no application to and will not affect the conscience of one who, as it later turns out, had no interest in and was a stranger to the estate some part of which was nevertheless paid to him. There may be thought to be some lack of logic in such a result, and the formulation of the defendants' case differs widely, it is plain, from the conclusion on this part of the case of the learned judge. The question remains: What do the authorities establish?

Reference to the text-books has not proved of very great assistance. The matter is however dealt with at some length in *ROPER ON LEGACIES*, 4th ed. (1847), vol. I, chap. VII, s. III (p. 456). Under the general title "Of the Refunding of Legacies" it is stated as follows:

In the last section was considered the right of legatees to follow the assets in the possession of *strangers* under titles derived from the executor by sales or pledges. It remains to consider the rights of executors, creditors, and unsatisfied legatees, to call back parts of the estate, which have been overpaid to one or more of the legatees, by reason of a defect of assets.

There follow then two sub-sections, sub-s. 1 dealing with the executor's right to oblige a legatee to refund, sub-s. 2 dealing with the equity of creditors to oblige legatees to refund. Sub-section 3 (pp. 459, 460) may be quoted more fully:

With respect to the equity of one legatee to make another refund, it may be stated as a *general* rule, that an unsatisfied legatee cannot maintain a suit against another who has been paid by the executor; because the remedy in the first instance, is against the executor; who, by discharging one legacy, has admitted assets for the payment of all. But an exception to this rule occurs, when the executor is in *insolvent* circumstances; for since the unsatisfied legatee can have no redress against him, he would be without a remedy, unless permitted to call upon the other legatee to refund. Still this permission is qualified, and subject to the following distinctions. If the assets be *originally sufficient* to satisfy all the legacies, and one of the legatees procure from the executor, either by or without suit, payment of his legacy; and then the executor wastes the estates, so as to render it deficient to discharge the remaining bequests, those legatees cannot oblige the satisfied legatee to refund: 1st, because the payment was not a *devastavit* in the executor; and 2dly, because the legatee is protected by the principle, that *vigilantibus, non dormientibus jura subveniunt*. But—if the assets be *originally deficient* to answer all the legacies, and a legatee receive from the executor his legacy in full; in that case, as the payment was a *devastavit* by the executor, and it is a rule in equity, that upon a deficiency of assets, all general legatees shall proportionally abate, the court will entertain a suit by the unsatisfied legatees, to compel the one so paid, to refund. The distinctions upon the present subject are thus stated by SIR JOSEPH Jekyll [in *Anon* (13)] . . . "That as all legatees are, upon a deficiency of assets, to be paid in proportion, so, if the executor paid one of them, the rest should make him refund in proportion; and if one of the legatees obtained a decree for his legacy, and was paid, and afterwards a deficiency happened, the legatee who recovered should refund notwithstanding, in imitation of the Spiritual Court, where a legatee recovering his legacy was made to give security to refund in proportion. But that if the executor had at first enough to pay all the legacies, and afterwards by his *wasting* the assets occasioned the deficiency; the legatee, who had recovered his legacy, should not be compelled to refund, but should retain the advantage of his legal diligence,

which the other legatees neglected, in not bringing their bill in time, before the *devastavit* of the executor; whereas, if they had commenced their suit before the commission of the waste, they might have obtained the same success."

Many of the early cases to which we shall presently refer are cited in support of the passages quoted from *ROPER*. It will be observed that there is no suggestion in the text of any such underlying principle as that contended for by the defendants nor any suggestion that the action—by analogy to the common law action for money had and received or otherwise—will lie only where the mistake made is a mistake of fact. The limitation, according to *ROPER*, in the case of an unpaid legatee is the absence or exhaustion of any remedy against the executor or administrator. On the other hand, there is in *ROPER* no reference in terms to a claim by a next of kin against other wrongly paid or overpaid next of kin or legatees, nor (oddly enough) is there any reference to the important case of *David v. Frowd* (5), which had been before *SIR JOHN LEACH* in 1833. That case is, together with a modern decision of this court in *Mohan v. Broughton* (6), cited in the notes to *SETON'S JUDGMENTS AND ORDERS*, 7th ed., vol. II, p. 1595, in support of the proposition:

Though the estate has been distributed among those found to be next of kin, they are liable in general to refund to the real next of kin . . . and an action may be brought by such real next of kin for that purpose . . .

The earliest cases cited to us in which there is found any reference to the right of an unpaid creditor or legatee to go direct against a legatee already paid were *Nelthrop v. Hill* (7) in 1669, before *BRIDGMAN*, Lord Keeper, *WINDHAM*, J., and *TURNER*, B.; *Grove v. Banson* (8) in the same year, before *BRIDGMAN*, Lord Keeper, and *WYLD*, J.; and *Chamberlain v. Chamberlain* (9) in 1675, before *FINCH*, Lord Keeper. It is not necessary to refer further to these three cases. All were cited to *LORD NOTTINGHAM*, L.C., in *Noel v. Robinson* (10). This case may be regarded as having laid the foundation for the later exercise of the equity jurisdiction for which the historical justification was the rivalry in regard to the administration of the estate of deceased persons between the Courts of Chancery and the Spiritual Courts. According to *SIR WILLIAM HOLDSWORTH*, *HISTORY OF ENGLISH LAW*, vol. VI, pp. 652, 653, the Court of Chancery:

. . . had practically taken over the jurisdiction of the ecclesiastical courts over suits for legacies, and suits for the distribution of residue. In theory, it is true, the jurisdiction of the ecclesiastical courts over these matters lasted till 1857; but it was generally ignored by the court of Chancery, on the grounds . . . that the ecclesiastical courts could not do complete justice in these cases—they could not give any indemnity to an executor paying a legacy under an order of the court, they could not order the legatees to refund if other debts subsequently appeared . . .

Noel v. Robinson (10) was cited in support. In the Ecclesiastical Courts it was the practice that:

To guard himself against latent debts, the executor is entitled to demand security of the legatee, before paying his legacy, to refund in case the amount is required in discharge of [debts].

(See *COOTE*, *THE PRACTICE OF THE ECCLESIASTICAL COURTS* (1847), p. 641.) But at least from the time of *Noel v. Robinson* (10) it appears that the Court of Chancery resorted to no such practice, and the reason, we think, was that, in the case supposed, the creditor would be treated as entitled to claim a refund direct from the legatee.

Having regard to its importance as a starting point and as showing the reason and justification for the jurisdiction, it is desirable to refer somewhat fully to *Noel v. Robinson* (10). The plaintiffs in the case were specific legatees of a moiety of the testator's American plantation. The defendant Robinson was the testator's executor who, after granting a lease of the plantation, had later sold it to the second defendant, Falconer. The plaintiffs alleged that Robinson, by granting the lease, must be taken to have assented to the specific bequest, and their claim against both defendants was for the property and for an account. Robinson, by his answer, denied that he had assented to the bequest and said that the sale to Falconer was required to pay the testator's debts, the deficiency of the estate having arisen since the date of the lease as a result of adverse trading conditions. He further said that, even if the lease must be taken as

an assent, nevertheless he (Robinson), having in fact paid the testator's debts, could stand in the shoes of the creditors and claim in effect a refund from the legatees. LORD NOTTINGHAM, L.C., after referring to the practice of the Spiritual Court in regard to the giving of security proceeded (1 Vern. 90, 93, 94) :

... but in this court, though there be no provision made for refunding, yet the common justice of this court will compel a legatee to refund. It is certain that a creditor shall compel the legatee to refund, and so shall one legatee compel the other, where the assets become deficient : but whether the executor himself, after he has once voluntarily assented unto a legacy, shall compel the legatee to refund is *causa primae impressionis* : and it must be allowed that there is a great difference between a voluntary assent, and where the executor was compelled to assent.

According to the report in VERNON the plaintiffs' bill was dismissed, but, as pointed out in the notes in the ENGLISH REPORTS (23 E.R. 334, 336), the decree was, in fact, in the plaintiffs' favour.

The next case is *Anon.* (11), dated 1683. It was a claim by a creditor of A. against the executor of A.'s executor and legatees under the will of A.'s executor. It was decreed that the legatees should refund. Next is *Newman v. Barton* (12), decided in 1690, which also appears to have been a case of a claim by an unpaid creditor against a legatee. It was, however, observed by the court (2 Vern. 205) :

A creditor shall follow the assets in equity, into whosoever hands they may come. But where the executor had voluntarily paid the full legacy, and afterwards assets proved deficient to pay the other legacies, they conceived neither the executor, nor any of the other legatees should compel him to refund ; but if the payment had not been voluntary, but he had recovered his legacy by decree, there he should have refunded.

From this observation, we understand that the assets were not deficient when the legacy was paid. If we have rightly interpreted the observations of the court in *Newman v. Barton* (12) they indicate a qualification to the unpaid legatee's right to sue, which is not to be found in the report of the judgment of LORD NOTTINGHAM, L.C., in *Noel v. Robinson* (10), namely, that, at least where the original payment was made voluntarily, there is no right of recovery unless there was originally a deficiency of assets. The foundation for the qualification is that in the absence of an original deficiency the first paid legatee got no more than what he was properly entitled to receive, and so, it may be added, there was nothing in respect of which equity could affect his conscience.

The point is brought out more clearly in the judgment (cited by ROPER in the passage we have quoted above) of SIR J. JEKYLL, M.R., in *Anon.* (13) in 1718 (the first of the 18th century cases). It was there laid down that a legatee paid in full was bound to refund to other legatees, whether the original payment had been made voluntarily or under compulsion, provided that there was an original deficiency of assets, but that where the deficiency arose from later waste by the executor then, on the principle of *vigilantibus non dormientibus jura subveniunt*, there would be no right to refund. It is further to be noted that the right to claim a refund was stated by SIR J. JEKYLL to be "in imitation of the Spiritual Court"—a reference to the practice already mentioned of requiring security before payment of a legacy.

The point is still further expanded in *Orr v. Kaines* (14). That was, in fact, a case of a claim by unpaid legatees against a solvent executor, but in the course of his judgment SIR JOHN STRANGE, M.R., observed (2 Ves. Sen. 194) that the voluntary payment (in full) of a legacy by an executor amounts to an admission by him of assets sufficient for all so that he will be compelled, if solvent, to pay all other legacies in full, whatever the state of the assets. But if the executor is insolvent then because "there is no other way" the unpaid or underpaid legatees can directly compel the fully paid legatee to refund. It is, however, stated in a note in the ENGLISH REPORTS (28 E.R. 125) (correctly, having regard to the previous decisions) that the direct claim against the legatee is inapplicable where the deficiency arises after the payment to him, *i.e.*, by reason of subsequent waste by the executor. The second part of the judgment of SIR JOHN STRANGE, M.R., marks a second step in the development of the equitable jurisdiction since *Noel v. Robinson* (10)—the appearance of a condition to the legatee's right to claim direct against the legatee that there should be "no other way" whereby the wrong to the former can be remedied—"because," as observed by ROPER in the passage we have already quoted, "the remedy in the first instance, is against the executor."

The last of the 18th century cases is *Walcott v. Hall* (15). That was a case where the executor, having paid all the legacies save one for £50 which he retained for an infant, subsequently was made bankrupt. It was held, following the reasoning of the three previous decisions, that in the circumstances, the fully paid legatees never having received more than they had been properly entitled to receive, there was no room for any claim in equity against them for a refund.

Before dealing with the later cases which were cited to the learned judge below, it may be convenient to make some observations on the effect of the authorities to which we have referred from *Noel v. Robinson* (10) in 1682 to *Walcott v. Hall* (15) in 1788. First, it is, in our judgment, impossible to find in any of them any trace of such an underlying principle or *ratio decidendi* as that contended for by the defendants in this court. It is, no doubt, true that an equitable claim predicates that the conscience of the defendant must be affected, but we have failed to observe any justification, in the judgments cited, for the suggestion that the state of the defendant's conscience depends on his knowledge or assumed knowledge that his title to the money paid to him may or may not be defeasible in favour of other interested persons. The test as regards conscience seems rather to be whether at the time when the payment was made the legatee received anything more than, at the time, he was properly entitled to receive. Secondly, there is equally, in our judgment, no trace of any such limitation to the right of action as *WYNN-PARRY, J.*, thought to be discernible from the later cases, *viz.*, that there must be or have been administration of the estate by the court and that the mistake made by the executor in paying the first legatee in full must be a mistake of fact. As regards the latter, it is no doubt true that, so far as can be gathered from the reports, the overpayments that had been made arose from nothing more than a miscalculation of the assets available and might, therefore, fairly be regarded as due to mistakes of fact, but so far from suggesting that the nature of the mistake made was a relevant consideration, the reports do not for the most part even indicate how it came about that the payments were made in fact. As regards the suggested qualification that there was or had been an administration by the court of the estate of the testator, the reports of the cited cases seem to us wholly to negative any such requirement. There are frequent references to the effect of payment by the executor voluntarily, *i.e.*, in the absence of any decree sanctioning or ordering the payment. It is nowhere suggested that the right of the unpaid legatee to claim from the fully or overpaid legatee depends on there being or having been an administration of the estate by the court. Thirdly, it is, in our view, of the first importance to bear in mind the circumstances in which the equitable cause of action arose and the reason for which it came into existence, *viz.*, the aim and desire of the Chancery Court, in the course of its struggle with the Spiritual Court, to provide some means of relief which would render unnecessary and take the place of the requirement of the Spiritual Court for the giving of security by the first paid legatee. On the other hand, it is, finally, to be noted that, so far, no case had arisen in which the plaintiffs were, not legatees under a will, but next of kin, either claiming to share in the distribution with other next of kin, or claiming to be entitled to the estate against other persons in whose favour distribution had been made as the persons supposedly entitled under the terms of a will or under an intestacy.

We come now to the cases cited by *WYNN-PARRY, J.*, in the court below. Of the first five, *viz.*, *Gillespie v. Alexander* (4), *Greig v. Somerville* (16), *David v. Frowd* (5), *Sawyer v. Birchmore* (17), and *Thomas v. Griffith* (18), the learned judge observed that in each case there was or had been an administration action. He said ([1947] 1 All E.R. 522, 529):

An analysis of these cases discloses two points of significance. In the first place, the distribution had in each case been made pursuant to an order of the court in an administration action, and, in the second place, the mistake, pursuant to which in each case the money had been paid, was a mistake of fact.

As we have already stated, in the light of the earlier decisions, the fact of there being or having been an administration suit and a distribution pursuant to an order of the court cannot be regarded as a condition of, or even as a material consideration for, the existence or exercise of the jurisdiction, and the same

A appears hardly less true of the character of the mistake made. On that ground, no doubt, the answer of the defendants to this part of the plaintiffs' claim has in this court, as already noticed, been put on a different and more elaborate basis. Of the five cases referred to, the first two and the last were cases of claims by creditors, and the same is true of *Davies v. Nicolson* (19), which came before KNIGHT-BRUCE and TURNER, L.JJ. There can, however, be no doubt, in our judgment, that, whether the claimant be a creditor or a beneficiary, the cause of action both in its history and its essential character is the same.

B We now come to the important case of *David v. Frowd* (5). It is true, as stated by the learned judge, that there had in that case been administration by the court of the estate of the deceased, one David Williams, and that the estate had been distributed pursuant to an order of the court among the persons who had been found by certificate of the master to be entitled as the next of kin. But there is nothing in the judgment of SIR JOHN LEACH, M.R., which gives any support to the view that these were material circumstances to the plaintiff's right of action. Nor is there anything in the judgment to indicate that the learned MASTER OF THE ROLLS regarded it as relevant that the assumed error made—though made, not by the personal representatives making the payment, but by the master in his certificate—was one of fact, *viz.*, as regards the identity of the next of kin. But the main significance of the case for present purposes lies in this, that the claim of the plaintiff was that she was the sole next of kin and in that capacity entitled to recover back from those who had received the estate the whole of what they had been paid—and, on the basis of the validity of the plaintiff's claim, wrongly paid. It should be stated that the intestate's personal representatives were included among the defendants in the action, but it is plain on an examination of the pleadings (which we obtained from the Public Record Office) that they were joined as recipients of part of the estate in their capacity as supposed members of the class of next of kin. Indeed, having regard to the administration decree and the orders made thereunder the personal representatives as such were obviously immune from attack. For the purposes of the hearing before SIR JOHN LEACH, M.R., it was agreed at the Bar that the title of the plaintiff as sole next of kin should be admitted. On that footing the question for the court was whether she was precluded by the administration decree from making her claim. That question the MASTER OF THE ROLLS answered in the negative. By his order he referred it to the master to inquire whether the plaintiff was sole next of kin or one of the next of kin, and he added a declaration (1833) (1 My. & K. 200, 211) :

E . . . that if the plaintiff be established as the sole next of kin of the intestate, the defendants are bound to refund to the plaintiff the several sums which they have received under the order of the court [in the administration action].

F Having regard to the importance of the case we caused the records to be searched with a view to discovering what was the exact order made and what was the outcome of the order. No trace of the formal order could be discovered and (whether the matter was afterwards settled or for other reasons) no record was found of any later order or proceeding. However that may be, *David v. Frowd* (5) was, on the proved or assumed facts of the case and having regard to the declaration made, a case in which the defendants were held liable to refund, not merely so as to let in some person found to be entitled to participate with them in the distribution, but to the full extent of what they had received and on the basis, accordingly, that they had, in truth, from the start been total strangers to the estate, without any title to what had been paid to them. Counsel for the plaintiffs placed, naturally, great reliance on the case, providing, as it does, at least a close analogy to the present. On the face of it, the principle sought to be formulated by the defendants (which we have earlier quoted) cannot be satisfactorily applied, for it cannot, as it seems to us, be seriously contended that the defendants in *David v. Frowd* (5), when they received their payments pursuant to the court's order following the master's certificate, must have known or be taken to have known that their title was wholly defeasible in favour of some other outside party so as to render their consciences susceptible to be acted on by equity, or, if such knowledge can be imputed to them, then one may ask : Why should there not equally have been imputed to the defendants in the present case knowledge that their title as residuary legatees was liable to be defeated in favour

of one who successfully challenged the validity of the residuary bequest itself? It was, therefore, not surprising that the defendants sought to explain away the case by suggesting, *e.g.*, that it should be regarded as specially dependent on its own facts, or that SIR JOHN LEACH, M.R., applied to it *per incuriam* (as *Mr. Neville Gray*, on behalf of the defendants, argued) the principle of the earlier cases. In our view, all these attempts fail. An examination of the judgment makes it, we think, clear that the learned MASTER OF THE ROLLS, after argument on the point, deliberately treated as applicable the principles of the earlier cases, and, though *David v. Frowd* (5) has since been frequently cited, no doubt has ever been cast on its correctness or on the appropriateness of its place in the chain of decisions from *Noel v. Robinson* (10) onwards. After a full reference to *Gillespie v. Alexander* (4), SIR JOHN LEACH, M.R., said (1 My. & K. 200, 210):

It is argued that there is a distinction between a creditor, and a person claiming as next of kin, because a creditor, it is said, has a legal title; the right being equal, there is no distinction in a court of equity between a legal and an equitable title. It is not, however, accurate to say that a creditor continues to have a legal title, after the fund has been administered in this court; he has, under such circumstances, lost that title by the administration of the court, and his only remedy is in a court of equity.

There then follows the passage (*ibid.*, 211) quoted in his judgment by WYNN-PARRY, J., (see [1947] 1 Ch. 716, 731). So far as concerns the conscience of the recipient wrongly paid, the passage seems to us to support the view that that fact of itself—the fact that he has received something to which in truth he was never entitled—may well sufficiently affect his conscience for the purposes of the jurisdiction of the court of equity:

A party claiming under such circumstances has no great reason to complain that he is called upon to replace what he has received against his right: complaints of hardship come with little force from the party who seeks to support a wrong.

It is convenient to refer next to *Mohan v. Broughton* (6), a case not referred to in the argument before us, but cited with *David v. Frowd* (5) in support of the note in SETON'S JUDGMENTS AND ORDERS, which we have earlier quoted. That was a case in which the plaintiff sought, on the footing that she was one of the next of kin of an intestate, to revoke letters of administration previously granted to another. The matter came originally before the court of first instance on an application by the defendant to stay the proceedings under the court's inherent jurisdiction. In the Court of Appeal, by consent, every question of substance was agreed to be tried on the assumption that the plaintiff's title was established. Reference was made in the argument to *David v. Frowd* (5) and also to *Sawyer v. Birchmore* (17), one of the five cases cited to WYNN-PARRY, J., previously mentioned, and also a case of a claim by a next of kin, though only for a partial refund so as to allow the claimant to participate with those already paid. LINDLEY, M.R., in his judgment (with which VAUGHAN WILLIAMS and ROMER, L.JJ., agreed) said ([1900] P. 56, 57, 58):

Now, what is it that this lady wants? She does not want to revoke the letters of administration for nothing . . . she says that in an administration action which was commenced some few years ago the estate of the intestate has been distributed amongst the wrong persons . . . Therefore she wants this revocation for the purpose of asserting her right. In other words, she wants to follow the assets into the hands of the persons who have got them. I do not myself see any difficulty in her commencing an action for that purpose in the Chancery Division . . .

The learned MASTER OF THE ROLLS spoke of "following the assets," but in the light of the argument and the reference to *David v. Frowd* (5) and *Sawyer v. Birchmore* (17), it is, in our view, clear that he had in mind the exercise of the equitable jurisdiction which those cases illustrated.

Two more cases directly bearing on this part of the case may usefully be referred to, before we come to *Re Rivers, Pullen v. Rivers* (20). They are *Fenwick v. Clarke* (21) and *Peterson v. Peterson* (22). Neither appears to have been cited in the court below. In *Fenwick v. Clarke* (21) a claim by an unpaid legatee to recover from legatees who had been paid in full came before KNIGHT BRUCE and TURNER, L.JJ. The claim failed on the ground that there had been at the time of the payment to the defendants a sufficiency of assets. *Walcott v. Hall* (15) was cited and followed, and in the course of his judgment TURNER,

L.J., (4 De G. F. & J. 240 245), quoted and approved part of the passage in *ROPER ON LEGACIES* (p. 459), which is cited earlier in this judgment :

If the assets be originally sufficient to satisfy all the legacies, and one of the legatees procures from the executor, either by means of or without a suit, payment of his legacy ; and afterwards the executor wastes the estate so as to render it deficient to discharge the remaining bequests, those legatees cannot oblige the satisfied legatee to refund. First, because the payment was not a devastavit by the executor, and secondly, because the executor is protected by the principle that *vigilantibus, non dormientibus jura subveniunt*.

The first paragraph of the headnote in *Peterson v. Peterson* (22) is as follows :

Where one of several residuary legatees or next of kin has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted ; *secus*, if the wasting has taken place before such share was received.

The claim in the case was by a next of kin of an intestate against other next of kin and was dismissed because the plaintiff failed to satisfy the court that there had been an insufficiency of assets when the defendants were paid. It is to be noted that (as appears from the recited facts) the administrator had been made bankrupt. Many of the earlier cases were reviewed in the course of the argument : *Anon* (13), *Walcott v. Hall* (15), *Orr v. Kaines* (14), *David v. Frowd* (5) and *Sawyer v. Birchmore* (17). LORD ROMILLY, M.R., said (L.R. 3 Eq. 111, 114) :

The rule is, that if one of the residuary legatees has received only his share, the subsequent wasting of the assets by the executor will not entitle the other residuary legatees to call upon him to refund ; and there is obvious good sense in that rule ; for, if the executor renders his accounts to a residuary legatee, and pays him his share, what right or business has the residuary legatee further to interfere in the matter of the administration of the estate ? He cannot file a bill for the administration of it, and, were he to do so, he would probably have to pay the costs. If so, why is he to suffer for the laches and neglect of the other residuary legatees, who have not required the executor to account to them, or to pay over the balance in his hands, or due from him ? The case, however, is materially altered if the executor has dissipated a portion of the assets before any residuary legatees call upon him to account ; and, it would seem, the rule ought to be that what is available at that time should be equally divisible among the whole of the residuary legatees ; but, where one residuary legatee calls upon another to refund, upon the ground of being overpaid, then, in my opinion, the burden of proof lies upon the person requiring the money to be refunded, to show that the payment was made in excess.

We come, accordingly, to the last of the long line of cases—*Re Rivers, Pullen v. Rivers* (20) before EVE, J. The importance of the case lies plainly in its modernity and in the fact that its decision followed chronologically certain other cases—particularly *Hilliard v. Fulford* (23), *Re Robinson, McLaren v. Public Trustee* (24), and *Re Hatch, Hatch v. Hatch* (25)—to which we presently refer and which, in the view of WYNN-PARRY, J., tended to negative the existence today in such a case as the present of the equitable right of action contended for by the plaintiffs. Having regard to the significance of the case, we were supplied by the plaintiffs with copies from the Public Record Office of the pleadings and the order made by EVE, J., in the action. The plaintiff in the action claimed to be entitled to a share in a reversionary legacy of £200 payable under the will of William Rivers on the death of the plaintiff's mother which occurred in 1917. The defendants were the personal representatives of one of the residuary legatees under the will. They admitted assets for the purposes of the action. The testator had died in 1863. A grant of letters of administration with the will annexed was made to the life tenant of residue who died in 1885. An administration action had been instituted in 1868 and in the course of that action an order was made for the carrying over of a sum of £266 13s. 4d. 3 per cent. annuities to a separate account entitled "The Annuity Account" of the plaintiff's mother. It had, no doubt, been the intention of the testator that the fund retained to answer the annuity given to the lady—which was in amount £8 per annum—should, on her death, provide the legacy of £200 bequeathed in that event to the plaintiff and her brothers and sisters. But, as appears from the statement of claim, no provision was, in fact, made in the administration action for the reversionary legacy—the relevant order providing

that, on the death of the plaintiff's mother, the fund of annuities carried over to the separate account should fall into and become part of the testator's general residue. In the event, the proceeds of the sale in 1917 of the £266 13s. 4d. annuities after providing for certain duties and costs fell far short of £200. The whole of the rest of the estate had been distributed. In these circumstances the plaintiff claimed direct against the defendants, as overpaid residuary legatees, the difference between what she had in fact received and what she should have received, *viz.*, £19 10s. 1d.: and the order of EVE, J., was, *simpliciter*, A
an order for payment of that sum by the defendants to the plaintiffs.

On the face of it the case appears entirely in line with those we have cited, but WYNN-PARRY, J., did not so interpret it. He said ([1947] 1 All E.R. 522, 531):

In my judgment, *Re Rivers* (20), when examined, does not help the plaintiffs. It is, I think, a simple example of a person receiving a payment otherwise than in due course of administration and being compelled to submit to an adjustment. It was for that reason, I think, that counsel for the defendants in that case was constrained to admit that he could not rely on the Statutes of Limitation. So regarded, the case falls within, and is but a further illustration of the principle emerging from, the five cases to which I have referred. I would add that, in so far as it may be necessary to do so, I take the view that in this case a mistake of fact was involved. B

With all respect to the learned judge, we do not think that so limited an interpretation can fairly be put on the case. Having regard particularly to the nature of the argument and the citation of authorities to the judge, including *Anon.* (13), *Walcott v. Hall* (15), *Gillespie v. Alexander* (4), *David v. Frowd* (5), *Sawyer v. Birchmore* (17), *Fenwick v. Clarke* (21) and *Peterson v. Peterson* (22), we do not think it open to doubt that EVE, J., purported to exercise the equitable jurisdiction to order an overpaid beneficiary to refund direct to an underpaid beneficiary and that there was no question of making an adjustment in due course of administration. As regards the statutes of limitation, it would appear to have been a sufficient answer to any defence under the statutes that the plaintiff's cause of action did not arise until her mother's death in 1917. It is to be noted that the plaintiff appears to have recovered the full amount of her deficit from the defendants though, as pleaded by them, they in fact represented one only of the residuary legatees. C

Re Rivers (20) is the last of the direct authorities, the last of a long line of cases which appear to us to illustrate a coherent and continuous development of an equitable jurisdiction of which the foundation was firmly laid by LORD NOTTINGHAM, L.C., in 1682 in the course of and as a move, as it were, in the struggle between the Court of Equity and the Spiritual Court. It has been necessary to examine the cases in no little detail in order that the shape of the development may be traced, but, before stating the conclusions we draw, it is necessary to refer to certain other cases cited before WYNN-PARRY, J. These cases have, at best, an indirect bearing on the main point and, save that *Re Rivers* (20) was cited in the last of them, the authorities directly relevant to the main point were not cited. Appeal was, however, made by both plaintiffs and defendants to passages in the judgments and the learned judge relied on them—or, at least, on certain of them—as “militating against the existence of the principle for which the” plaintiffs contended. We are in this respect unable to share the learned judge's view. The first is *Rogers v. Ingham* (26). The plaintiffs had relied on certain statements in the judgments, particularly of MELLISH, L.J., and BAGGALLAY, J.A., in support generally of their contention that it was no answer to the plaintiffs that the mistake which had been made was one of law, not of fact. We agree with the learned judge in thinking that the plaintiffs can derive little or no help from the case, which arose out of the circumstance that the trustee of a certain will had with the full knowledge, and, indeed, at the time, the assent, of the plaintiff made certain payments to the defendant to which, on the true construction of the will, the defendant had not been entitled. In these circumstances the court held that the plaintiff must be treated as having herself, though by the hands of the trustees, made the payment, and, consequently, as being in no different position from that of trustees making a payment under a mistake as to the legal position. It is convenient to refer next to *Re Robinson* (24) before WARRINGTON, J. In that D
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case, a grant of annuities having been made by King Charles II, the persons entitled in 1886 purported to execute a disentailing assurance. The trustees had from 1886 to 1900 paid the annuities to the person entitled on the basis of the validity of this assurance. The court having held (in other proceedings) that the attempt to disentail was ineffectual under the general law, the plaintiff in 1911 sought to recover from the defendant what had been wrongly paid from 1886 to 1900. At an early stage in the argument the learned judge asked what statute of limitation was applicable to the case and counsel for the defendant is reported to have answered that the claim being one for money had and received the relevant statute was that of James I (Limitation Act, 1623). Thenceforward, the case appears to have proceeded entirely on the basis of its being one for money had and received and the learned judge held on that footing that the claim was barred under the Act of 1623. As we have stated, no reference was at any stage made to the *Noel v. Robinson* (10) line of cases, and the plaintiff's counsel did not attempt to contend that the plaintiff's right of action lay in equity on the authority of those cases, as distinct from the claim at common law. We agree with WYNN-PARRY, J., in thinking that the case does not assist the plaintiffs. We do not think that it assists the defendants either.

Hilliard v. Fulford (23) was somewhat strongly relied on by the learned judge. In that case the executor-trustees of a will, erroneously construing its effect, treated the testator's residue (amounting to £3,750) as divisible into fifths. Four of the shares they had paid out. The fifth sum of £750 had been paid into court on behalf of an infant. In the subsequent proceedings, the plaintiff had established (i) that on the true construction of the will he was entitled to participate with the other five residuary legatees, *i.e.*, that the residue had been divisible into sixths and not fifths, and (ii) that the trustees had improperly spent out of residue £1,095 on repairs to certain real property and were accountable to residue accordingly for that sum—in other words that the true residue consisted, not of £3,750 divisible into five shares of £750, but of £4,845 divisible into six shares of £807 10s. The question and the sole question before JESSEL, M.R., on the application which forms the subject of the report was how, in the circumstances, certain costs which the trustees had been ordered to pay and the trustees' own costs, charges and expenses should be borne. It is true that certain observations of the MASTER OF THE ROLLS (4 Ch.D. 389, 394), quoted by WYNN-PARRY, J., appear, on the face of them, to be of more general import :

Of course you cannot make those other residuary legatees pay back anything. There is no pretence for saying that they can be compelled to come in and contribute.

But it is, in fact, quite clear, not only from the last sentence in the report before the judgment and the second sentence of the judgment, but also from the order made, which is set out in the end of the report, that the sole question was that of costs. In order to give effect to the decision of the MASTER OF THE ROLLS, the executor-trustees were to be put in the position as if no distribution had been made, *i.e.*, as though they still retained in their hands the whole residue of £4,845. From that notional sum the costs were to be deducted and then the amount of the sixth shares ascertained. To the extent that the shares of the residuary legatees who had been paid worked out at a figure below £750 the executor-trustees, as the parties responsible for the blunders, were made, in effect, to pay the difference out of their own pockets. As clearly appears when the matter is translated into figures, no question whatever arose of any claim by the plaintiff or the infant defendant to obtain a refund from the other four residuary legatees. They each in the end all received their full shares and, if the other legatees were left in the position of having had more than their full shares, they retained the surplus at the expense of the executors. Had the question of a refund to the plaintiff and the infant defendant arisen, the *Noel v. Robinson* (10) line of cases (which were irrelevant and not mentioned) would, no doubt, have been referred to.

The second case relied on by WYNN-PARRY, J., was *Re Hatch* (25) before SARGANT, J. There, following a decree for judicial separation, a husband had entered into a covenant to pay his wife a certain annual sum. After his death his estate (subject to the covenant) became divisible among his children, one of whom died, having appointed his mother (the wife) as his personal repre-

sentative and universal legatee. The husband during his life and his executors after his death having wrongly paid to the wife her annuity without deduction for income tax, it was sought in administration proceedings relating to the husband's estate to make the wife recoup out of her share in the estate (derived from the deceased child) the overpayments she had received as a creditor. SARGANT, J., rejected the claim on the ground that, the overpayments having been made under a mistake of law, they never were a "debt" due from the wife, so that there was nothing properly liable to be recouped. He went, indeed, somewhat further. He said ([1919] 1 Ch. 351, 356, 357):

Assume . . . that by a mistake of law the annuitant as a creditor had been paid too little so that the residuary legatees had received too much, would it be open to the annuitant to stop the distribution of the estate until the sums by which the residuary legatees had been overpaid had been deducted? To ask that question is in my opinion to answer it.

It is unnecessary in the present case for us to express any view on the correctness of the decision in *Re Hatch* (25). It is sufficient to observe that once again no reference was made to any of the *Noel v. Robinson* (10) line of authorities and that, had such reference been made, it is at least possible that some of the observations of SARGANT, J., would have been subject to qualification. In our view, the case cannot in the circumstances be regarded as any authority against the existence of the principle of equity jurisdiction for which the plaintiffs contend.

There remain the two recent cases, somewhat similar in character, of *Re Mason* (27) (before ROMER, J., and the Court of Appeal) and *Re Blake* (28) (before MAUGHAM, J.). Both cases were petitions of right against the Crown presented by persons claiming as next of kin of intestates, in effect, to recover moneys received many years previously by the Crown on the footing of the intestates having left no next of kin. It will be necessary to refer again to these cases, or, at least, to *Re Blake* (28), in regard to the question of the application to the present case of the relevant statutes of limitation, but the sole question determined in both cases, material for present purposes, was whether the claims were barred by the application of the Limitation Act, 1623. In *Mason's* case (27) the intestate, Maria L'Epine, had died as long ago as 1798, and for the purpose of his judgment ROMER, J., assumed that moneys which in fact belonged to her next of kin represented by the plaintiff had been wrongly paid over by the administrators to King George III. The learned judge said ([1928] Ch. 385, 391):

It is, in other words, a claim by a *cestui que trust* to recover from a third party money which his trustee has by mistake paid to that third party. Such a claim is one for money had and received . . . it may be a matter of some doubt whether, in strictness, the *cestui que trust* in such a case could maintain an action against the third party for money had and received, though he could at all events maintain a suit in equity for it, making the trustee a party. But in such a suit the *cestui que trust* would have no better right than the trustee would have in an action brought by himself, and, if the claim of the trustee would be barred in an action at law by any Statute of Limitations, the claim of the *cestui que trust*, so far as it was one for money had and received, would be equally barred.

On that ground the learned judge held the plaintiff's action to be barred. Now, again, there was no reference whatever made to the *Noel v. Robinson* (10) line of cases. Had there been, we do not think that ROMER, J., would or could have used exactly the language that he did. We do not intend to cast any doubt on the correctness of the decision of ROMER, J.,—and it would not, indeed, be open to us so to do, for the decision was affirmed in this court—but it is, we think, not accurate to say—particularly in the light of the *Noel v. Robinson* (10) line of cases—that the claim of the plaintiff was an action for money had and received. As we have earlier pointed out, there are essential differences between the common law action and the equitable action which is the subject of the present case, and we note that in the Court of Appeal in *Re Mason* (27) more guarded language was used, e.g., by LAWRENCE, L.J., who said ([1929] 1 Ch. 1, 12):

. . . these proceedings are in effect proceedings for money had and received . . . Though, therefore, *Re Mason* (27) is, undoubtedly, an authority binding on this court for the application at that date to such a case as was there considered

of the Limitation Act, 1623, we cannot regard it as an authority for the view that an action in equity by an unpaid next of kin to recover direct from an overpaid or wrongly paid recipient of an intestate's estate will be liable to be defeated, like an action at common law for money had and received, unless the payment wrongly made was made under a mistake of fact.

In our judgment, the result of *Re Blake* (28) is the same. In *Re Blake* (28) the decision of EVE, J., in *Re Rivers* (20) was cited—though none of the earlier cases on which *Re Rivers* (20) was founded. But—whether having regard to the citation of *Re Rivers* (20) or otherwise—MAUGHAM, J., expressed himself in more precise language (if we may venture to say so) than had been used in *Re Mason* (27) and clearly intimated his appreciation of the existence of an equitable cause of action to recover money wrongly paid away by an executor or administrator, distinct in character from the common law action for money had and received. The relevant passages from the judgment of MAUGHAM, J., are cited by WYNN-PARRY, J., ([1947] 1 Ch. 741, 742) and we need not repeat them. It is true that MAUGHAM, J., did not in terms refer to an equitable claim independent of a mistake of fact or of any mistake, but the mistake which had been, or was assumed to have been, made in *Re Blake* (28) was a mistake of fact and no further consideration of the attributes or qualifications of the equitable cause of action was necessary for the decision in the case.

What, then, is the conclusion to be drawn on this part of the plaintiffs' claim from what, we fear, has been a long citation of the authorities? It is not, we think, necessary or desirable that we should attempt any exhaustive formulation of the nature of the equity invoked which will be applicable to every class of case, but it seems to us, first, to be established that the equity may be available equally to an unpaid or underpaid creditor, legatee or next of kin. Secondly, it seems to us that a claim by a next of kin will not be liable to be defeated merely (a) in the absence of administration by the court, or (b) because the mistake under which the original payment was made was one of law rather than fact, or (c) because the original recipient, as things turn out, had no title at all and was a stranger to the estate, though the effect of the refund in the last case will be to dispossess the original recipient altogether rather than to produce equality between him and the claimant and other persons having a like title to that of the recipient. In our judgment, there is no authority either in logic or in the decided cases for such limitations to the equitable right of action. In our judgment, also, there is no justification for such limitations to be found in the circumstances which gave rise to the equity. As regards the conscience of the defendant on which in this, as in other jurisdictions, equity is said to act, it is *prima facie*, at least, a sufficient circumstance that the defendant, as events have proved, has received some share of the estate to which he was not entitled. In *David v. Frowd* (5) SIR JOHN LEACH, M.R., said (1 My. & K. 200, 211):

A party claiming under such circumstances has no great reason to complain that he is called upon to replace what he has received against his right.

On the other hand, to such a claim by an unpaid beneficiary, there is, in our judgment, at least in circumstances such as the present, one important qualification. Since the original wrong payment was attributable to the blunder of the personal representatives, the right of the unpaid beneficiary is in the first instance against the wrongdoing executor or administrator, and the beneficiary's direct claim in equity against those overpaid or wrongly paid should be limited to the amount which he cannot recover from the party responsible. In some cases the amount will be the whole amount of the payment wrongly made, e.g., where the executor or administrator is shown to be wholly without assets or is protected from attack by having acted under an order of the court. Authority for this qualification is to be found in the judgment of SIR JOHN STRANGE, M.R., in *Orr v. Kaines* (14) where he observed (2 Ves. Sen. 194) that, if the executor is insolvent, an unpaid legatee is admitted to claim direct from the wrongly paid recipient because "there is no other way." See also the note to *Hodges v. Waddington* (29) (2 Ventris 360):

. . . the principal case went upon the insolvency of the executor.

It is true that no direct authority for the qualification is to be found in any of the other decided cases, but in none of those cases where the direct claim

was allowed did it appear in fact that there was an executor or administrator against whom a claim might have been made or successfully made. *ROPER ON LEGACIES*, in the passage which we have cited, treats the qualification as established by the authority of *Orr v. Kaines* (14), where the unpaid legatee "can have no redress against" the personal representative the direct claim is justified, since otherwise "he would be without a remedy." In our judgment, the absence or exhaustion of the beneficiary's right to go against the wrongdoing executor or administrator ought properly to be regarded as the justification for calling on equity to come to the aid of the law by providing a remedy which would otherwise be denied to the party who has been deprived of that which justly is his. A

In the present case the order of April, 1944, put an end, on the terms recited in the order, to any claim which any of the next of kin of Caleb Diplock might otherwise have had against his executors or their estates or any of them. Though we have not been told of the exact circumstance in which that order came to be made, it must, in our view, be assumed that the compromise sanctioned by the order represented a fair estimation of what might have been recovered from the executors or their estates in the course of proceedings brought against them. And it must also, in our judgment, necessarily be assumed that in no circumstances could the full total of the sums wrongly paid away—which amounted to over £200,000—have been recovered from the executors or their estates. We have not been informed of the exact sum recovered under the compromise, but it follows, in our judgment, that the sum recovered ought to be credited rateably to all the 139 charities, so that the maximum amount which in equity can be recovered by the next of kin from any defendant is thus limited to the same proportion of the sum paid to that defendant as the balance of the total sum paid away by the executors to the 139 charities less the total amount recovered from the executors and their estates bears to the total sum paid away. For example, if the amount so recovered is one fourth of the total sum paid away, then the maximum liability of any defendant to refund direct to the next of kin would be three-fourths of that which such defendant received. B C D

It is to be noted that the writ in the main action (against St. George's Hospital and others) was issued in January, 1940—more than four years before the date of the compromise order. It does not, however, follow, in our judgment, that at the date of the issue of the writ the plaintiffs had no cause of action in equity for recoupment. The point has an important bearing on the further question of the application of the relevant Statutes of Limitation. If our view is right, the beneficiary's cause of action does not, or does not necessarily, arise for the first time after exhaustion of any remedy he may have against the personal representative. If it did only so arise for the first time, the overpaid recipient might have the possibility of such proceedings hanging over him for a very great length of time and the commencement of the running of the Statutes of Limitation might be similarly postponed. In our judgment, the cause of action is for recoupment of such amounts as are, in fact, irrecoverable from the party primarily responsible—viz., the personal representative—and it will be sufficient in any case at the trial to show that at the date of the writ the whole of the sums wrongly paid away were not recoverable from the personal representative. In the present case, the extent of the executors' contribution has been determined, and there is, therefore, no difficulty in fixing the amounts which, if they are otherwise liable, the defendants must refund. In cases where the total recoverable from the personal representative has not been finally determined at the date of the trial of the action against the recipient, any order would have to make appropriate provision for the plaintiff duly prosecuting his claim against the personal representative and bringing into account all sums then or thereafter recovered from him. It is also to be noted that in the main action the plaintiffs were J. H. Diplock (who died in 1940) and three other members of the class of next of kin, and in the other nine actions the plaintiffs are those three other individuals plus Mr. Connolly. We understand that there has been some collaboration both among the 48 persons who together constitute the whole class of next of kin, on the one side, and between the 139 charities to whom the £200,000 odd of residue was wrongly paid, on the other, with a view to limiting the litigation E F G H

between them. It does not, however, appear that in any of the actions the plaintiffs have sued in representative capacities, though in the main action (alone of all of them) the plaintiffs have asked for a representation order and in all the actions the relief sought includes general administration or execution of the trusts. It is further to be observed that in all the actions the prayer under this branch of the claim is for payment of the sums received by the defendants to the judicial trustee—in no case do the plaintiffs ask for payment direct to themselves of what is alleged to be due to them. We have in mind also that counsel for the plaintiffs in regard to the question of limitation conceded that, even if the plaintiffs sued in a representative capacity, it would not follow that the claims of some of the class represented were not barred if, in fact, those persons had been aware of their rights for the requisite period of time, and we further have in mind that the present appeals relate to 10 actions only of a total of 123 commenced at one time or another of which 20 actions were brought to trial.

It may become necessary to discuss with counsel the proper extent and form of relief on the basis of this judgment. We notice, however, that in those of the learned judge's orders which required payment by any of the defendants, such defendants were directed to pay the sums ordered to Mr. Connolly, the judicial trustee—for the purpose of being administered by him, as we assume, on behalf of the whole class of next of kin generally. No suggestion was made before us that, assuming liability under this head of the plaintiffs' argument on the part of any defendant, this form of order was not in the circumstances correct, i.e., it was not suggested that the liability of any defendant should be limited by reference to the individual interest of any next of kin or by reference to the proportion which the sum originally paid to that defendant bore to the total amount wrongly distributed. Subject to discussion on the precise form of order, it appears to us in the light of the submissions made to this court that each defendant should be ordered to repay to the judicial trustee the sums originally paid over to that defendant, but, subject to the limitation already mentioned, that the total amount recovered by or on behalf of the next of kin by virtue of the compromise order of April, 1944, should be treated as having been credited rateably to and among all the 139 charities (including the defendants) in proportion to the original sums paid over to them. Any sums in fact recovered from any of the charities other than the defendants would, on the other hand, not have to be credited rateably to and among all the charities. There is, of course, the further limitation that no member of the class of next of kin can be entitled to recover more than the sum which he would have received, had the estate been properly administered, but it seems clear that this further limitation can have no practical significance. We should add that, as already indicated, in our judgment, the defendants are liable under this head of their claim for the principal claimed only and not for any interest. This last result appears to follow from *Gittins v. Steele* (30), cited in *ROPER ON LEGACIES*, p. 461, where the language of LORD ELDON, L.C., in the case (1 Swans., 199, 200) is cited :

If a legacy has been erroneously paid to a legatee who has no farther property in the estate, in recalling that payment I apprehend that the rule of the court is not to charge interest ; but if the legatee is entitled to another fund making interest in the hands of the court, justice must be done out of his share.

We turn, accordingly, to the defence of limitation. On this question we have not the advantage of the judgment of WYNN-PARRY, J., since, on the view he took, the question of limitation did not arise. It will be convenient to recall one or two material facts and to add to them a few more. Caleb Diplock died on Mar. 23, 1936. The several payments to the defendants were made at various dates from Nov. 28, 1936, to Mar. 10, 1938. On the view that we take, however, these dates of payment are not material. The main action was instituted on Jan. 3, 1940, and it seems clear, therefore, that on no view can the defence of limitation be available to St. George's Hospital. The remaining 9 actions were instituted on July 28, 1945. It has, however, been admitted for the purpose of the appeals that these actions should be treated as having been initiated at an earlier date, viz., Mar. 22, 1945, so that, if the proper period of limitation be six years (as the defendants contend), time would not in any case have begun to run effectively in the defendants'

favour later than Mar. 22, 1939. It has also been conceded for the purposes of these appeals that of the three next of kin who are plaintiffs in all the actions, one, Cornelius Simpson, was aware of the death of Mr. Diplock early in 1939, but that the other two did not become aware of the death until after Mar. 22, 1939. If, therefore, the date on which the claimant discovered or ought with reasonable diligence to have discovered the mistake made by the executors is the material date for determining when the period of limitation began to run, it is obvious that, in the case of the latter two plaintiffs, their claim *prima facie* cannot be barred, for, unless it can be shown that there was some lack of reasonable diligence, they cannot have discovered the mistake made before they knew that Mr. Diplock was dead. In the case of the plaintiff, Cornelius Simpson, the matter may be otherwise, though it cannot, of course, be assumed that knowledge of Mr. Diplock's death involved any knowledge of the terms of his will or of the executors' mistake.

It is admitted on both sides that the only statute now applicable is the Limitation Act, 1939, which came into operation on July 1, 1940, for, by the effect of s. 34 (4) and the schedule to that Act, all relevant subsisting statutory provisions for limitation were repealed, including ss. 3, 4 and 7 of the Act of 1623, the Real Property Limitation Acts, 1833 and 1874, and the Trustee Act, 1888. On the basis, therefore, that the defence of limitation must rest on the application, direct or by analogy, of the Act of 1939, the two questions to be answered, are: (i) What (if any) is the relevant period; and (ii) (in so far as necessary) from what date does the period begin to run?

Counsel for the plaintiffs submitted that the answer to the first question is 12 years. Having regard to the dates, it is plain that, if 12 years is the appropriate period, the second question need not be considered. The period of 12 years will carry the time back from Mar. 22, 1945, to a date long before Mr. Diplock's death. Counsel for the plaintiffs founded his contention on the terms of s. 20 of the Act of 1939, which, he says, is the section by its language applicable to the present case. Section 20 is as follows:

Subject to the provisions of sub-s. (1) of the last foregoing section no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of 12 years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.

Section 19 (1) excepts from any period of limitation "an action by a beneficiary against a trustee where the trustee has been party to fraud or to recover trust property in the trustee's hands or converted by him to his use. Counsel for the plaintiffs contended that, according to the ordinary acceptation of the language used, this branch of the plaintiffs' claim is "an action in respect of" a "claim to . . . [a] share or interest in" the personal estate of a deceased person. *Mr. Upjohn*, on behalf of the defendants, has argued that on its proper construction the section relates only to claims of the character mentioned *against a personal representative*, and, bearing in mind that the Act is in its heading described as "An Act to consolidate with amendments certain enactments relating to the limitation of actions," he prayed in aid (as he was entitled to do) the terms of the consolidated statutes, as interpreted by the courts. Indeed, both *Mr. Upjohn* and counsel for the plaintiffs invoked the language of the earlier Acts in support of their arguments, and it is, therefore, necessary to make some reference to them.

As regards actions by legatees (which had been held to include residuary legatees) to obtain payment of their legacies or shares of residue, the period of limitation had been fixed by the Real Property Limitation Act, 1874, s. 8, as 12 years:

. . . after a present right to receive the same shall have accrued to some person capable of giving a discharge . . .

the period of 12 years having been substituted for 20 years prescribed by s. 40 of the Real Property Limitation Act, 1833. Neither s. 40 of the Act of 1833 nor s. 8 of the Act of 1874 was expressly confined to actions against the personal representative, but the formula used in both was "no action . . . to recover . . .

[any] legacy," and, having regard to the formula, it appears (and it was not, as we understood, disputed) that the two sections related only to actions to "recover" from the estate, *i.e.*, in effect, to actions against personal representatives: see, *e.g.*, *Re Johnson, Sly v. Blake* (31) *per* CHITTY, J. (29 Ch.D. 964, 971). It having been held that the Act of 1833 did not cover claims on an intestacy by a next of kin, the gap was filled by s. 13 of the Law of Property Amendment Act, 1860, which fixed the relevant period at 20 years—the same as the period then applicable in the case of a legacy. The formula used in the Act of 1860 followed that of the 1833 Act:

... no ... suit ... to recover the personal estate, or any share of the personal estate, of any person dying intestate ...

to which in this case were added the words:

... possessed by the legal personal representative of such intestate ...

The terminus from which the period began to run was the same as that applicable to a claim for a legacy. The Act of 1874 (which reduced the statutory period from 20 to 12 years in the case of a legacy) left untouched the period applicable to a claim by a next of kin.

Prior to the coming into operation of the property legislation of 1925 the position, therefore, as regards claims by unpaid next of kin under an intestacy was as follows. If the claim was against the personal representative, the relevant period of limitation was 20 years from the accrual of a present right to receive the share claimed by some person capable of giving a discharge. If, however, the claim was a claim in equity direct against some third party wrongly paid or overpaid—*i.e.*, *David v. Frowd* (5) form of action—neither the Act of 1860 nor any other statute of limitation had any direct application. In such case the Limitation Act, 1623, was applied, treating the action as analogous in this respect to a common law action for money had and received. That this was so is illustrated by the decision of MAUGHAM, J., in 1932 in *Re Blake* (28). In that case, the material facts of which have already been stated, the third party sued was the Crown. The liability of the Crown in such proceedings and the application by analogy of the statute of 1623 arose from s. 3 of the Intestates Estates Act, 1884. That section provided (*inter alia*) that a petition of right should not be presented:

... in respect of the personal estate of any deceased person or any part or share thereof ... except within the same time and subject to the same rules of law and equity in and subject to which ...

a like proceeding might be instituted against a subject. MAUGHAM, J., accordingly, held that, applying the period of limitation which would have been appropriate in the case of a similar claim against the subject, the claim had become barred six years after the date of the payment: see also *Re Mason* (27). In the course of his judgment MAUGHAM, J., pointed out ([1932] 1 Ch. 54, 59) that, having regard to the nature of the cause of action, the relevant section of the Intestates Estates Act, 1884, was s. 3 and not s. 2. The latter section provided that, where the administration of the personal estate of any deceased person had been granted to a nominee of the Crown, any proceeding against that nominee:

... for the recovery of the personal estate of such deceased person, or any share thereof [should] be of the same character, and ... subject to the same rules of law and equity (including the rules of limitation under the statutes of limitation ...) ...

as if the administration had been granted to the nominee as one of the next of kin. As observed by MAUGHAM, J., therefore, had the action been one brought against a nominee of the Crown in his capacity of personal representative, the effect of s. 2 of the Act of 1884 would—or would but for the Law of Property (Amendment) Act, 1924—have been to make applicable the 20 years' period prescribed by s. 13 of the Law of Property Amendment Act, 1860. But (as the learned judge pointed out) one of the effects of the 1925 property legislation had been the repeal by s. 10 and sched. X of the Law of Property (Amendment) Act, 1924, of s. 13 of the Act of 1860 without (apparently, *per incuriam*) any reservation of the cases of persons dying before the coming into operation on January 1, 1926, of the Property Acts of 1925. In the case of persons dying on or after January 1, 1926, the effect of s. 46 of the Administration of Estates Act,

1925 (which made the administrator of an intestate a trustee for the next of kin) would appear to have been to make applicable the provisions of s. 8 of the Trustee Act, 1888, to claims by the next of kin against the administrator. It should be added that another effect of the property legislation of 1925 was (by virtue of s. 56 and sched. II, pt. I, of the Administration of Estates Act, 1925) to repeal ss. 2 and 3 of the Intestates Estates Act, 1884, in the case of deaths occurring on or after Jan. 1, 1926. Those sections were, however, reproduced—as extended to real estate also—by s. 30 (1) and (2) of the Administration of Estates Act, 1925, which, so far as material to the present appeals, made use of the same wording, as that used in s. 2 (“for the recovery of”) and s. 3 (“in respect of”) of the Act of 1884. A

The position, therefore, immediately prior to the coming into operation of the Limitation Act, 1939, as regards claims by unpaid next of kin, was substantially the same as that which obtained prior to the coming into operation of the property legislation of 1925—the provision of s. 30 of the Administration of Estates Act, 1925, in the case of persons dying after the coming into operation of that Act, having replaced, as regards proceedings against the Crown, the similar provisions of ss. 2 and 3 of the Intestates Estates Act, 1884—save that, as regards claims by the next of kin of a person dying on or after Jan. 1, 1926, against his personal representative, the relevant period of limitation would (apparently) have been that governed by s. 8 of the Trustee Act, 1888, i.e., save in the excepted cases of fraud, etc., *prima facie* 6 years from the accrual of the cause of action. B C

Counsel for the plaintiffs, in support of his argument for the application to the present case of s. 20 of the Act of 1939, relied strongly on the contrast in the language used, on the one hand, in s. 2 of the Intestates Estates Act, 1884, and s. 30 (1) of the Administration of Estates Act, 1925, in reference to actions “for the recovery of” the personal estate of an intestate, and, on the other hand, in s. 3 of the Act of 1884 and s. 30 (2) of the Administration of Estates Act, 1925, in reference to actions “in respect of” the personal estate of an intestate. The first formula is (he says) that appropriate to claims against the personal representative and, accordingly, follows the formula found in the Acts of 1833, 1860 and 1874 in reference to actions “to recover” a legacy or a share of residue. The second is that appropriate to a *David v. Froud* (5) type of action. By its use, therefore, of the second formula—“no action in respect of any claim to the personal estate”—s. 20 of the Act of 1939 must (according to counsel for the plaintiffs) necessarily be taken to apply, if not to apply primarily, to an action of the character here in question. Having regard to the repeal of the Acts of 1833 and 1874, it seems to us plain that s. 20 of the Act of 1939 must apply to claims by an unpaid beneficiary against the executor or administrator—in other words, to claims by a beneficiary “to recover” his legacy or share. On the other hand, we cannot see that, according to ordinary usage of the English language, the section does not equally apply to a claim by an unpaid beneficiary direct against one overpaid or wrongly paid. In our judgment, counsel for the plaintiffs is right in saying that such an action is fairly and properly described as an action “in respect of” a claim to the personal estate of a deceased person or to a share therein. The examination we have made into the previous history of the legislation does not, in our judgment, provide any valid reason for rejecting this interpretation of the language. On the contrary, the references on which counsel for the plaintiffs relies seem to us strongly to support it. It is a well established canon of the construction of Acts of Parliament (and particularly of consolidating statutes) that phrases used therein which have been the subject of judicial interpretation are used in the sense in which they have been so interpreted. It seems to us, therefore, particularly in the light of the decision of MAUGHAM, J., in *Re Blake* (28), that the adoption in s. 20 of the Act of 1939 of the formula “in respect of” by way of contrast to the formula “for the recovery of,” which had appeared in the Acts of 1833, 1860 and 1874 and also in s. 2 of the Act of 1884 and s. 30 (1) of the Administration of Estates Act, 1925, must have been deliberate, and that it is impossible to resist the conclusion that by its use Parliament intended to bring within the ambit of s. 20 of the Act of 1939 claims of the *David v. Froud* (5) type, as well as claims directly against a personal representative. It is true that, if our construction is right, there is some awkward- D E F G H

ness as regards the date from which, in the case of a *David v. Frowd* (5) claim, the period of limitation begins to run, for that date must be "the date when the right to receive the share or interest accrued," i.e., the same date as that from which the statute runs in the case of a claim against a personal representative and without regard to the time when the moneys belonging to the claimant were, in fact, wrongly paid to the recipient, but, in our view, the awkwardness (if such it be) is insufficient to override the effect which we think must be given to the earlier part of the section. It is also true that, if this interpretation is correct, the effect of the new Act will have been to increase the statutory period applicable to causes of actions of the kind here in question. Such a result, no doubt, appears contrary to the general trend of the legislation of the last 100 years. The question, however, depends on the language Parliament has thought fit to use, and there is at least substantial ground for supposing that the increase was not accidental. Section 33 (a), the saving section, provides that nothing in the Act is to enable an action to be brought which was barred before the commencement of the Act by an enactment repealed by the Act. An example of such a case might well be provided by a claim on the part of a next of kin against an administrator. According to the defendants' own argument (with which we agree), such a claim would now by virtue of s. 20 be subject to the limitation period of 12 years from the accrual of the right to receive the share of the estate. Before the coming into operation of the Act of 1939, such a claim would have been liable to be barred in 6 years by virtue of the repealed provisions of s. 8 of the Trustee Act, 1888. Again, in the case of an action at common law for repayment of money paid under a mistake of fact, time formerly ran from the date of payment. Section 26 of the Act of 1939 postpones the commencement of the running of time until the mistake is, or with reasonable diligence should be, discovered. Further, it does not seem to us surprising or unreasonable that the period of limitation applicable to a claim by a beneficiary against a personal representative should be the same as that applicable to a claim by him direct against one overpaid or wrongly paid out of an estate.

We, therefore, conclude that the period of limitation applicable to this branch of the plaintiffs' claim is, by virtue of s. 20 of the Act of 1939, 12 years from the date when their rights accrued, with the result that the defences of limitation necessarily fail. We add, however, that, if we are wrong in this view, it is by no means clear that the defendants are substantially in any better position. If s. 20 of the Act of 1939 does not apply, then it is conceded that there is no section of the Act which expressly does apply to the case. In that event *Mr. Upjohn* relies on s. 2 (1) (a) and (7) of the Act, which are as follows :

(1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say : (a) actions founded on simple contract . . . (7) This section shall not apply to any claim for . . . equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as the corresponding enactment repealed by this Act has heretofore been applied.

Mr. Upjohn says that the effect of these two sub-sections is to preserve and perpetuate, as it were, the analogous application to causes of action of this character of the repealed Limitation Act, 1623. We assume in favour of counsel for the defendants that the words "actions founded on simple contract" must be taken to cover actions for money had and received, formerly actions on the case, and, as such, covered in express terms by the Limitation Act, 1623. The assumption must, we think, be made, though the words used cannot be regarded as felicitous. Even so, however, we are unable to agree with counsel for the defendants that the language of s. 2 (7) is sufficient, as regards what we have called *David v. Frowd* (5) claims, to override what we have felt compelled to conclude is the natural and inevitable meaning of the express terms of s. 20. It is to be noted that the opening words of s. 2 (7) are negative in form :

This section shall not apply to any claim for . . . equitable relief . . .

The sub-section proceeds :

. . . except in so far as any provision thereof may be applied by the court by analogy . . .

In our view, the effect of this somewhat diffident language must be to limit the analogous (in the present case, the doubly analogous) application of s. 2

of the Act to claims of a kind for which no express provision is to be found elsewhere in the statute.

Assuming, however, that, contrary to our view, s. 2 of the Act does apply, by analogy, to the present case, what is the result? We have already given our reasons for thinking, on the hypothesis put forward by *Mr. Upjohn*, that the "accrual of the cause of action" cannot be postponed until the right of the next of kin against the executors and their estates have been exhausted. But the provisions (*inter alia*) of s. 2 are, by s. 1, expressed to be subject to the provisions of pt. II of the Act :

. . . which provide for the extension of the periods of limitation in the case of . . . mistake.

They are, therefore, subject to the provisions of s. 26 of the Act. By para. (c) of s. 26, where :

. . . the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered . . . the mistake . . . or could with reasonable diligence have discovered it.

In order to avoid any difficulty created for him by s. 26, *Mr. Upjohn* discerns in the hands of the plaintiffs on this part of their case a double edged sword, for he says that it is an essential part of their main argument that the plaintiffs themselves made no mistake and are not in any way prejudiced or affected by the mistake of the executors. But, in truth, this dangerous weapon is, in our view, in the defendants' hands, for, if they seek to bring the case, for the purposes of the defence of limitation, within s. 2 of the Act and to rely on the reasoning in *Re Blake* (28), they must do so by averring that the cause of action is analogous to the common law action for money had and received, and, if they assert the analogy, they must take it with its attributes and consequences. Beyond doubt, it would appear that in the case of an action at common law to recover money paid under a mistake of fact, s. 26 would now operate to postpone the running of time. It is true that no such action would lie where the mistake is one of law, but, for reasons which we have already given, we do not accept the defendants' contention that the "analogous" claim in equity will also lie only where the mistake made was one of fact. In our judgment, therefore, assuming the analogy (as it must be assumed, if s. 2 is to apply at all) the action is one for the recovery of money paid away by mistake—albeit by the mistake of other persons and by a mistake of law—and, in our judgment, on this assumption, is an action for relief from the consequences of mistake no less than would be an action at common law to recover money paid away under a mistake of fact. If, therefore, contrary to our view, s. 2 is applicable (subject to s. 26), the proper order would be to direct an inquiry to ascertain when each of the plaintiff next of kin—and each of the remaining next of kin, if the appeals are to enure for their benefit—discovered, or ought with reasonable diligence to have discovered, the mistake. As we have already stated, it would appear almost certain, as regards two of the plaintiff next of kin, and not improbable as regards the third, that the relevant dates would be found to be after Mar. 22, 1939, and we cannot help thinking it likely that similar answers would be given in regard to the other beneficiaries. The result would, therefore, not, as it seems to us, be likely to be of assistance to the defendants. In our judgment, however, the answer to the defences of limitation is that by virtue of s. 20 of the Act the relevant period is 12 years. That answer is fatal to the defences.

If the views we have expressed on the validity of the claims *in personam*, on the defence of the statutes of limitation, and on the orders to which the plaintiffs are entitled, are correct, the plaintiffs have said that they do not need to rely on their alternative claims *in rem*. It might, therefore, be thought to be strictly unnecessary for us to express any views in regard to those claims, but the claims—including, particularly, the very difficult question of the effect of *Sinclair v. Brougham* (3)—have been the subject of elaborate arguments before us and they are fully dealt with by WYNN-PARRY, J., in his careful judgment. With much of that part of the learned judge's judgment (as later appears) we agree, though we venture to differ from him in certain important respects. We also bear in mind that, though they have all been heard together, there are before us ten appeals, and it was clear from the arguments that, having regard to the special facts relating to each defendant, the success or

partial success of the plaintiffs' claims *in rem* against one defendant would by no means necessarily involve a corresponding success against all or any of the others. It appears to us, therefore, that our views in regard to these claims, as they might affect each defendant, would be a material consideration affecting any application by any defendant for leave to appeal to the House of Lords. Further, if on any such appeal it were held that we were wrong in our conclusions either on the substance of the personal claims or on the defence of limitation or on the orders to which the plaintiffs are entitled, the plaintiffs would certainly seek to rely on their proprietary claims either in substitution for or as supplementary to their personal claims. In all the circumstances, therefore, of this remarkable case, it has not seemed to us that it would in any case be satisfactory for us to express no view on the claims *in rem*. We think, too, that such a course would lack proper respect to the learned judge's judgment and the arguments of counsel. There is, moreover, one point in regard to which, as it seems to us, success by the plaintiffs on their personal claims would not, or would not necessarily, exhaust their rights. We have already stated our view that on their personal claims the plaintiffs are not entitled to any interest. The same may not, however, be true as regards the claims *in rem*, at least where the plaintiffs are able to "trace" their proprietary interest into some specific investment. It is to be noted that in two out of the three cases in which WYNN-PARRY, J., ordered payment to the judicial trustee (*viz.*, in action IV.D against the committee of management of Queen Alexandra Cottage Homes and in action IV.E against Guy's Hospital) those orders included payments in respect of interest. As we have already stated, there is no cross-appeal by the defendants concerned in either of those cases. *Prima facie*, therefore, it appears to us that, where the plaintiffs can make good their claim *in rem* against any defendant and can also in the circumstances make good a claim for interest (including the two cases in which orders to that effect have been made by the learned judge), the plaintiffs would be entitled to recover on their claim *in rem* (so far as it went) together with interest and to limit their recovery on their personal claim to the balance of the principle sum paid to the defendant less the principal amount recovered on their claim *in rem*. We think it right, therefore, to state fully our own conclusions on this branch of the case and our reasons for them. It will be seen that the only claims which, in our view, can be supported on the basis of the so-called equitable doctrine of tracing are of a strictly limited character.

We shall endeavour to explain our views as to the basis on which the doctrine must now be taken to rest. In this connection we regard *Sinclair v. Brougham* (3) as of fundamental importance. That decision, in our view, did not so much extend as explain the doctrine of *Hallett's* case (2), which now must be regarded not, so to speak, as a *genus* but as a species in a *genus* where equity works on the same basic principles but selects what on the particular case is the equitable method of applying them in practice. It will be found that our views as to the meaning and effect of the speeches in *Sinclair v. Brougham* (3) differ from those expressed by WYNN-PARRY, J. We should, however, be lacking in candour rather than showing respect if we refrained from saying that we find the opinions in *Sinclair v. Brougham* (3) in many respects not only difficult to follow but difficult to reconcile with one another. Before passing to a consideration of *Sinclair v. Brougham* (3), we may usefully make some observations of our own as to the distinction between the attitude of the common law and that of equity to these questions. The common law approached them in a strictly materialistic way. It could only appreciate what might almost be called the "physical" identity of one thing with another. It could treat a person's money as identifiable so long as it had not become mixed with other money. It could treat as identifiable with the money other kinds of property acquired by means of it, provided that there was no admixture of other money. It is noticeable that in this latter case the common law did not base itself on any known theory of tracing such as that adopted in equity. It proceeded on the basis that the unauthorised act of purchasing was one capable of ratification by the owner of the money: see *per* LORD PARKER OF WADDINGTON ([1914] A.C. 398, 441) in *Sinclair v. Brougham* (3). Certain words of VISCOUNT HALDANE, L.C. (*ibid.*, 419), in *Sinclair v. Brougham* (3) may appear to suggest a further limitation, *i.e.*, that "money" as we have used that word was not regarded at common

law as identifiable once it had been paid into a banking account. We do not, however, think it necessary to discuss this point at length. We agree with the comments of WYNN-PARRY, J., on it ([1947] 1 All E.R. 522, 534, 535) and those of ATKIN, L.J. ([1921] 1 K.B. 321, 335) in *Banque Belge Pour L'Etranger v. Hambrouck* (32). If it is possible to identify a principal's money with an asset purchased exclusively by means of it, we see no reason for drawing a distinction between a chose in action such as a banker's debt to his customer and any other asset. If the principal can ratify the acquisition of the one, we see no reason for supposing that he cannot ratify the acquisition of the other.

We may mention three several matters which we think are helpful in understanding the limitation of the common law doctrine and the reasons why equity was able to take a more liberal view. They are as follows. (i) The common law did not recognise equitable claims to property, whether money or any other form of property. Sovereigns in A.'s pocket either belonged in law to A. or they belonged in law to B. The idea that they could belong in law to A. and that they should, nevertheless, be treated as belonging to B. was entirely foreign to the common law. This is the reason why the common law doctrine finds its typical exemplification in cases of principal and agent. If B., a principal, hands cash to A., his agent, in order that it may be applied in a particular manner, the cash, in the eyes of the common law, remains the property of B. If, therefore, A., instead of applying it in the authorised manner, buries it in a sack in his garden or uses it for an unauthorised purchase, B. can, in the former case, recover the cash as being still his own property, and, in the latter case, affirm the purchase of something bought with his money by his agent. If, however, the relationship of A. and B. was not one which left the property in the cash in B., but merely constituted a relationship of debtor and creditor between them, there could, of course, have been no remedy at law under this head since the property in the cash would have passed out of B. into A. (ii) The narrowness of the limits within which the common law operated may be linked with the limited nature of the remedies available to it. Specific relief, as distinct from damages (the normal remedy at common law), was confined to a very limited range of claims as compared with the extensive uses of specific relief developed by equity. In particular, the device of a declaration of charge was unknown to the common law and it was the availability of that device which enabled equity to give effect to its wider conception of equitable rights. (iii) It was the materialistic approach of the common law coupled with and encouraged by the limited range of remedies available to it that prevented the common law from identifying money in a mixed fund. Once the money of B. became mixed with the money of A., its identification in a physical sense became impossible. Owing to the fact of mixture there could be no question of ratification of an unauthorised act, and the only remedy of B., if any, lay in a claim for damages. Equity adopted a more metaphysical approach. It found no difficulty in regarding a composite fund as an amalgam constituted by the mixture of two or more funds, each of which could be regarded as having, for certain purposes, a continued separate existence. Putting it in another way, equity regarded the amalgam as capable, in proper circumstances, of being resolved into its component parts. Adapting, for the sake of contrast, the phraseology which we have used in relation to the common law, it was the metaphysical approach of equity, coupled with and encouraged by the far-reaching remedy of a declaration of charge, that enabled equity to identify money in a mixed fund. Equity, so to speak, is able to draw up a balance sheet, on the right hand side of which appears the composite fund, and on its left hand side the two or more funds of which it is to be deemed to be made up.

Regarded as a pure piece of machinery for the purpose of tracing money into a mixed fund or into property acquired by means of a mixed fund, a declaration of charge might be thought to be a suitable means of dealing with any case where one person has, without legal title, acquired some benefit by the use of the money of another—in other words, any case of what is often called “unjust enrichment.” The opinion of LORD DUNEDIN ([1914] A.C. 398, 437) in *Sinclair v. Brougham* (3) appears to us to come very nearly to this, for he appears to treat the equitable remedy as applicable in any case where a superfluity, expressed or capable of being expressed in terms of money, is found to exist. Such a view would dispense with the necessity of establishing as a starting point the existence

of a fiduciary or quasi-fiduciary relationship or of a continuing right of property recognised in equity. We may say at once that, apart from the possible case of LORD DUNEDIN'S speech, we cannot find that any principle so wide in its operation is to be found enunciated in English law. The conditions which must exist before the equitable form of relief becomes available will be considered later in this judgment. But one truism may be stated here in order to get it out of the way. The equitable form of relief, whether it takes the form of an order to restore an unmixed sum of money (or property acquired by means of such a sum) or a declaration of charge on a mixed fund (or on property acquired by means of such a fund) is, of course, personal in the sense that its efficacy is founded on the jurisdiction of equity to enforce its rules by acting on the individual. It is, however, not personal in the sense that the person against whom an order of this nature is sought can be made personally liable to repay the amount claimed to have belonged to the claimant. The equitable remedies presuppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself. If the fund, mixed or unmixed, was spent on a dinner, equity, which only dealt in specific relief and not in damages, could do nothing. If the case was one which at common law involved breach of contract, the common law could, of course, award damages, but specific relief would be out of the question. It is, therefore, a necessary matter for consideration, in each case where it is sought to trace money in equity, whether it has such a continued existence, actual or notional, as will enable equity to grant specific relief.

To turn to another preliminary matter, we do not think that confusion can be avoided unless the meaning of the word "money" as used in connection with this class of question is kept in mind. It is tempting to use the illustration of sovereigns in a bag or, to use an expression of LORD DUNEDIN'S, a strong box, but this must not blind us to the fact that such an illustration has little or no likeness to actual facts in present day conditions. We can explain what we mean by a reference to the present cases. The plaintiffs claim that "money" forming part of the residuary estate of the testator and, therefore, divisible among his next of kin has been improperly paid to a charity. This "money" when "paid" was in the form of a cheque on the executorship account, *i.e.*, a negotiable instrument. This negotiable instrument at the moment preceding its delivery to the charity belonged to the residuary estate of the testator, and any of the next of kin, if he had known of the situation, could have secured an injunction restraining the executors from delivering it to the charity. As in that event the cheque would never have been presented for payment, the "money" representing the relevant portion of the residuary estate would have remained in its existing state, *i.e.*, as part of the chose in action constituted by the banker's debt to the executors in respect of the executorship account. The charity accepted the cheque, and, on the assumption that it was not a purchaser for value and is not to be charged with such notice as to make it a constructive trustee, it accepted the cheque as a volunteer. The first stage, therefore, was that the charity had in its possession a negotiable instrument, which in origin belonged to the residuary estate and in which the next of kin were, in the eyes of equity, interested. If the next of kin had been in a position to interfere at that stage, they could, in our view, clearly (and the contrary was not argued) have recovered the cheque from the charity whom, as a volunteer, equity would have compelled to recognise the equitable interest of the next of kin in it, but the cheque was, in fact, paid into a banking account in the name of the charity. The next of kin claim to follow their "money." What really happened was that, when the cheque was cleared, a credit was passed by the paying bank to the collecting bank for the benefit of the charity who thus, without handling any "money" in the sense of cash, became possessed of "money" in the sense of credit in its banking account, *i.e.*, a chose in action. Now, if the "money" in the form of the cheque was "paid in" to a separate account so that the "money" in the form of a chose in action which resulted from the operation remained "unmixed" (*i.e.*, was identifiable as a chose in action having a separate existence), it is not disputed that the "money" will be specifically recoverable from the charity. It is not suggested in that case that the title to the "money"

of the charity as a volunteer can defeat the claim of the next of kin to recover it for the benefit of the estate. The appropriate equitable relief would be by way of specific order for restoration of what, in the eyes of equity, never ceased to belong in equity to the estate, the reason, of course, being that the charity, which took the cheque, not as a purchaser for value without notice, but merely as a volunteer, could not set up a title adverse to the estate in respect of "money" (i.e., on those facts a separate and identifiable chose in action) obtained by means of "money" in the form of a cheque, i.e., an order by the executors on their bankers to transfer from "money" belonging to the estate in the form of a chose in action an aliquot sum of "money" in the form of a credit in favour of the charity, as payee of the cheque, in its account with its bankers. When the various senses in which the word "money" is used are appreciated, the conceptions of "purchaser for value without notice" and of "volunteer" which are common currency in the language of equity, do not appear inappropriate, as they might, perhaps, have done (at any rate, at first sight) in the case of current coins which pass by delivery, and one of the apparent difficulties in the way of tracing, identifying and locating "money" does, we think, disappear.

The first question which appears to us to fall for decision on this part of the present appeals may, we think, be thus formulated:—Did the power of equity to treat Diplock "money" as recoverable from the charity, which, undoubtedly, existed down to the moment when the cheque was paid by the bank on which it was drawn, cease the moment that the "money" by the process of "mixture" came to be represented by an accretion to, or an enlargement of, the chose in action consisting of a debt already owing to the charity by its own bankers? WYNN-PARRY, J., in effect, decided that it did. His reason for taking this view, shortly stated, was as follows. The principle applicable was to be extracted from the decision in *Hallett's* case (2), and that principle was in no way extended by the decision in *Sinclair v. Brougham* (3); the principle can only operate in cases where the mixing takes place in breach of a trust, actual or constructive, or in breach of some other fiduciary relationship, and in proceedings against the trustee or fiduciary agent; here the mixing was not of this character since it was effected by an innocent volunteer; there is no ground on which, according to principle, the conscience of such a volunteer can be held in equity to be precluded from setting up a title adverse to the claim; in every case, therefore, where a "mixture" has been carried out by the charity, the claim, whether it be against a mixed monetary fund or against investments made by means of such a mixed fund, must fail *in limine*. We may say at once that this view of the inability of equity to deal with the case of the volunteer appears to us, with all respect to WYNN-PARRY, J., to be in conflict with the principles expounded, particularly by LORD PARKER OF WADDINGTON, in *Sinclair v. Brougham* (3). If LORD PARKER meant what we think he meant, and if what he said is to be accepted as a correct statement of the law, *Mr. Pennycuick*, who argued this part of the case on behalf of the charities, admittedly felt great difficulty in supporting this part of the reasoning of the learned judge. We shall deal further with LORD PARKER's observations on this topic when we come to them in our examination of *Sinclair v. Brougham* (3), but here we may conveniently summarise what we consider to be the effect of them as follows. Where an innocent volunteer (as distinct from a purchaser for value without notice) mixes "money" of his own with "money" which in equity belongs to another person, or is found in possession of such a mixture, although that other person cannot claim a charge on the mass superior to the claim of the volunteer, he is entitled, nevertheless, to a charge ranking *pari passu* with the claim of the volunteer. LORD PARKER's reasons for taking this view appear to have been on the following lines. Equity regards the rights of the equitable owner as being "in effect rights of property," though not recognised as such by the common law. Just as a volunteer is not allowed by equity in the case, e.g., of a conveyance of the legal estate in land, to set up his legal title adversely to the claim of a person having an equitable interest in the land, so in the case of a mixed fund of money the volunteer must give such recognition as equity considers him in conscience (as a volunteer) bound to give to the interest of the equitable owner of the money which has been mixed with the volunteer's own. But this burden on

A the conscience of the volunteer is not such as to compel him to treat the claim of the equitable owner as paramount. That would be to treat the volunteer as strictly as if he himself stood in a fiduciary relationship to the equitable owner which *ex hypothesi* he does not. The volunteer is under no greater duty of conscience to recognise the interest of the equitable owner than that which lies on a person having an equitable interest in one of two trust funds of "money" which have become mixed towards the equitable owner of the other. Such a person is not in conscience bound to give precedence to the equitable owner of the other of the two funds.

B We may enlarge on the implications which appear to us to be contained in LORD PARKER'S reasoning. First, it appears to us to be wrong to treat the principle which underlies *Hallett's* case (2) as only coming into operation where the person who does the mixing is not only in a fiduciary position but is also a *party to the tracing action*. If he is a party to the action, he is, of course, precluded from setting up a case inconsistent with the obligations of his fiduciary position. But supposing that he is not a party? The result cannot surely depend on what equity would or would not have allowed him to say if he had been a party. Suppose that the sole trustee of (say) five separate trusts draws £100 out of each of the trust banking accounts, pays the resulting £500 into an account which he opens in his own name, draws a cheque for £500 on that account and gives it as a present to his son. A claim by the five sets of beneficiaries to follow the money of their respective trusts would be a claim against the son. He would stand in no fiduciary relationship to any of them. We recoil from the conclusion that all five beneficiaries would be dismissed empty handed by a court of equity and the son left to enjoy what in equity was originally their money. Yet that is the conclusion to which the reasoning of the learned judge would lead us. LORD PARKER'S reasoning, on the other hand, seems to us to lead to the conclusion that each set of beneficiaries could set up its equitable interest which would prevail against the bare legal title of the son as a volunteer and that they would be entitled to share *pari passu* in so much of the fund or its proceeds as remained identifiable. An even more striking example was admitted by *Mr. Penny-cuick* to be the result of his argument, and he vigorously maintained that it followed inevitably from the principles of equity involved. If a fiduciary agent takes cash belonging to his principal and gives it to his son, who takes it innocently, then so long as the son keeps it unmingled with other cash in one trouser pocket, the principal can follow it and claim it back. Once, however, the son, being under no fiduciary duty to the principal, transfers it to his other trouser pocket in which there are reposing a coin or two of his own of the same denomination, the son, by a sort of process of accretion, acquires an indefeasible title to what the moment before the transfer he could not have claimed as his own. This result appears to us to stultify the beneficent powers of equity to protect and enforce what it recognises as equitable rights of property which subsist until they are destroyed by the operation of a purchase for value without notice. The error into which, we respectfully suggest, the learned judge has fallen is in thinking that what, in *Hallett's* case (2), was only the method (there appropriate) of bringing a much wider-based principle of equity into operation—*viz.*, the method by which a fiduciary agent, who has himself wrongfully mixed the funds, is prohibited from asserting a breach of his duty—is an element which must necessarily be present before equity can afford protection to the equitable rights which it has brought into existence. We are not prepared to see the arm of equity thus shortened.

H It is now time to examine in some detail *Sinclair v. Brougham* (3). Before us it was argued, on behalf of the defendants, that the principle on which it was decided was not that applied in *Hallett's* case (2), but a different one altogether, invented with a view to solving a particular problem. We do not agree. The principle, in our view, was clearly the same, but in its application to new facts fresh light was thrown on it, and it was shown to have a much wider scope than a narrow reading of *Hallett's* case (2) would suggest. We have examined with care not only the opinions themselves but the printed cases and the arguments of counsel, as well as the judgments of the majority and of FLETCHER MOULTON, L.J., in the Court of Appeal. It is in the context of this material that the speeches must be interpreted. The contest in

Sinclair v. Brougham (3) was between shareholders and depositors in respect of a miscellaneous mass of assets distributable by the liquidator in the winding-up of a building society. The deposits had been made and the assets were used in connection with a banking business carried on in the name of the society but beyond its powers. Each of the two classes claimed priority over the other. Until the case reached the House of Lords the possibility that they might rank *pari passu* does not appear to have been considered. The majority of the Court of Appeal, affirming NEVILLE, J., gave the shareholders priority over the depositors. FLETCHER MOULTON, L.J., would have given the depositors priority over the shareholders. The House of Lords held that both views were wrong and that, on the principle on which *Hallett's case* (2) was founded, the two classes shared rateably. In one respect, no doubt, this application of the principle is an extension of it, since, although the right of individuals to trace their own money (if they could) was preserved in the order of the House, the order provided for tracing the aggregate contributions of the two classes *as classes*. *Hallett's case* (2) was, of course, based on the right of an individual to follow what he could in equity identify as his own money. The extension of the principle in *Sinclair v. Brougham* (3) was the obvious and, indeed, on the facts, the only practical method of securing a just distribution of the assets. The importance of the point must not, however, be overlooked in considering the arguments and the speeches. Apparently, it had not occurred to any of the judges in the lower courts or to any of the eminent counsel who signed the cases or argued in the House of Lords that *Hallett's case* (2) had anything to do with such a case as *Sinclair v. Brougham* (3). There is not a mention of it in any of the judgments below or in either of the printed cases or in argument in the House of Lords until VISCOUNT HALDANE, L.C. ([1914] A.C. 398, 404) suggested that the principle of *Hallett's case* (2) might apply. The point thus offered was accepted by counsel, who proceeded to base arguments on it. Counsel on behalf of the depositors submitted that *Hallett's case* (2) was really based, "not upon trusteeship in the narrow sense, but upon ownership" and argued that :

... if property of B. is found in the hands of A., then *prima facie* A. is in a wide sense in a fiduciary relationship towards B., because equity affects his conscience with regard to that particular property . . .

This proposition, as stated, was not accepted by the House. From it counsel deduced the consequence that the depositors were entitled to priority in respect of the moneys which they had deposited. This argument was, of course, quite different from the other two arguments adduced on behalf of the depositors, *viz.*, that based on money had and received and that based on the principles enunciated by FLETCHER MOULTON, L.J., in his dissenting judgment. Counsel for the B. shareholders agreed (*ibid.*, 406) that (subject to a qualification not material on the facts):

... money paid under an *ultra vires* contract does not become the property of the society but remains the property of the payer, and so long as he can identify it he may trace it through any number of changes and claim it on the footing that it is and always has been his property.

But (*ibid.*, 407, 408) a claim based on property was, they said (and this relates to the point mentioned above) impossible in that case because no tracing order could be made without identification and the doctrine of tracing could not be applied to the collective claims of the depositors as a class. They also said (*ibid.*, 409) that *Hallett's case* (2) was confined to fiduciary relationship in a strict sense.

It is to be remembered that the arguments of counsel on either side were directed to claiming priority for their respective clients and much of the reasoning in the speeches is directed to negating these claims to priority. The House held that, although the equity underlying *Hallett's case* (2) was applicable, the result of its proper application was that the conclusion sought by both arguments was wrong and that the fund was divisible rateably between the two classes of claimants. We may call attention in passing to the manner in which the House dealt with the argument of counsel for the B. shareholders that there could be no tracing save in favour of an individual who could follow and (in equity) identify his own property and that in consequence there could not be what would be in substance a tracing order in favour of a class. This

argument does appear to raise a technical difficulty. But the House brushed it aside. LORD SUMNER'S speech contains the clearest exposition of the reasons for dealing with it in the manner approved by the House. He said (*ibid.*, 459, 460):

My Lords, I agree, without recapitulating reasons, that the principle on which *Hallett's* case (2) is founded justifies an order allowing the appellants to follow the assets, not merely to the verge of actual identification, but even somewhat further in a case like the present, where after a process of exclusion only two classes or groups of persons, having equal claims, are left in and all superior claims have been eliminated. Tracing in a sense it is not, for we know that the money coming from A. went into one security and that coming from B. into another, and that the two securities did not probably depreciate exactly in the same percentage, and we know further that no one will ever know any more. Still I think this well within the "tracing" equity, and that among persons making up these two groups the principle of rateable division of the assets is sound.

This does, at least, show that in applying the equitable principle equity is entitled to adopt that method of application which in the circumstances of the case will lead to an equitable result.

We now proceed to consider some of the salient facts in *Sinclair v. Brougham* (3). The case is complicated by the fact that the claims of the depositors came to be considered at a time when the society was in liquidation, with the result that the B. shareholders came into the picture as competing claimants against the assets. But a problem precisely similar in all essentials would, as it appears to us, have arisen if the depositors had claimed to trace their money while the society was still a going concern. In that case the shareholders would not have appeared as claimants at all; the competition would have been between the depositors and the society. In the actual case the shareholders were the claimants, but all that they could claim was such money as the society itself could have claimed as between itself and the depositors. We shall not be thought disrespectful if we call attention, perhaps rather more emphatically than was sometimes thought necessary in the opinions as delivered, to certain distinctions which must be borne clearly in mind. The first is the distinction between the directors and the society, which could not be bound in any way or for any purpose, directly or indirectly, by the *ultra vires* acts of the directors. The second is the distinction between the society and the shareholders who were only entitled to such equitable rights in the assets as the society itself could have claimed, for that was all that the liquidators had the right to give them. The third distinction is of no less importance, that between the *ultra vires* business (which was not in law the society's business) and the assets requiring distribution which were in the society's name and of which the society was the legal owner. So far as we have been able to discover, all the assets in question stood, as we would have expected them to stand, in the name of the society—they were, as LORD DUNEDIN said ([1914] A.C. 398, 438) "in the society's strong-box"—and it was thus that they came into the hands of the liquidator. None of them was in the name of the directors who were, therefore, not necessary parties to the proceedings. In view of the arguments addressed to us and of the judgment of WYNN-PARRY, J., on the point, this is important and for the following reason. The starting point of the claim of the depositors was the existence of a fiduciary relationship as between themselves and the directors, and that relationship arose from the fact that the depositors had entrusted their money to the directors for the purpose of a business which could not lawfully be carried on so that the directors must be treated as holding the money on behalf of the depositors. If the directors had paid the money of a depositor into their own banking account, he would have had an action against them exactly similar to the action in *Hallett's* case (2) and it would have been correctly said that the directors could not be heard to set up a title of their own to the money standing in the account adverse to the claim of the depositor. But nothing of the sort could be said if the directors paid the money into the account of the society at its bankers. Neither the conscience of the society nor of its liquidator (if it went into liquidation) could ever come into the picture on the basis of a fiduciary relationship, since the only parties to that relationship were the directors and the depositors. The society could not

have been a party to it, since it had no power to accept the depositor's money. If, therefore, in such a case the depositor could claim a charge on the society's account with its bankers, the claim must have been based on some wider principle.

What can that principle be? In our judgment it must be the principle clearly indicated by LORD PARKER OF WADDINGTON, that equity may operate on the conscience not merely of those who acquire a legal title in breach of some trust, express or constructive, or of some other fiduciary obligation, but of volunteers, provided that, as a result of what has gone before, some equitable proprietary interest has been created and attaches to the property in the hands of the volunteer.

LORD PARKER said ([1914] A.C. 398, 449) that :

... the assets for distribution being assets not of a legitimate but an *ultra vires* business are not the assets of the society, except in so far as they can substantiate some equity to them and ... such equity as they have can arise only from an application of the same principles to which the *ultra vires* lenders are themselves entitled to have recourse.

The result of this, in LORD PARKER's opinion (*ibid.*, 448), was that :

The equities of the *ultra vires* lenders and of the society are equal, and it follows that the remainder of the assets ought to be divided between the *ultra vires* lenders and the society rateably ...

This result is arrived at in the manner indicated (*ibid.*, 447), where LORD PARKER says :

But the fact that the society's own money had been employed by its directors or agents in an *ultra vires* business would entitle the society to an additional equity. It would be entitled, on the principles of *Re Hallett's Estate* (2) to follow the money as long as it or any property acquired by its means could be identified. In other words it would have exactly the same equities in this respect as the *ultra vires* lender, including the equity which in my opinion underlies the *Crace-Calvert* case (33).

In saying that the assets "are not the assets of the society" LORD PARKER must not, we think, be taken to have disregarded the fact that they stood in the name of the society. What he must have meant was that the society could not assert any save a bare legal title except to the extent that it could establish an interest in the mass which equity could recognise.

We must, however, return to the facts. The money subscribed by the shareholders was rightly obtained by the society and when received became the property of the society. The directors, inasmuch as they were responsible for the manner in which this money subscribed was dealt with, were no doubt in a fiduciary position towards the society. But it was not by working on their conscience in that capacity that the House of Lords was able to assert the equitable interest of the society (and, by reason of the liquidation, of the shareholders) in the mass of assets standing in the name of the society. The House of Lords could not work on the conscience of the directors for the simple reason that the directors were not there to have their consciences worked on. The society (and the liquidator and the shareholders) could assert a claim to an interest in the assets, but in view of the fact that the assets consisted of a mixed fund, the only machinery by means of which such a claim could be asserted and made effective was the equitable machinery of a declaration of charge. As, in their claim on the mixed fund, the shareholders were, in view of the liquidation, in effect asserting the rights of the society itself in a matter in which, but for the liquidation, they would have had no *locus standi*, no question of trust or fiduciary relationship as between themselves and the society entered into the matter. The society, as it appears to us, was in the position of a person whose own moneys (*viz.*, the amounts subscribed by the shareholders) had become mixed with moneys belonging to others (*viz.*, the depositors) to which the society never had any right at all. The society (and, in the liquidation, the shareholders) could claim an interest in the mixed fund not as following an equitable interest of its own in moneys in the hands of the directors but as asserting its own equitable interest in a mass of assets standing in *its own name*, but to the extent only to which its own assets (*viz.*, money subscribed by its shareholders) could in equity be traced into the mass.

Looked at in this way *Sinclair v. Brougham* (3) resolves itself into one where the fund to be distributed consisted of a mixed fund in the hands of X. (the society), the origin of which could be traced in part to moneys of X. itself and in part to moneys of Y. (the depositors) to which X. never had any equitable title, but which, remaining in the eyes of equity the property of Y., was, in violation of the equitable right of Y., (the depositors) mixed by Z. (the directors) with the moneys of X. (the society). On this basis the right of the depositors must, we think, be rested on their equitable interest which they were asserting, not against the directors as trustees or fiduciary agents for them, but against the society (or what was in effect the same thing, the liquidator) as a volunteer into whose hand (or "strong-box") the money of the depositors had become mixed with money belonging to the society itself. As the society was no party to the borrowing, it was *vis-a-vis* the depositors a volunteer, holding the legal title to the assets representing the borrowed money. It was compelled, as being a volunteer, to recognise the equal title of the depositors, and the shareholders claiming in its right were compelled to do the same. Contrary to the view of NEVILLE, J., and the Court of Appeal, the society could not claim priority over the depositors. *Per contra*, the depositors could not claim priority over the shareholders. To have allowed them to do so would have been to treat the society as having itself been in a fiduciary relation to the depositors (which it was not) and to place it in as bad a position as the unfaithful agent in *Hallett's* case (2). This would have been manifestly unjust. This explanation appears to us to accord with the fundamental conception which lies at the root of this equitable jurisdiction, *i.e.*, that equity intervenes, not to do what might be thought to be absolute justice to a claimant, but to prevent a defendant from acting in an unconscionable manner. Equity will not restrain a defendant from asserting a claim save to the extent that it would be unconscionable for him to do so. If this limitation on the power of equity results in giving to a plaintiff less than what on some general idea of fairness he might be considered entitled to, that cannot be helped.

Having done our best to formulate in our own words what appear to us to be the principles on which *Sinclair v. Brougham* (3) was decided, we now turn to an examination of the speeches themselves. We find it convenient to begin with the speech of LORD PARKER OF WADDINGTON, which appears to us to contain the clearest exposition. LORD PARKER treats five different classes of cases as falling under one and the same comprehensive principle. They are as follows: (a) *Re Hallett's Estate* (2); (b) and (c) two illustrations given by himself ([1914] A.C. 398, 442); (d) the decision of the Court of Appeal in the *Crace-Calvert* case (33); (e) *Sinclair v. Brougham* (3) itself. He prefaces his references to (a), (b) and (c) with a brief statement of the differences between the remedies at common law and in equity. The passage ([1914] A.C. 398, 441, 442) deserves citation at length as it provides the key to the whole opinion:

At law, therefore, the lender can recover the money, so long as he can identify it, and even if it has been employed in purchasing property, there may be cases in which, by ratifying the action of those who have so employed it, he may recover the property purchased. Equity, however, treated the matter from a different standpoint. It considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for any one who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money, it ended, as was so often the case, in creating what were in effect rights of property, though not recognised as such by the common law.

The first of LORD PARKER's own two illustrations is the case where a person standing in a fiduciary relation to two different persons acquires property by means of a mixed fund of money, part of which had belonged to one and part to the other. In such a case each has an equal equity. Each is entitled to a charge and neither is entitled to priority over the other. The explanation of this result lies in the fact that each has an equitable right of property and that right of property can be traced by each into the asset purchased. Equity gives effect to this right by means of the equitable remedy of a declaration of

charge. Now, in this example the property purchased is in the hands of the fiduciary agent. The case of property not in the hands of the fiduciary agent falls under LORD PARKER's second illustration ((c) above). This example is so important for present purposes that we will quote it in full (*ibid.*, 442, 443) :

Suppose, again, that the fiduciary agent parts with the money to a third party who cannot plead purchase for value without notice, and that the third party invests it with money of his own in the purchase of property. If the third party had notice that the money was held in a fiduciary capacity, he would be in exactly the same position as the fiduciary agent, and could not, therefore, assert any interest in the property until the money misapplied had been refunded. But if he had no such notice this would not be the case. There would on his part be no misconduct at all. On the other hand, I cannot at present see why he should have any priority as against the property over the owner of the money which had, in fact, been misapplied.

Mr. Pennyquick acknowledged that this passage was a serious obstacle in his way. He argued, however, that the illustration was not strictly necessary or directly pertinent to LORD PARKER's decision of the case before him, since in that case the mixing had been done, not by the volunteer, but by the fiduciary agents before the volunteer had received anything. He argued, accordingly, that it was mere *dictum* and could not be supported either on principle or on authority. We do not think it can be regarded as mere *dictum* since it appears to us to be an essential step in the reasoning by which LORD PARKER came to his conclusion as to the proper way to deal with *Hallett's* case (2), and, in our view, there can be no difference in principle between a case where the mixing has been done by the volunteer and a case where the mixing has been done previously by the fiduciary agent. In any event, we should not be prepared to dissent from the considered view on such a topic of the greatest master of equity of our time.

We may pause here to refer to the interpretation of this passage which commended itself to WYNN-PARRY, J., ([1947] 1 All E.R. 522, 543, 544). He came to the conclusion that in this illustration LORD PARKER was not :

... postulating the mixing by the third party in his banking account of the money paid to him by the fiduciary agent with his own money before the investment is effected ...

On this basis the illustration did not appear to infringe the rule which WYNN-PARRY, J., himself was laying down that, once a mixing takes place in the banking account of anyone not standing in a fiduciary relationship (particularly a volunteer), equity is powerless to interfere. But with all respect to the learned judge we find it impossible to agree with his interpretation. LORD PARKER was clearly postulating a mixing of the two classes of money. Is it conceivable that he was not intending to include what in nine hundred and ninety-nine out of one thousand instances would be the normal case of the purchaser paying for the property bought by a cheque on his own banking account? In any event, however, we do not think that there is any substance in the distinction drawn by the learned judge. We are unable to share the view, which appears to underlie his reasoning, that there is some difference in the case where "money" is "mixed" in a banking account and the case where a "mixing" takes place in some other way. If a volunteer pays for the property which he purchases by two separate sums of money, one being his own and the other being that given to him by the fiduciary agent, the two sums, whether in the form of two cheques or two sums of cash, become "mixed" in the very act of purchase in the only sense that matters. Their identity is lost to the eye of the common law, which is unable to detect their continued existence in the property bought, as much as if both sums had been paid into the same account at a bank. If, as WYNN-PARRY, J., appears to concede, the eye of equity is less shortsighted and is able to detect the existence of two sums as present in the property bought if it is paid for by two separate cheques, why is it incapable of doing precisely the same thing where the two sums are paid into one banking account? The real fact is, as it appears to us, that in the opinion of LORD PARKER (with which we respectfully agree) it made not a particle of difference to the significance of his illustration whether or not the two sums had passed through one banking account before the purchase was effected.

Returning to the passage quoted, we desire to call attention to some of its features. First, the right of the owner of the money is treated as equivalent

to a right of property which, in the view of equity, can only be taken away by means of a purchase for value without notice. Secondly, the limited explanation which was sufficient to decide *Hallett's* case (2) is not sufficient for this example, and the claim of the true owner against the volunteer does not depend for its success on the incapacity of a fiduciary agent to base a claim on his own breach of duty. Thirdly, the money is misapplied by giving it to a volunteer who is treated as subject to the ordinary rule of equity that a volunteer takes subject to equitable estates or interests subsisting in the property taken. In other words, LORD PARKER was taking a case where, in his own words ([1914] A.C. 398, 442), equity had "ended . . . in creating what were in effect rights of property." Fourthly, the money given to the volunteer by the fiduciary agent is mixed with other money not, as in *Hallett's* case (2), by the fiduciary agent but by the volunteer himself who mixes it with other money of his own. Fifthly, if the volunteer had no notice that the money was held in a fiduciary capacity, there was no reason why he should be unable to "assert any interest in the property until the money misapplied had been refunded"—in other words, the particular matter that affected the conscience of the fiduciary agent in *Hallett's* case (2) and gave the principal his right to priority is not present in this example. Lastly, comes the concluding sentence (*ibid.*, 443) in which LORD PARKER says that he cannot see why the volunteer should have priority over the true owner of the money misapplied. This is a very important sentence and is, in our view, deliberately directed to the argument which we have noted above that the shareholders were entitled to priority. It is, moreover, obviously spoken in relation to the decision of the Court of Appeal then under review, where the majority had held that the B shareholders took priority over the depositors. On a proper understanding of the position in *Sinclair v. Brougham* (3), that case itself is, in our opinion, as a matter of principle on all fours with the supposed case (c) with which LORD PARKER is dealing, notwithstanding that the fund in the hands of the society was not mixed by the society but was received by it already mixed by the directors, and the conclusion that the innocent volunteer (i) is not disentitled to claim an interest in the mixed fund in competition with the true owner of the money misapplied, but (ii) is not entitled to any priority, is exactly the conclusion on which the decision in *Sinclair v. Brougham* (3) is founded. That this is so follows, we think, from the analysis we have made of the principle itself, *viz.*, that, when once the proprietary interest has been created by equity as a result of the wrongful or unauthorised dealing by the original recipient of the money, that interest will persist and be operative against an innocent third party who is a volunteer, provided only that means of identification or disentanglement remain. For such purpose, it cannot make any difference whether the mixing was done by the original recipient (sometimes called "the fiduciary agent") or by the innocent third party.

LORD PARKER subjects to an exhaustive examination *Re Guardian Permanent Benefit Building Society* (*Crace-Calvert's* case) (33). That was a case in which so much of the decision of the Court of Appeal as had decided that the unlimited power to borrow conferred by the rules of the society was void and that the society in consequence had no power to borrow at all was later reversed by the House of Lords. But LORD PARKER's examination of the case relates to what the Court of Appeal decided ought to be done on the basis of its own decision as to the voidness of the borrowing power. It is important to appreciate this because LORD PARKER, in expressing his agreement with the principle recognised by the Court of Appeal, evidently considered that the actual order was not really in accordance with that principle. The important thing about LORD PARKER's treatment of this case is that he considered the equity there applied by the Court of Appeal—"on the plainest principles of equity" as SIR GEORGE JESSEL, M.R., had said—was "the same equity as that on which a tracing order is based." The equity is described by LORD PARKER in the following words ([1914] A.C. 398, 444):

The equity lay in this, that it would be unconscionable for the society to retain the amount by which its assets had been increased by, and in fact still represented, the borrowed money. It would be inequitable for the society to take advantage of the misapplication by its agents of money belonging to others and held by them in a fiduciary capacity.

Now the "agents" in that case were the directors who, acting *ultra vires* the society (and to that extent not as agents of the society), as the Court of Appeal (wrongly as it turned out) held, had borrowed money from various lenders who are the "others" referred to in the passage cited. That money, as between themselves and the lenders, the directors held in a capacity fiduciary towards the lenders because they had no power on the society's behalf to borrow it. That money they applied by dealing with it in such a way that, to use LORD PARKER's words (*ibid.*, 443), it "found its way into the society's assets." We have already explained the process in *Sinclair v. Brougham* (3) by which the depositors' money found its way into the Birkbeck Society's "strong box." It would have been inequitable for the Guardian Society (or its liquidator or shareholders claiming in the winding-up) to take advantage of this misapplication of the lenders' money. LORD PARKER disagreed with the Court of Appeal in regard to the method by which it had purported to give effect to the equity, but as to the equity itself he expressed a clear opinion.

The actual method of distribution adopted by the Court of Appeal in the *Crace-Calvert* case (33) was that, after paying the costs of the liquidation and all debts and everything to which the members were entitled by way of return of capital, interest and bonus, the surplus was to be returned to the lenders. This priority given to the creditors and the members LORD PARKER criticises, and after suggesting various matters which might have been ascertained on an inquiry, he says (*ibid.*, 445, 446):

One question of principle only would, I think, have been involved. Could the society be considered as having itself been a party to any breach of fiduciary duty so as to preclude it from asserting any interest in the assets, until the *ultra vires* lenders had been fully repaid thereof? Or was the society in the position of a person who had innocently received from a fiduciary agent money belonging to another and invested it with money of his own? My present opinion is that the first of these questions should be answered in the negative and the latter in the affirmative, in which case the society and *ultra vires* lenders would, as against the assets, rank *pari passu* and without any priority the one over the other.

The importance of this passage is that LORD PARKER is here treating the society as a volunteer and thus linking the *Crace-Calvert* case (33) with his illustration (c).

We may conclude our examination of LORD PARKER's speech with a reference to a passage (*ibid.*, 449) where he states his approval of a view expressed by FLETCHER MOULTON, L.J., in his dissenting judgment in the Court of Appeal. LORD PARKER says:

I agree that so far as the distributable assets represent the money of the *ultra vires* lenders they are not in equity the assets of the society.

He thus returns to what he had said earlier in his speech (*ibid.*, 442) that the equity which he was examining was based on what in effect were:

. . . rights of property, though not recognised as such by the common law.

From the foregoing study of LORD PARKER's speech, it would appear that in his opinion there is an equitable principle common to all these cases of mixed funds. It operates in different ways according to the circumstances. In some cases it results in a priority to one or other of the claimants, in other cases the claimants rank *pari passu*. Where one claimant is a person in a fiduciary relationship to another and has mixed moneys of that other with moneys of his own, that other takes priority. The same result follows where a person, taking that other claimant's money from the person in a fiduciary relationship with notice that it is money held in a fiduciary capacity, proceeds to mix it with money of his own. Where the contest is between two claimants to a mixed fund made up entirely of moneys held on behalf of the two of them respectively and mixed together by the fiduciary agent, they share *pari passu*, each being innocent. Where the moneys are handed by way of transfer to a person who takes for value without notice, the claim of the owner of the moneys is extinguished just as all other equitable estates or interests are extinguished by a purchase for value without notice. In the case, however, of a volunteer who takes without notice, e.g., by way of gift from the fiduciary agent, if there is no question of mixing, he holds the money on behalf of the true owner whose equitable right to the money still persists as against him. On the other hand, if the volunteer mixes the money

with money of his own, or receives it mixed from the fiduciary agent, he must admit the claim of the true owner, but is not precluded from setting up his own claim in respect of the moneys of his own which have been contributed to the mixed fund. The result is that they share *pari passu*. It would be inequitable for the volunteer to claim priority for the reason that he is a volunteer : it would be equally inequitable for the true owner of the money to claim priority over the volunteer, for the volunteer is innocent and cannot be said to act unconscionably if he claims equal treatment for himself. The mutual recognition of one another's rights is what equity insists on as a condition of giving relief.

We now turn to the speeches of the other noble and learned Lords. VISCOUNT HALDANE, L.C., examines and rejects the theory that the case was one of money had and received, and on this basis he states the claim of the depositors to be as follows (*ibid.*, 418) :

Their claim cannot be *in personam* and must be *in rem*, a claim to follow and recover property with which, in equity at all events, they had never really parted.

He describes the limits within which the common law recognised a right to follow money (*ibid.*, 419) :

... whether the case be that of a thief or of a fraudulent broker, or of money paid under mistake of fact, you can, even at law, follow, but only so long as the relation of debtor and creditor has not superseded the right *in rem*.

We have already referred to what appears to have been the view of VISCOUNT HALDANE, L.C., as to this debtor-creditor qualification. What does appear to be clear is that, if the money was *mixed* with other money, either in a bag or in a banking account, the common law was unable to give to the owner any specific relief. Thus, like LORD PARKER OF WADDINGTON, VISCOUNT HALDANE bases the remedy available in equity on a right of property recognised by equity as vested in the plaintiff throughout, not lost by payment into a banking account, nor by the mixture of moneys, nor by merger in a mass of assets. In all these cases the equitable remedy by way of declaration of charge is available.

It is to be observed that neither LORD PARKER nor VISCOUNT HALDANE suggests that the equitable remedy extends to cover all cases where A. becomes possessed of money belonging to B., a view which LORD DUNEDIN seemed inclined to accept if he did not actually do so. LORD PARKER and VISCOUNT HALDANE both predicate the existence of a right of property recognised by equity which depends on there having existed at some stage a fiduciary relationship of some kind (though not necessarily a positive duty of trusteeship) sufficient to give rise to the equitable right of property. Exactly what relationships are sufficient to bring such an equitable right into existence for the purposes of the rule which we are considering is a matter which has not been precisely laid down. Certain relationships are clearly included, *e.g.*, trustee (actual or constructive) and *cestui que trust*, and "fiduciary" relationships such as that of principal and agent. *Sinclair v. Brougham* (3) itself affords another example. There, a sufficient fiduciary relationship was found to exist between the depositors and the directors by reason of the fact that the purposes for which the depositors had handed their money to the directors were by law incapable of fulfilment.

An important part of VISCOUNT HALDANE's speech (*ibid.*, 421-423) is taken up with an examination of *Hallett's* case (2). He says (*ibid.*, 422) that in *Hallett's* case (2) "the difficulty of following money into a debtor and creditor account like a banker's is got over in equity" by treating the loan to the banker "as an investment *pro tanto* of the principal's money" and allowing the principal to waive the breach of duty and to "claim the investment to the extent of the amount due to him as made on his behalf." He then points out that in the case before the House the investment was not made in breach of a fiduciary duty on the part of the society. This is important, since no question arose of operating on the conscience of the persons, *i.e.*, the directors, who had misapplied the money by using it in an *ultra vires* business. They were not parties. The decision in *Sinclair v. Brougham* (3) shows that the right of the owner of the money, although it may in some cases be treated as equivalent to a right to "adopt" an improper investment, does not rest on so narrow a foundation. Where there are two claimants to property which has been acquired by means of a mixed fund composed of moneys belonging to both of them, there can be no question of an "adoption" of the investment save by the consent of both

of them. In the absence of such consent neither can claim any right save to have a charge, enforceable in the ordinary way by sale, and payment out of the proceeds. LORD PARKER, speaking of such a case (which is his illustration mentioned in (b) above) says (*ibid.*, 442) :

Each is entitled to a charge on the property for his own money, and neither can claim priority over the other. It follows that their charges must rank *pari passu* according to their respective amounts. Further, I think that as against the fiduciary agent they could by agreement claim to take the property itself, in which case they would become tenants in common in shares proportioned to amounts for which either could claim a charge.

LORD DUNEDIN solved the problem on different lines. After criticising the conclusion of the Court of Appeal in the *Guardian* case (*Grace-Calvert's* case (33)), he began by enunciating the proposition (*ibid.*, 431) that :

... all ideas of natural justice are against allowing A. to keep the property of B. which has somehow got into A.'s possession without any intention on the part of B. to make a gift to A.

What he describes as the "equity" involved in the action for money had and received is in his view "based on inherent ideas of justice" (*ibid.*, 432), but he thought that this action would not lie in the case of payment under an *ultra vires* contract. This, however, does not matter if there is an equitable remedy. He compares (*ibid.*, 434) the expression by Roman jurists of what he describes as the "super-eminent equity" in the brocard *nemo debet locupletari jactura aliena* and he asks (*ibid.*, 435) whether English equity is to retire defeated from the task which other systems of equity have conquered. He describes (*ibid.*, 436) as unconscionable in the technical sense a view which leads to the result that :

... having got hold of property which does not belong to you, if only you are wise or lucky enough to change its form you may enjoy the proceeds unmolested.

He says (*ibid.*) that there cannot be a *jus in re* in currency. If by this he means that when money is delivered as currency the title at law passes by delivery, we should, of course, agree. But if he means that there can be no equitable property left in the transferor of the money, we respectfully disagree and in this view we are supported by what was said by LORD PARKER. If a principal confides money to a fiduciary agent for a particular purpose and that agent wrongfully pays it away to another, *e.g.*, on the purchase of a chattel, the principal cannot, of course, recover the money. He has no *jus in re*. Suppose, however, that the fiduciary agent wrongfully gives it to a volunteer, has the principal no right in equity to recover it from the volunteer or to obtain against the volunteer a declaration of charge on any mixed fund or any property into which it has gone ? What LORD DUNEDIN's answer would have been to the question framed in this way is not, we think, clear. The reason is that he regards both an action to get back, *e.g.*, a specific chattel, and an action for money had and received as :

... just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.

He says (*ibid.*, 437) that equity helps :

... the common law by tracing, and can say that if the proceeds of property can be shown to be what I have called a superfluity in the person of the recipient, then it will hold that that property is traced just as surely as if it was still in the original form.

We have, we think, said enough to show that LORD DUNEDIN arrives at the same result in the actual case as VISCOUNT HALDANE, L.C., LORD ATKINSON and LORD PARKER OF WADDINGTON, but by a different route. In the case itself he found the "superfluity" to originate in the excess over the money subscribed by the shareholders due to the admixture of moneys lent by the depositors. The result of this was, however, not that the shareholders took 20s. in the £ before the depositors took anything. What we understand LORD DUNEDIN to mean is that, where the assets into which the moneys of both have gone have depreciated in value, the depreciation is to be treated as rateably distributed. In other words, the "superfluity" is what remained after paying to the shareholders, not the par amount of their original subscriptions, but the depreciated value of what they had subscribed. Attractive though LORD

DUNEDIN's view may be, we cannot regard it as agreeing with those of VISCOUNT HALDANE, LORD ATKINSON and LORD PARKER. Those noble and learned lords limited the right to recover to cases where there is what equity regards, in effect, as a right of property. LORD DUNEDIN, on the other hand, treats the principle which he favours as applicable wherever the property of A. has, without justification, got into the hands of B. Where this has happened, while recognising the limited nature of the relief afforded at law, he appears to think that equity will always intervene to help the rightful owner.

LORD SUMNER's approach is also different from that of the other members of the House. Like them, he rejects the claim for money had and received, and he appears to reject ([1914] A.C. 398, 456) the broad "equity" favoured by LORD DUNEDIN. He thinks (*ibid.*, 458) that the case required to be decided upon equitable principles upon which there was no direct authority. He regards the problem as one of administration. The assets requiring to be administered must be regarded as belonging to someone. They cannot be treated as *res nullius*. He agreed (*ibid.*, 459) that the principle on which *Hallett's case* (2) is founded justified the order proposed.

There are two cases subsequent to *Sinclair v. Brougham* (3) which were quoted to us. *Banque Belge Pour L'Etranger v. Hambrouck* (32), a decision of this court, was a case in which unmixed "money" in the hands of a volunteer was held to be recoverable by a bank from whom the "money" had been drawn by means of cheques on its customer's account which had been fraudulently obtained or drawn by the customer's clerk. So far as it is relevant to the question which we have to consider, the case appears to do no more than afford an example of the proposition (which is not disputed) that "unmixed money" can be traced into the hands of a volunteer. But the references in the judgments to the equitable principle are in no way inconsistent with what we have said. If anything, they seem to us to support our view. *Re Blake* (28), a decision of MAUGHAM, J., we have already referred to in other connections. The only relevance for present purposes lies in the judge's references to the equitable principles relating to the tracing of trust funds ([1932] 1 Ch. 54, 62, 63). He said (*ibid.*, 63, 64):

The old doctrine as to the impossibility of following money into the hands of a volunteer has been largely encroached upon by more modern decisions, especially in cases where the trustee is the defendant.

It is to be observed that neither the *Banque Belge* case (32) nor *Sinclair v. Brougham* (3) was cited to or mentioned by the learned judge and, with respect, we do not follow him in his reference to claims against a volunteer "where the trustee is the defendant." In such a case the defendant can scarcely be described as a "volunteer." The learned judge went on to say (*ibid.*, 64) that he had been unable to find any case:

... in which a claim to follow money in the hands of a volunteer (not being the original trustee or his bankers) has been successfully made ...

We ourselves regard the claim of the depositors in *Sinclair v. Brougham* (3) and the claim of the plaintiff bank in the simpler *Banque Belge* case (32) as successful claims to follow money into the hands of a volunteer. With respect, we cannot think that MAUGHAM, J., would have used the language that he did if the question had been fully argued before him and the relevant cases not only cited but accurately explained.

In the analysis we have made of the speeches in *Sinclair v. Brougham* (3) and of the principle which underlies them, it has been made clear that, though the equity may operate on the conscience of a volunteer, it will not operate on the conscience of a purchaser for value without notice. Some attempt was made on the part of the defendants to establish that they or some of them might properly be described as falling within the latter category, *e.g.*, by reason of the fact that moneys which certain of them had received were paid on the terms that such moneys were applied in a particular way. The argument was not strenuously stressed before us and was rejected by WYNN-PARRY, J. We entirely agree with the learned judge on this point and do not find it necessary to add anything to the reasons which he gave for his conclusion.

We have now to consider how the principles which we have outlined are to be applied to the facts of the individual cases which are before us. We

deal first with what appear to be the most important claims from the point of view of amount. They are cases in which the money received from the Diplock executors was used in the execution of works on land or buildings already belonging to the charities. The plaintiffs claim in each case declarations of charge on land of the charity in respect of these amounts. The cases are: (i) Leaf Homeopathic Hospital (action II.C) which spent £1,137 (part of its total grant of £7,500) on its hospital buildings; (ii) Westminster Hospital (action IV.A) which applied the whole of its grant of £4,000 towards the building on its own land (at a total cost of £500,000) of the new Westminster Hospital; (iii) Heritage Craft Schools (action IV.B) who spent their grant of £2,000 as to £1,499 17s. 4d. on the erection of buildings known as the "Toddlers' Home" on land of their own, and as to £500 2s. (apparently) on the improvement of certain other land of their own used in connection with the "Toddlers' Home." According to the agreed statement of facts, this latter sum was, in fact, so spent. According to the defence, however, this sum was used to repay to a Colonel Warren a like sum advanced by him to the Schools for the purpose of executing this improvement. (In the notice of appeal an alternative claim is framed on this basis: we will deal with the alternative case later); (iv) Queen Alexandra Cottage Homes (action IV.D) which spent £3,750 (part of its total grant of £4,760) in the erection of a block of "homes" on land of its own; (v) Guy's Hospital (action IV.E), which spent out of its total grant of £21,000 the sum of £19,391 12s. 11d., less £5,052, on the reconstruction of an existing ward in the hospital so as to form two children's wards known as the "Caleb Ward" and the "Diplock Ward" and the sum of £555 1s. 7d. on meeting deficits on other building operations. These expenditures all raise the same question, *viz.*: Is there any equitable remedy available to the plaintiffs by which they can trace the Diplock money into the property on which it was expended? WYNN-PARRY, J., dismissed all these claims save, in the case of Guy's Hospital, for a sum of £5,052 (part of the sum above mentioned of £19,391 12s. 11d.) which had not, in fact, been expended but still stood to the credit of a special account at the date of the hospital's receipt of the "warning letter." In our opinion, he was right in rejecting these claims, but—as will have been seen—we respectfully disagree with the reasoning by which he arrived at his result.

Where the contribution of a volunteer to a mixed fund or the acquisition of what we may call a "mixed asset" is in the form of money, it is, as we hope to have shown, inequitable for him to claim the whole fund or the whole asset. The equitable charge given to the other claimant in respect of the money contributed by him results merely in the division of the mixed fund between the two of them or the reduction of the asset by sale to its original components, *i.e.*, money which is then divisible in the same manner. The volunteer gets back what he put in, *i.e.*, money. On this basis, if a charity had used a mixed fund, consisting in part of its own money and in part of Diplock money, in the acquisition of property, whether, *e.g.*, land or stock, the application of the equitable remedy would have presented no particular difficulty. The Diplock money and the charity money could each have been traced. A charge enforced by sale and distribution would have been effective as well as fair to both parties. The charity would not, as the result of the mixture, have been deprived of anything that it had before. In the present cases, however, the charities have used the Diplock money, not in combination with money of their own to acquire new assets, but in the alteration and improvement of assets which they already owned. The altered and improved asset owes its existence, therefore, to a combination of land belonging to the charity and money belonging to the Diplock estate. The question whether tracing is possible, and, if so, to what extent, and also the question whether an effective remedy by way of declaration of charge can be granted consistently with an equitable treatment of the charity as an innocent volunteer, present quite different problems from those arising in the simple case above stated. In the case of the purchase of an asset out of a mixed fund, both categories of money are, as we have said, necessarily present throughout the existence of the asset in an identifiable form. In the case of adaptation of property of the volunteer by means of trust money, it by no means necessarily follows that the money can be said to be present in the adapted property. The

beneficial owner of the trust money seeks to follow and recover that money and claims to use the machinery of a charge on the adapted property in order to enable him to do so. But in the first place the money may not be capable of being followed. In every true sense, the money may have disappeared. A simple example suggests itself. The owner of a house who, as an innocent volunteer, has trust money in his hands given to him by a trustee uses that money in making an alteration to his house so as to fit it better to his own personal needs. The result may add not one penny to the value of the house. Indeed, the alteration may well lower its value, for the alteration, though convenient to the owner, may be highly inconvenient in the eyes of a purchaser. Can it be said in such cases that the trust money can be traced and extracted from the altered asset? Clearly not, for the money will have disappeared leaving no monetary trace behind. The asset will not have increased (or may even have depreciated) in value through its use.

The matter, however, does not end here. What, for the purposes of the inquiry, is to be treated as "the charity property"? Is it to be the whole of the land belonging to the charity, or is it to be only that part of it which was altered or reconstructed or on which a building has been erected by means of Diplock money? If the latter, the result may well be that the property, both in its original state and as altered or improved, will, when taken in isolation, have little or no value. What would be the value of a building in the middle of Guy's Hospital without any means of access through other parts of the hospital property? If, on the other hand, the charge is to be on the whole of the charity land, it might well be thought an extravagant result if the Diplock estate, because Diplock money had been used to reconstruct a corner of it, were to be entitled to a charge on the entirety. It is, however, not merely a question of locating and identifying the Diplock money. The result of a declaration of charge is to disentangle trust money and enable it to be withdrawn in the shape of money from the complex in which it has become involved. This can only be done by sale under the charge. But the equitable owner of the trust money must in this process submit to equality of treatment with the innocent volunteer. The latter too, is entitled to disentangle his money and to withdraw it from the complex. Where the complex originates in money on both sides there is no difficulty and no inequity. Each is entitled to a charge. But if what the volunteer has contributed is not money but other property of his own such as land, what then? You cannot have a charge for land. You can, it is true, have a charge for the value of land, an entirely different thing. Is it equitable to compel the innocent volunteer to take a charge merely for the value of the land when what he has contributed is the land itself? In other words, can equity, by the machinery of a charge, give to the innocent volunteer that which he has contributed so as to place him in a position comparable with that of the owner of the trust fund? In our opinion, it cannot. In the absence of authority to the contrary, our conclusion is that as regards the Diplock money used in these cases it cannot be traced in any true sense, and, further, that, even if this were not so, the only remedy available to equity, *viz.*, that of a declaration of charge, would not produce an equitable result and is inapplicable accordingly.

We now consider two claims of a different class. They arise in connection with (i) the alternative case above mentioned of the Heritage Craft Schools (action IV.B) and (ii) the Leaf Homoeopathic Hospital (action II.C), as regards £6,000, further part of the hospital's total grant of £7,500. In the former case, the alternative claim was that the judicial trustee is entitled by way of subrogation to stand in the shoes of Colonel Warren in respect of his loan of £500 2s. which was said to have been paid off out of the Diplock grant. In the latter case, the claim is to have the benefit of a charge for £6,000 on property of the hospital formerly held by Barclays Bank, Ltd., as security for a fixed loan for that amount which was paid off out of the Diplock grant under the terms on which that grant was made. Both claims were rejected by WYNN-PARRY, J. The facts in relation to this £500 2s. do not appear to have been clearly ascertained. Assuming, however, that it was used to repay Colonel Warren, the result, apparently, was to enable the charity to apply the sum borrowed from Colonel Warren for the purpose of executing the works in question. There is no suggestion that Colonel Warren's loan was a secured

loan. The payment to Colonel Warren can only have operated to extinguish the debt owing to him and the money which he had advanced was consequently available for use by the charity for the purposes indicated without there being any obligation to repay it. The case cannot, we think, be regarded as a case of subrogation. We agree with the view of WYNN-PARRY, J., that in such a case the debt was extinguished so that, in order to give effect to the equitable doctrine said to be applicable, it would be necessary to revive the debt in some way. We do not see how it can be said to be unconscientious on the part of the charity to object to this being done. In substance, the Diplock money was used for the purpose of carrying out works on the land of the charity and, in our opinion, the plaintiffs are in no better position than they are in the cases of works carried out on lands of a charity which we have already discussed.

The case of the Leaf Homeopathic Hospital is different in that (a) the loan was a secured loan, (b) the grant was made in terms for the purpose of enabling the charity to pay off the loan, and (c) the £6,000 in question cannot be said to have been used indirectly in the execution of works as in the case of the Heritage Craft Schools. It was used simply and solely for the purpose of clearing off an existing incumbrance. Here, too, we think that the effect of the payment to the bank was to extinguish the debt and the charge held by the bank ceased to exist. The case cannot, we think, be regarded as one of subrogation, and, if the plaintiffs were entitled to a charge, it would have to be a new charge created by the court. The position in this respect does not appear to us to be affected by the fact that the payment off of this debt was one of the objects for which the grant was made. The effect of the payment off was that the charity, which had previously held only an equity of redemption, became the owners of unincumbered property. That unincumbered property derived from a combination of two things, the equity of redemption contributed by the charity and the effect of the Diplock money in getting rid of the incumbrance. If equity is now to create a charge (and we say "create" because there is no survival of the original charge) in favour of the judicial trustee, it will be placing him in a position to insist on a sale of what was contributed by the charity. The case, as it appears to us, is in effect analogous to the cases where Diplock money is expended on improvements on charity land. The money was in this case used to remove a blot on the title. To give the judicial trustee a charge in respect of the money so used would, we think, be equally unjust to the charity who, as the result of such a charge, would have to submit to a sale of the interest in the property which it brought in. We may point out that, if the relief claimed were to be accepted as a correct application of the equitable principle, insoluble problems might arise in a case where in the meanwhile fresh charges on the property had been created or money had been expended on it.

As regards the main action, the only appeal made to this court relates to the claim against St. George's Hospital. That charity received a grant of £8,000 on Mar. 20, 1937. By a letter dated Oct. 19, 1939, addressed to the solicitors for the executors, the assistant secretary stated that this sum "has been invested in the name of the rebuilding fund of St. George's Hospital." This letter is admitted in para. 4 of the defence, but it is denied :

... that any part of the investments in the name of the rebuilding fund of this defendant in fact represents the said sum of £8,000 or forms part of the testator's estate.

According to correspondence which is before us, it would appear that the £8,000 was paid into the charity's "rebuilding appeal account" with the Westminster Bank, Knightsbridge, on Mar. 21, 1937. The correspondence shows that certain sums (apparently small) were drawn from this account and spent and that investments were from time to time made by means of money drawn from the account. In the case of Dr. Barnardo's Homes we think (as later appears) that the rule to be applied in order to give effect to the plaintiffs' equity would be the same as that applied in *Devaynes v. Noble, Clayton's* case (34). In the case of Dr. Barnardo's Homes we have before us the relevant banking account, showing all the dealings, in and out, since the receipt of the Diplock money. In the case of St. George's Hospital we have not before us

the corresponding banking account, but it appears to us that on principle the same rule would *prima facie* be applicable. In any case it seems to us reasonably clear that the £8,000 or some part of it can be traced into the investments. We are unable, on the information before us, to ascertain what precisely the plaintiffs' rights are, but (subject to discussion) we think that they would (if necessary) be entitled to an appropriate inquiry.

The Prince of Wales Hospital, Plymouth (action II.A) received a grant of £1,000 on Mar. 23, 1937. The cheque for this sum was paid into the hospital's current account, which at that date was overdrawn to the amount of £21,822 6s. 5d. This account was continuously overdrawn and at the date of the "warning letter" of Oct. 19, 1939, the overdraft amounted to £30,187 16s. 5d. The hospital's bankers held security for the overdraft in the shape of investments which were of the market value of £25,835 4s. 3d. on Mar. 23, 1937, and £22,322 2s. 11d. on Oct. 19, 1939. Certain of these investments were sold and the proceeds applied in reduction of the debt. One holding was redeemed. No order under this branch of the case is asked for in the notice of appeal. It is, therefore, unnecessary for us to say anything further in regard to the Prince of Wales Hospital.

The National Institute for the Deaf (action I.F) received a grant of £1,500. The cheque was paid into the charity's current account, which was in credit. It is agreed that if the rule in *Clayton's* case (34) were applied, the whole of the sum of £1,500 would have to be treated as having been drawn out and expended during the year ended Mar. 31, 1938, for the ordinary purposes of the charity and no money or other asset could be treated as representing any part of it, but before the applicability of *Clayton's* case (34) is considered, there is another question. For the purposes of its own accounts the charity treated the £1,500 as having been carried, like other legacies, to its capital account and not to its income and expenditure account. Whenever general expenditure exceeded income in any year, the deficiency was debited to capital account. On Aug. 30, 1938, and in December, 1938, two sums of £500 and £1,000 respectively were withdrawn from the banking account and placed on deposit at the Post Office Savings Bank where they have remained, and for the purposes of the charity's accounts they have been treated as representing the £1,500 of Diplock money. On these facts it is argued on behalf of the plaintiffs that the charity is bound by its own appropriation and that the money so placed on deposit must be treated as representing the Diplock grant.

This claim, with others of the same nature, is dealt with by WYNN-PARRY, J., ([1947] 1 All E.R. 522, 547). His reason for rejecting the claim was that the claim could only be rested on the common law right to follow. In accordance with his general conclusion he held that the equitable right of tracing was not applicable for the reason that the charity was not a fiduciary agent. The claim, he thought, could not be maintained at common law since in the eyes of the common law the £1,500 had lost its identity for ever by being mixed with other money in the charity's banking account. His reasoning ceases to be applicable if the views which we have expressed as to the equitable remedy are correct. On that basis the £1,500 could be traced into the charity's banking account. The question whether or not it ought at any given date to be regarded as wholly or partially present in that account would have depended, in the first instance, on the answer to the question whether the rule applied in *Clayton's* case (34) was applicable to withdrawals made from the account, or whether, the account being, *ex hypothesi*, a mixed fund composed of Diplock money and the charity's own money, withdrawals ought to be regarded as having been made rateably from both claimants. As already indicated, the applicability of the rule in *Clayton's* case (34) is later discussed in connection with the case of Dr. Barnardo's Homes. Here, however, the charity has earmarked the sums withdrawn from its account and deposited at the Post Office Savings Bank. It seems to us that equity cannot disregard this. A volunteer, who mixes what turns out to be trust money with his own, can surely himself "unmix" it subsequently if he thinks fit to do so. And as the operation of equity is directed to preventing the volunteer doing what is unconscionable, surely it would be unconscionable for the volunteer, who, for his own purposes, has earmarked the trust money, to assert that what he has earmarked is not trust money but money which he is entitled to keep as his own. In our opinion,

the plaintiffs' claim in this part of the case to be entitled to this £1,500 is correct, and it is not necessary here to discuss *Clayton's* case (34) at all.

In the case of Dr. Barnardo's Homes (action I.E), the case presented to us, as we understood it, was limited to a claim to trace the sum of £3,000 granted by the executors and paid into the charity's general current account on Dec. 14, 1936, into a sum of £40,000 $2\frac{3}{4}$ per cent. Funding Loan purchased for £39,341 13s. 9d on Dec. 23, 1936, and paid for by a cheque drawn on the same account and cleared on Dec. 24. The precise manner in which the entries in the bank pass book ought to be interpreted is not, we think, entirely clear, but for the purpose of explaining the principle which we consider would be applicable we start with the position at the close of business on Dec. 14, 1936. The position then was that the credit balance of £49,771 4s. 11d. represented, as to £3,000, Diplock money, and as to the remainder, *viz.*, £46,771 4s. 11d., charity money. If the whole of this charity money is treated (as for the purpose of our explanation we are treating it) as having been paid in before the Diplock £3,000 was paid in, it would follow, if the principle of *Clayton's* case (34) were applicable as between the claimants and the charity, that the first £46,771 4s. 11d. drawn out would be charity money. Now, as we have said, the cheque for £39,341 13s. 9d. was cleared and debited to the account on Dec. 24. Meanwhile, a number of withdrawals had taken place, totalling £22,194 7s. 1d.

In the pass book the next withdrawal is the £39,341 13s. 9d. with which we have to deal. Taking, therefore, the starting figure of £49,771 4s. 11d. and deducting from it the £22,194 7s. 1d. withdrawn which, on *Clayton's* case (34), must be regarded as charity money, there remained £27,576 17s. 10d. The result would be that the sum of £39,341 13s. 9d. must be regarded as having consisted, as to the first £24,576 17s. 10d. of charity money, as to the next £3,000, of Diplock money, and as to the remainder, of charity money. On this basis the plaintiffs would be entitled to a charge on the funding loan in respect of their claim to £3,000.

The above result would only follow if *Clayton's* case (34) applies. It might be suggested that the corollary of treating two claimants on a mixed fund as interested rateably should be that withdrawals out of the fund ought to be attributed rateably to the interests of both claimants. But in the case of an active banking account this would lead to the greatest difficulty and complication in practice and might in many cases raise questions incapable of solution. What, then, is to be done? In our opinion, the same rule as that applied in *Clayton's* case (34) should be applied. This is really a rule of convenience based on so-called presumed intention. It has been applied in the case of two beneficiaries whose trust money has been paid into a mixed banking account from which drawings were subsequently made, and, so far as we know, its application has not been adversely criticised: see *per* FRY, J. (13 Ch.D. 696, 704) in *Hallett's* case (2) and *per* NORTH, J. ([1895] 2 Ch. 433, 436) in *Re Stenning, Wood v. Stenning* (35). In such a case both claimants are innocent, neither is in a fiduciary relation to the other, and, if the mixed fund had not been drawn on, they would be entitled to rateable charges on it. Exactly the same occurs where the claimants are, not two beneficiaries, but one beneficiary and one volunteer, and we think, accordingly, that the same principle should be adopted.

The Royal Sailors' Orphan Girls' School and Home (action III.C) received a grant of £2,000 sent to them on Mar. 20, 1937, and paid it into their current account. By a contract dated Mar. 24, 1937, they contracted to purchase a sum of £1,943 18s. 5d. $3\frac{1}{2}$ per cent. War Stock. This stock, costing (with expenses) the sum of £2,000, was paid for by cheque on the account on Apr. 6, 1937. It is admitted in para. 5 of the defence that this £2,000 was the £2,000 received from the Diplock executors. So far, the case resembles the case of the National Institute for the Deaf, in that the money was paid into a mixed account, and the charity agrees that the £2,000 subsequently drawn out and invested in War Loan was the Diplock money. For the reasons which we have given, we think that, for the purposes of the equitable doctrine, this £2,000 and any investment shown to represent it must be regarded as belonging to the Diplock estate, but there is a further complication, since it is argued that there is no investment which can in any true sense be said to represent the £2,000 of Diplock money. At the date of the purchase of the War Stock the charity already owned

£9,747 10s. 2d. like stock. Both sums of stock were uncertified inscribed stock, and, according to the method of accounting adopted by the Bank of England, the £1,943 18s. 5d. was added to the existing holding. This, by itself, would not, in our opinion, affect the power of equity to trace the Diplock money and secure its return to the estate in the shape of a proportionate part of the total holding. Unlike the case already discussed where the Diplock money was expended in works on charity land, no injustice would be done to the charity as volunteers by carrying out the necessary process of dissection. There are, however, further complications. Subsequently to the addition of the £1,943 18s. 5d. to the existing holding, two further sums of stock, amounting respectively to £50 6s. 6d. and £47 10s. 9d., were purchased by the charity, and these sums it would be entitled to have taken into account on a division of the holding. So far, still, there is no difficulty. But in addition to purchases, certain sales took place amounting to £3,509 11s. 4d., the purchase price being expended for the general purposes of the charity. Of these sales, the last, for £434 11s. 2d., was effected on Dec. 23, 1939, *i.e.*, after the receipt of the "warning letter" and must, we think, be treated as referable solely to the charity's own interest. The other sales covered a period between Nov. 10, 1938, and Aug. 10, 1939. To what interest ought these sales to be attributed? Entirely to the charity's own interest, say the plaintiffs, leaving the Diplock interest intact in the stock remaining unsold. They suggest that a principle analogous to that of *Clayton's* case (34) ought to be applied, with the result that the stock first brought into the mass which was the charity's own stock ought to be treated as having been first drawn out. We do not accept the view that the case ought to be treated as though it were subject to the rule in *Clayton's* case (34). We see no justification for extending that rule beyond the case of a banking account. Here, before the sales took place, the mass of stock, if the question had then been raised, would have been regarded in equity as belonging rateably to the charity and to the Diplock estate. The only equitable way of treating the situation appears to us to be to regard each sum of stock withdrawn from the mass as having been made up in the same proportions. In so far as, on this principle, withdrawals represented in part Diplock money and the sums received on the sale of the stock withdrawn were expended on general purposes and cannot now be traced into any existing asset, that amount of Diplock money must be regarded as having disappeared. But in respect of so much of the Diplock interest as is not thus accounted for, we are of opinion that the claim to a rateable proportion of the stock still held is established.

In considering the individual cases for the purpose of applying the principle of the equitable right of tracing, we have, for simplicity, assumed that the plaintiffs' claims extend to the full amount of the Diplock moneys, properly belonging to the next of kin, paid to each defendant—in particular, we have not taken into account the sums recovered from the executors or their estates under the compromise order. No argument was addressed to us on this aspect of the matter. *Prima facie* and subject to discussion, it appears to us that the sums so recovered ought to be credited rateably to all the charities for all purposes, *i.e.*, for the purposes of the claims *in rem* as well as the claims *in personam*. In the case of Dr. Barnardo's Homes, for example, where we have expressed the view that the plaintiffs are entitled to "trace" the whole amount of £3,000 of Diplock money paid away to the defendant charity into the £40,000 2½ per cent. Funding Loan, the defendant would be entitled to be treated as having accounted to the plaintiffs for the appropriate proportion of the sums recovered, so that the plaintiffs would be limited to claiming so much only of the Funding Loan as represents the balance of their total claim of £3,000.

The result of the whole matter is that the plaintiffs are, in our judgment, entitled to succeed on all the appeals. Having regard to the view we have expressed in regard to their claims *in personam* and in regard to the failure of the defences of the statutes of limitation to those claims, and in the light of the submissions made to us, the plaintiffs would under this head of their claim be entitled, as it appears to us, to orders against each of the defendants for payment to the judicial trustee of an amount equivalent to the total sum paid to that defendant less a rateable proportion of the sums recovered from the executors or their estates, but without any interest. Orders have, however, been made by WYNN-PARRY, J., on the claims *in rem* against three of the

defendants, *viz.*, against the Leaf Homeopathic Hospital (action II.C) in respect of an agreed sum of £250; Queen Alexandra Cottage Homes (action IV.D) in respect of the proceeds of sale of a sum of £1,000 local loans; and Guy's Hospital (action IV.E) in respect of a sum of £5,052; in each of the two latter cases together with a further sum for interest. As has been already stated, there is no cross-appeal against any of these orders for payment.

In addition, we have expressed the view that on their claims *in rem* the plaintiffs would be entitled to succeed against certain of the defendants either wholly or in part; *i.e.*, (i) against the National Institute for the Deaf (action I.F), to the full extent of their claim, by tracing the Diplock money into the Post Office Savings deposits of £1,500; (ii) against the Royal Sailors' Orphan Girls' School and Home (action III.C), partially, by tracing Diplock money into a rateable part of the 3½ per cent. War Stock; (iii) against Dr. Barnardo's Homes (action I.E), to the full extent of their claim, by tracing Diplock money on the application of the rule in *Clayton's case* (34) into the 2½ per cent. Funding Loan; and (iv) against St. George's Hospital (main action) to an extent at present unspecified by tracing Diplock money on the application of the rule in *Clayton's case* (34) into one or other of the investments made by the hospital during the relevant period out of its "rebuilding appeal account." Subject to argument, as already stated the amount of the plaintiffs' claims must for the purposes of their "tracing" remedy, no less than for the purposes of their personal remedy, be treated as rateably reduced by virtue of the sums recovered from the executors. On the other hand, in each of these cases the plaintiffs would appear to be entitled, further, to a sum representing the interest in fact earned by the investments into which the Diplock money (reduced as above mentioned) is so traced.

At the hearing we understood the plaintiffs to say that, if they were held entitled to succeed on their personal claims, they would not seek or need to rely on their claims *in rem*. On this view, the proper order in each case would be to set aside the order made by WYNN-PARRY, J.—including in the appropriate cases that part of his order directing payment to the plaintiffs—and to substitute an order for payment to the judicial trustee of an amount equivalent to the full principal sum (reduced as above mentioned) received by the defendants. There remains, however, the question of the plaintiffs' right in certain cases to interest.

As we have already indicated, we shall be prepared to hear argument on the proper form of order to be made in the several cases, after there has been an opportunity on the part of all parties concerned to consider this judgment. In so far, however, as the plaintiffs seek, or are entitled, to rely on their claims *in rem* so as to recover sums for interest, or should be taken to be bound by the orders, so far as in their favour, made by WYNN-PARRY, J., then the proper order would in each case appear to be: (a) to direct in the four cases of the National Institute for the Deaf, the Royal Sailors' Orphan Girls' School and Home, Dr. Barnardo's Homes and St. George's Hospital a transfer to the judicial trustee of the appropriate securities in respect of which the plaintiffs have established their right of "tracing" (or payment of a sum equivalent to the proceeds of sale thereof) together with payment of the appropriate sums for interest; (b) in those four cases and also in the three cases of the Leaf Homeopathic Hospital, Queen Alexandra Cottage Homes and Guy's Hospital (in which WYNN-PARRY, J., ordered payments to the judicial trustee) to direct, pursuant to the plaintiffs' rights *in personam*, payment to the judicial trustee of the balance of the principal sums (reduced as above mentioned) paid to the defendants after bringing into account the principal amount covered by the orders under (a) above and the orders made by WYNN-PARRY, J. (as the case may be); and (c) in the case of the remaining defendants to direct, pursuant to the plaintiffs' rights *in personam*, payment to the judicial trustee of the full principal amount (reduced as above mentioned) received from the executors. The necessary accounts and inquiries would have to be framed to give effect to the orders under (a) and (b).

As regards costs, it is to be noted that the judicial trustee, who has been separately represented before us, is a defendant in the main action and the plaintiff in the other nine actions. The Attorney-General has also been represented before us as a defendant in the main action. Again subject to

discussion, the proper order would appear to us to be that the defendants should pay the party and party costs of the plaintiffs and of the judicial trustee and the Attorney-General both here and below, such order to be without prejudice to the right of the judicial trustee to recover the balance of his costs, together with his proper charges and expenses, from the estate.

Solicitors: *White & Leonard* (for next of kin and the judicial trustee); *Trollope & Winckworth* (for the National Institute for the Deaf, Dr. Barnardo's Home, Prince of Wales' Hospital, Plymouth, and Leaf Homeopathic Hospital); *Eland, Nettleship & Butt* (for St. George's Hospital); *Freshfields* (for Westminster Hospital, Queen Alexandra Cottage Homes, Guy's Hospital and Heritage Craft Schools); *Peake & Co.* (for the Royal Sailors' Orphan Girls' School and Home); *Treasury Solicitor* (for the Attorney-General).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

July 26, 27. THE COURT admitted a new agreed statement of facts in the claim against the National Institute for the Deaf (action I.F.: see p. 363 ante), heard argument thereon, and delivered a supplementary judgment, holding that the rule in *Clayton's* case applied, that all the plaintiffs could claim against the charity was a personal claim, and that their right to trace was non-existent. A report of these further proceedings will appear on p. 429 post.

SMITH'S POTATO ESTATES, LTD. v. BOLLAND (INSPECTOR OF TAXES).

SMITH'S POTATO CRISPS (1929), LTD. v. INLAND REVENUE COMMISSIONERS.

quished. MORGAN v. TATE & LTD. [1953] 2 All E.R. 162. (Viscount Simon, Lord Porter, Lord Simonds, Lord Normand and Lord Oaksey), April 19, 20, 22, 23, July 14, 1948.]

Income Tax—Deductions—Cost of litigation—Appeal vital to retain services of valuable employee—Income Tax Act, 1918 (c. 40), sched. D, Rules Applicable to Cases I and II, r. 3 (a).

Excess Profits Tax—Deductions—Cost of litigation—Appeal vital to retain services of valuable employee—Finance Act, 1940, (c. 29), s. 32 (1)—Finance (No. 2) Act, 1939 (c. 109), s. 14 (1).

To secure a supply of potatoes for the purpose of their business a company formed and held all the shares in a subsidiary company which, with the parent company's money, acquired a large estate, previously managed for many years by an experienced farmer, Y. To retain Y.'s services, the subsidiary company entered into an agreement with him under which he was paid, in the accounting year ending Mar. 31, 1941, £6,486, which was included in the accounts of the subsidiary company. In computing the profits of the subsidiary company (which were included in the parent company's profits for assessment to excess profits tax for that chargeable accounting period), the Commissioners of Inland Revenue decided that for excess profits tax purposes no deduction should be allowed in respect of Y.'s remuneration in excess of £3,500, being the amount the commissioners considered reasonable and necessary having regard to the requirements of the trade or business and to the actual services rendered by Y. Both companies, regarding Y.'s employment as essential to the well-being of the enterprise and fearing they would suffer through Y.'s discontent, appealed to the Board of Referees against this decision and the Board held that £5,800 out of the sum of £6,486 was deductible. As a result, the commissioners did not seek to disallow any part of Y.'s remuneration in subsequent years. The subsidiary company incurred legal and accountancy costs of £622 in the preparation and prosecution of the appeal:—

Held: (VISCOUNT SIMON and LORD OAKSEY dissenting) the legal and accountancy costs incurred were not a disbursement "wholly and exclusively laid out or expended for the purposes of the trade" within the meaning of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, and so were not deductible by the subsidiary company for the purposes of its assessment to income tax and were not deductible by the parent company for the purpose of the assessment subject to excess profits tax.

Dicta of LORD LOREBURN, L.C., and LORD DAVEY in Strong & Co., Ltd. v. Woodfield ([1906] A.C. 448, 452, 453), *applied*.

Dictum of VISCOUNT CAVE, L.C., in British Insulated & Helsby Cables v. Atherton ([1926] A.C. 205, 211, 212), *considered*.

Allen v. Farquharson Bros. & Co. (1932) (17 Tax Cas. 59) and *Worsley Brewery Co., Ltd. v. Inland Revenue Comrs.* (1932) (17 Tax Cas. 349), *considered*.

Decision of Court of Appeal, ([1947] 1 All E.R. 704), *affirmed*.

[AS TO EXPENSES WHOLLY OR EXCLUSIVELY EXPENDED FOR PURPOSES OF TRADE, see HALSBURY, Hailsham Edn., Vol. 17, p. 152, para. 312; and FOR CASES, see DIGEST, Vol. 28, pp. 42-44, 56, 57, Nos. 215-266, 286-292.]

Cases referred to:

- (1) *Strong & Co., Ltd. v. Woodfield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215; 28 Digest 57, 290.
- (2) *Smith v. Lion Brewery Co., Ltd.*, [1911] A.C. 150; 80 L.J.K.B. 566; 104 L.T. 321; 5 Tax Cas. 568; 75 J.P.Jo. 87; 28 Digest 57, 291.
- (3) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; 28 Digest 56, 286.
- (4) *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 28 Digest 52, 264.
- (5) *Allen v. Farquharson Bros. & Co.*, (1932), 17 Tax Cas. 59; Digest Supp.
- (6) *Mersey Docks & Harbour Board v. Lucas*, (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 2 Tax Cas. 25; 28 Digest 21, 104.
- (7) *Rushden Heel Co., Ltd. v. Keene (Inspector of Taxes)*, *Rushden Heel Co., Ltd. v. Inland Revenue Comrs.*, [1947] 1 All E.R. 699.
- (8) *Worsley Brewery Co., Ltd. v. Inland Revenue Comrs.*, (1932), 17 Tax Cas. 349.

CONSOLIDATED APPEALS by the taxpayers from a decision of the Court of Appeal (LORD GREENE, M.R., MORTON and SOMERVELL, L.JJ.), dated Apr. 2, 1947, and reported [1947] 1 All E.R. 704.

The Special Commissioners had disallowed a deduction, for the purposes of income and excess profits tax, of legal and accountancy costs incurred by the first appellants in successful appeals by both appellants against the proportion of the remuneration of an employee which was allowable in computing the profits of the first appellants, a company subsidiary to the other taxpayer, assessable to excess profits tax. ATKINSON, J., allowed the appeals by the taxpayers, but his decision was reversed by the Court of Appeal. The House of Lords now affirm, by a majority, the decision of the Court of Appeal. The facts appear in the opinion of LORD PORTER.

Frederick Grant, K.C., and Tribe for the appellants.

The Solicitor-General (Sir Frank Soskice, K.C.) and R. P. Hills for the respondents.

The House took time for consideration.

July 14. **VISCOUNT SIMON**: My Lords, I have had the advantage of studying the opinions prepared by my colleagues who sat with me in hearing the arguments in these consolidated appeals, and as these opinions are not unanimous I feel that I should briefly express my own conclusion, even though this will not affect the ultimate result. It is not necessary for me to set out the detailed facts in these two cases. They are fully stated in the opinion about to be delivered by my noble and learned friend, LORD PORTER.

The main question to be decided is whether the legal and accountancy expenses of prosecuting an appeal (in this instance, a successful appeal) to the Board of Referees against a decision of the Commissioners of Inland Revenue under s. 32 of the Finance Act, 1940, incurred by a taxpayer with a view to reducing the assessment made on him as a trader for excess profits tax, can be deducted as being a disbursement "wholly and exclusively laid out or expended for the purposes of the trade": r. 3 (a) of the Rules Applicable to Cases I and II of sched. D. The commissioners had fixed the proper figure for an item of disbursement at £3,500. The result of prosecuting the appeal, at a cost of £622 10s. 11d., was to establish that the proper figure was £5,800. ATKINSON, J., held that the expense of £622 10s. 11d. was an admissible deduction on the ground that the cost of the litigation was incurred for the purpose of ascertaining the true figure of profits on which the trader must bear excess profits tax. The Court of Appeal (LORD GREENE, M.R., MORTON and SOMERVELL, L.JJ.) reversed this decision, holding that the disbursement was not "wholly and exclusively"

incurred for the purposes of the trade, but was, at any rate in part, incurred in an endeavour to reduce the amount of tax which the taxpayer had to pay. It is to be observed that the size of the figure to be deducted—£5,800 instead of £3,500—not only affects the correct calculation of excess profits tax for the year, but also the adjustment later on of the total burden of such tax to be borne by the trader. Moreover, since excess profits tax is deductible as an expense when calculating the proper assessment of the trader to income tax, the fixing of a correct figure for the former is essential to the correct calculation of the latter, and it is only when the latter is ascertained that the trader knows how much of his commercial profit he can carry forward, or, if a company, how much of the year's profit is available for dividend or for reserve.

It seems to me that it is essential for the proper carrying on of a trade that the trader should know what portion of his profits in a given year is left to him after the Revenue has taken its share by taxation. If, therefore, he considers that the Revenue seeks to take too large a share and to leave him with too little, the expenditure which the trader incurs in endeavouring to correct this mistake is a disbursement laid out for the purposes of his trade. If he succeeds, he will have more money with which to earn profits next year. It is true that the result of his success is to reduce the tax he has to pay—alternatively, one may say that the result is to show that the profit of the year's trading left to him after paying tax is greater than the Revenue was willing to admit—but, to my mind, the purpose was a trading purpose and nothing else. The trade is not to be regarded as extending over twelve months and no more. Indeed, as I have already pointed out, excess profits tax is liable to be adjusted in the light of subsequent trading results, and assessment for income tax is arrived at on figures of the previous year. With all respect to those who think otherwise, I regard it as fallacious to argue that the trader's expenditure in fighting the Revenue's assessment is not "wholly and exclusively" incurred for the purposes of the trade because the expenditure would not be incurred if there was no tax to pay. If there was no tax to pay, the benefit realised by the trader from carrying on the trade would not be reduced by taxation, and it is the purpose of trade (at any rate, under private enterprise) to make its legitimate profit.

Viewed in this light, I do not see why the expenditure here in question is not wholly and exclusively laid out for the purposes of the trade—if it had not been incurred, the trade would be less profitable. LORD DAVEY's gloss on the words of the statute in *Strong & Co., Ltd. v. Woodfield* (1) ([1906] A.C. 448, 453) is well known, but I think it is better to concentrate on the statutory words themselves. Rightly understood, however, I do not find that LORD DAVEY's words contradict the view I am disposed to take. *Strong & Co., Ltd. v. Woodfield* (1) was a case in which the taxpayer sought to deduct a loss not connected with or arising out of his trade. LORD LOREBURN said (*ibid.*, 452): "I think only such losses can be deducted as are connected with, in the sense that they are really incidental to, the trade itself." LORD DAVEY's test was that the purpose of the expenditure must be "the purpose of enabling a person to carry on and earn profits in the trade . . ." (*ibid.*, 453). Here, the expenditure was, in my view, incurred for the purpose of carrying on and earning profits in the trade, for a reduction in the amount of tax does increase the fund in the trader's hands after tax is paid and so promotes the carrying on of the trade and the earning of trading profits. The incidental consequence that the trader is not taxed so heavily in respect of his profits from trade does not, as it seems to me, alter the fact that the litigation was wholly and exclusively undertaken for the purposes of the trade. My own opinion, therefore, would be that the appeal should be allowed, but, in view of the opinion of the majority of your Lordships, I move that it be dismissed with costs.

LORD PORTER: My Lords, these consolidated appeals raise the question whether in computing their profits for income tax purposes in respect of the year ending Mar. 31, 1934, the appellants in the first appeal are entitled to deduct a sum of £622 10s. 11d., being the legal and accountancy expenses incurred in prosecuting an appeal to the Board of Referees against a decision of the Commissioners of Inland Revenue, given under s. 32 of the Finance Act, 1940. These appellants are a wholly owned subsidiary of the appellants in this second appeal and the matter for decision in that case is whether the same sum is deductible in computing the profits of the first appellants for the purpose

of assessment to excess profits tax for the chargeable accounting period ending on the same date. Under the provisions of para. 2 of pt. I of sched. V to the Finance Act, 1940, assessments to excess profits tax in respect of the profits of the first appellants fall to be made on the second appellants, but with a provision under para. 8 of pt. IV of that schedule for the reimbursement by the first appellants of the second appellants if they pay the tax.

The first appellants were formed to purchase and manage an estate at Nocton in Lincolnshire on which it was hoped to grow a supply of potatoes sufficient for the requirements of the second appellants. That estate, before its purchase, had been managed by a Mr. Young and in order to ensure its successful working it was thought essential to continue to employ him for that purpose. After four years' service Mr. Young was dissatisfied with the terms of his remuneration, and on Mar. 4, 1941, a new agreement was entered into between him and the first appellants for a term of six years certain from Apr. 6, 1940, and thereafter until determined by six months' notice on either side. Under this agreement he received an increased remuneration amounting in 1940 to £3,550, in 1941 to £6,486, in 1942 to £6,198, in 1943 to £5,334, in 1944 to £5,747 and in 1945 to £2,416. On Aug. 15, 1942, the Commissioners of Inland Revenue issued to the secretary of the first appellants a notice stating that under s. 32 of the Finance Act, 1940, they had decided that, in computing, for the purposes of excess profits tax, the profits of that company's trade or business for the accounting period ending Mar. 31, 1941, no deduction should be allowed in respect of Mr. Young's remuneration in excess of £3,500. From this decision both companies appealed to the Board of Referees and that body held that £5,800 was allowable. From and after that period the Inland Revenue authorities have not challenged the allowance of the full amount actually paid and the sum now in dispute represents the costs incurred in prosecuting this appeal.

Under sched. D tax is charged in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom and the relevant statutory provisions as to the deductions to be allowed are to be found in r. 3 (a) of the Rules Applicable to Cases I and II of sched. D and read as follows :

(3) In computing the amount of profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, *employment*, or vocation . . .

Excess profits tax is dealt with in s. 14 (1) of the Finance (No. 2) Act, 1939, which enacts that for the purposes of that tax the profits arising from a trade or business should be computed on income tax principles, as adapted in accordance with the provisions of pt. I of sched. VII to the Act, and defines income tax principles in relation to a trade or business as the principles on which the profits arising from the trade or business are computed for the purpose of income tax under Case I of sched. D or would be so computed if income tax were chargeable under that Case in respect of the profits so arising. The only other provision of this Act which need be quoted is that contained in s. 18 (1), *viz.* :

The amount of excess profits tax payable in respect of a trade or business for any chargeable accounting period shall, in computing for the purposes of income tax the profits and gains arising from that trade or business, be allowed to be deducted as an expense incurred in that period . . .

The appellants relied on this last section, coupled with the fact that excess profits tax is imposed on traders only, and urged that the expenses of ascertaining the sum properly deductible as excess profits tax from income tax was an expense wholly and exclusively laid out for the purposes of the trade. A subsidiary question arises whether the expenditure incurred in order to ascertain the sum properly allowable was undertaken to save tax or for the purposes of retaining the services of Mr. Young, but from the facts already stated it is plain that the main question in the case is concerned with the true meaning of the expression "wholly and exclusively laid out or expended for the purposes of the trade," and, more particularly with the phrase "purposes of the trade."

The phraseology and its meaning have been dealt with in a considerable number of cases, but before considering their effect I think it desirable to state the conclusion at which I should have arrived from a study of the wording of the section itself. The widest meaning attributed to it, and that for which the

appellants contend, is, perhaps, best expressed by saying that it includes every expense to which the trader is put because he carries on the trade. Were he not a trader, it is contended, he would not have to pay excess profits tax, and, therefore, any expense to which he is put in arriving at its correct figure is wholly and exclusively laid out for the purposes of the trade. Similarly, it is maintained that, as the law obliges him to pay income tax, his expenses of calculating the balance of profits and gains for income tax purposes are incurred wholly and exclusively for the purposes of his trade, more particularly where the taxpayer is a company which by law is compelled to publish its accounts. In support of this argument it is urged that even the amount available to be put aside as reserve or for distribution in dividends cannot be ascertained until it is known what sum must be provided for excess profits and income tax purposes. The argument, so far, extends only to expenditure incurred for the purpose of finding out what the balance of profits or gains is, but, it is said, if the cost of ascertaining that balance by making up the company's accounts is wholly and exclusively laid out for the purposes of its trade, so the expense of ensuring by an appeal to the Board of Referees the correctness of the figure reached is equally wholly and exclusively laid out for those purposes. The opposite view maintained by the Crown is, perhaps, best expressed in *Strong & Co., Ltd. v. Woodfield* (1) ([1906] A.C. 448, 453), where LORD DAVEY says: "These words . . . appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade . . ." My Lords, that expression has often been referred to and approved, but it was used in reference to the circumstances of the case then under consideration, and I doubt if it carries the matter to a final conclusion. It still leaves open the question what expense is incurred for the purpose of enabling a trader to earn profits, and the adoption of a phrase helpful in analysing the meaning of words in an Act of Parliament with reference to a particular set of circumstances is not necessarily either useful or conclusive in all cases. It is probably safer to retain the wording of the Act itself, and, by applying it to the facts established, to discover whether the deduction falls within its terms or not.

Regarding the circumstances which your Lordships have to consider from this point of view, I should myself draw a marked distinction between accounts made up on the purely trading basis and those which are prepared for and accepted by the Inland Revenue. If there were no obligation to ascertain and pay either of these taxes, there would be no necessity for making up accounts on income tax principles—it would suffice to make up the ordinary commercial accounts. The computation of accounts for tax purposes is, therefore, not directly associated with the carrying on of the business. It is an obligation imposed on the company for another and extraneous purpose, *i.e.*, for the purpose of ascertaining the tax to be paid out of profits. It is not, at any rate directly, undertaken for trade purposes, but to satisfy the revenue authorities.

It is true that as a matter of convenience, the cost of making up accounts for the Inland Revenue is allowed by the authorities as a deduction from profits as is the cost of making up the strictly business accounts of the trade, but this is a matter, not of principle, but of expediency. The two duties overlap and in practice are almost indivisible. Moreover, it is of advantage to the Revenue to have the figures required for their purposes carefully and accurately made up. Strictly, however, I think the expenses should be divided and any additional cost of making up Revenue accounts should be disallowed in determining the allowable deduction for income tax purposes, but the advantages of allowing both to be deducted as a practical measure outweigh the disadvantages though the result may not be strictly logical. But no such illogicality has to be faced when the sum which is alleged to be deductible is not the cost of accountants' work in ascertaining trading profits, but the expense of an appeal to the Board of Referees for the purpose of discovering the true measure of profits for tax purposes only. Such expenditure is incurred directly for tax purposes and for nothing else, though it may indirectly affect both the amount available for distribution to the proprietors of the business and that proper to be put to reserve.

This is the conclusion which I should have reached if left to determine the question unassisted and unembarrassed by authority. It remains to be determined whether your Lordships' decision in previous cases throw doubt upon this view. My Lords, *Strong & Co., Ltd. v. Woodfield* (1) may be said to form

the starting point for deducing the principles at stake in the present appeal, and, though the words of LORD DAVEY quoted above are the expression most frequently referred to, I think that those of LORD LOREBURN, L.C., have equal, if not greater, importance. He says ([1906] A.C. 448, 452):

... it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader.

Further, LORD DAVEY, after pointing out that Case I relates to trades, manufactures, adventures or concerns in the nature of trade, goes on to say (*ibid.*, 453):

It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

These expressions of opinion, given some forty years ago, and accepted ever since are, in my view, inconsistent with the appellants' contention, but it is said they are at best *dicta* and are inconsistent with the principles on which such authorities as *Smith v. Lion Brewery* (2) and *Usher's Wiltshire Brewery v. Bruce* (3) are based and, in particular, with the observations of VISCOUNT CAVE, L.C., in *British Insulated & Helsby Cables, Ltd. v. Atherton* (4) ([1926] A.C. 205, 211, 212), who says that it has often been pointed out that the Act does not contain any express allowance or enumeration of deductions, and, therefore, it is necessary first to inquire whether the deduction is expressly prohibited, and, if not, whether it is of such a nature as to be proper to be charged against incomings in a computation of the balance of profits and gains. He goes on to state that:

... a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade ...

My Lords, this statement was *obiter* only as the actual decision was merely that the expenditure was capital expenditure, and, therefore, not deductible, but the language does require careful consideration. In that case the question actually in issue was whether subscriptions by a company towards a pension fund were to be deducted in ascertaining the balance of profits and gains of its trade. It was true that the expenditure did not at once affect its revenue, but it was a method of ensuring the better and more contented service of its employees and in that sense it did directly affect the success of its enterprise. It was exclusively laid out to enable the company to be more successful: no part of it was incurred in order to ascertain the Revenue's proportion of the profits when made. So far as income tax is concerned there is direct authority in the High Court in *Allen v. Farquharson* (5) that the cost of opposing the Inland Revenue in a contest as to what the profits of a business are is not deductible, but, it is said, that case merely followed *Strong & Co., Ltd. v. Woodfield* (1), and, in any case, excess profits tax differs in as much as it is imposed on a trader only, and, therefore, the cost of ascertaining it is part of the trade. I do not accept this contention. It is true that a trader only is liable to pay it, but it is not payable by him as a trader. He pays as an individual, like any other individual, the tax on the sum which he has earned as a trader. "To my mind," said LORD SELBORNE, L.C., in *Mersey Docks & Harbour Board v. Lucas* (6) ([1883] 8 App. Cas. 891, 905), "it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used ...", and, therefore, what your Lordships have to determine is whether the expense is incurred in order to earn gain or is the application or distribution of that gain when earned. With all respect to the opposing view, expenditure to ascertain the true amount of tax to be paid, whether it be income tax or excess profits tax and whether successful or unsuccessful, is, in my opinion, incurred, at any rate in part, in order to determine the correct amount of income tax or excess profits tax as the case may be and not in order to earn gain even though that phrase be given a broad significance. The same conclusion might

be reached by saying in the words of this statute that such expense is not wholly or exclusively laid out for the purposes of trade. It is, in truth, partially, if not wholly, laid out in order to discover what sum is to be paid to the Crown out of the profits or gains which have already been earned and computed.

In these two consolidated appeals the further point was argued that those appeals were launched and consequent expense incurred in order that Mr. Young's services might be retained. The Special Commissioners, however, have found that one main object, though possibly not the most prominent, was to save tax. They had evidence on which they could so find and in these circumstances, this is not a matter in which your Lordships would interfere. I should dismiss both appeals.

LORD SIMONDS (read by LORD NORMAND) : My Lords, these consolidated appeals, the one by Smith's Potato Estates, Ltd., which I will call "the estates company," and the other by Smith's Potato Crisps (1929), Ltd., which I will call "the parent company," since the estates company is its subsidiary, raise questions of income tax and excess profits tax on which ATKINSON, J., and the Court of Appeal have come to different conclusions. In the income tax appeal the question is whether certain expenses amounting to £622 10s. 11d. incurred by the estates company in promoting an appeal to the Board of Referees under a statutory provision in respect of liability to excess profits tax ought to be deducted in computing the profits of the business of the company for purposes of income tax under Case I of sched. D. to the Income Tax Act, 1918. In the excess profits tax appeal the question is whether the same expenses ought to be deducted in computing the profits of that business for the purposes of excess profits tax under pt. III of the Finance (No. 2) Act, 1939, and enactments amending that part. The parent company are appellants in the excess profits tax appeal because they are chargeable to that tax in respect of the profits of the business of the subsidiary company. The appeal to the Board of Referees, the expenses of which have given rise to these questions, was an appeal by the estates company against the disallowance by the Commissioners of Inland Revenue under s. 32 of the Finance Act, 1940, of the deduction of certain fees and payments for services to a manager of the business of the estates company in computing the profits of its trade or business for the purposes of excess profits tax. The appeal was allowed by the Board of Referees. It is not disputed that the expenses were reasonably and properly incurred.

It is necessary to refer to only a few statutory provisions. It is provided by s. 14 (1) of the Finance (No. 2) Act, 1939, that for the purposes of excess profits tax the profits arising from a trade or business shall be computed on income tax principles subject to certain adaptations which are not relevant to the present case, and it is further provided that for the purposes of the subsection the expression "income tax principles" in relation to a trade or business means the principles on which the profits arising from the trade or business are computed for the purposes of income tax under Case I of sched. D or would be so computed if income tax were chargeable under that Case in respect of the profits so arising. Section 18 (1) of the same Act provides that the amount of the excess profits tax payable in respect of a trade or business for any chargeable accounting period shall, in computing for the purposes of income tax the profits and gains arising from that trade or business, be allowed to be deducted as an expense incurred in that period. As will appear the estates company relied on this section in the income tax appeal. The first section that I cited refers me back to Case I of sched. D, under which income tax is imposed on the profits of any trade, manufacture, adventure or concern in the nature of a trade and the profits are directed to be computed in accordance with the rules applicable to the sources comprised in that case. By r. 3 (a) of the Rules Applicable to Cases I and II it is provided as follows :

3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, *employment*, or vocation . . .

These are the words round which the main argument has ranged. It has been contended, as a general proposition, that the expenses of disputing an assessment to income tax and litigating it to the utmost permissible extent are

deductible for the purpose of computing the amount of profits of the trade to be charged, but a subsidiary argument also was developed on the facts of the particular case on which I must say a few explanatory words. The manager of the estates company, whose remuneration had been the subject of the disallowance by the Commissioners of Inland Revenue and of the appeal to the Board of Referees, was a Mr. Young. His services were regarded as of great importance by the estates company, who feared that they might be lost if in the year under review and in future years any part of his remuneration should be disallowed. It was, therefore, contended that there was, in the exceptional circumstances of the case, a special business motive for incurring the expenses of an appeal, a matter which went to the earning of future, as distinct from the taxation of past, profits.

Both on the general and the subsidiary contentions the Special Commissioners were against the appellants. As I read their decision they accepted that there was the "special business motive" that I have stated, but added these words :

Nevertheless the immediate purpose of the appeal was that of all taxation appeals, namely, to get a reduction of tax, or, in other words, to retain a larger share of the profits. We regard this as a substantive purpose in itself and not as something merely incidental to the earning of future profits.

They, therefore, held that the expenses in question were not money "wholly and exclusively" laid out or expended for the purposes of the trade within r. 3 (a) of Cases I and II. They added that they were not a "loss" within r. 3 (e), but that is not a matter which has now to be considered. ATKINSON, J., took a different view. He thought that an expense properly and reasonably incurred in the final ascertainment of profits could be considered an outlay in order to earn profits, and, apart from this general ground, he thought that in the particular circumstances of the case the expenses might be deducted on the footing that expenditure for the purpose of retaining somebody really vital to the business was expenditure which was "even on a narrow interpretation of the phrase incurred for the purpose of gaining profits." The Court of Appeal unanimously reversed the judgment of ATKINSON, J., on both points, and in spite of the able and cogent arguments of counsel for the appellants I cannot entertain any doubt that the decision of the Court of Appeal is right.

My Lords, I suppose that few expressions have been discussed more often in the courts than that which you have once again to consider, "money wholly and exclusively laid out or expended for the purposes of the trade," but it is their application rather than their meaning that is in doubt. I agree with the submission of learned counsel that it does not help to substitute other words for these which are found in the statute and then to put a gloss on those other words, but it is, I think, important to emphasise that the words "for the purposes of the trade" in their context, *i.e.*, where a computation of "profits" for the ascertainment of taxable income is being made, must mean "for the purpose of enabling a person to carry on and earn profits in the trade." These familiar words I cite from LORD DAVEY's speech in *Strong & Co., Ltd. v. Woodfield* (1) ([1906] A.C. 448, 453). They have been cited and applied over and over again, and, if they are kept firmly in mind, they dispose *in limine* of the argument which prevailed with ATKINSON, J., and has been urged before your Lordships.

A consideration of the numerous cases that were cited shows that it is not always easy to decide whether it can be said of a particular expenditure that it satisfies LORD DAVEY's test, but it is significant that counsel were not able to call to the attention of the House any case in which the appellants' present contention had been put forward. For a long period of years large sums of money have been devoted to the litigation of income tax claims. The most acute minds of the legal and accountancy professions have been at the service of the taxpayers, yet the claim that such money was expended wholly or exclusively for the purposes of the trade appears never to have reached a court of law. The reason is not far to seek. It is that neither the cost of ascertaining taxable profit nor the cost of disputing it with the revenue authorities is money spent to enable the trader to earn profit in his trade. What profit he has earned, he has earned before ever the voice of the taxgatherer is heard. He would have earned no more and no less if there was no such thing as income tax. His profit is no more affected by the exigibility of tax than is a man's temperature

altered by the purchase of a thermometer, even though he starts by haggling about the price of it. It is in this sense that the learned MASTER OF THE ROLLS used a phrase which was challenged by counsel for the appellants. He said in the *Rushden Heel* case (7) ([1947] 1 All E.R. 699, 702): "... but his obligation to pay it [the tax] is his obligation as a subject and a taxpayer, and, in ascertaining the amount of his liability, he is putting himself in a position to discharge his duty to the Crown." As a trader it is his job to make profits: as a taxpayer it is his duty, like that of any other subjects, to pay taxes. It is as little a part of his trade to find out how much tax he must pay as it is a part to pay it when he has found out. In this respect he is in the same position as any other taxpayer under any other Case of any other schedule. This aspect of the case may be examined more closely. Let me suppose that a trader, having been assessed to income tax in the sum of £X in a certain year, disputes the assessment, claiming that his taxable profit is not £X but a lesser sum, say £Y. Suppose further that he succeeds in his claim. I fail to see how he has by the expenditure that he incurred earned profit in his trade. His taxable profit has been reduced, which was the object of his expenditure. But what has this to do with his trading profit? If his trading profit is to be regarded as the same thing as his taxable profit (which it is not or is not necessarily), then his money has been laid out for the purpose of reducing his trading profit, a purpose difficult to ascribe to a trader and impossible to bring within the scope of the rule. To use an expression of ROWLATT, J., unless the expenditure is at least intended to "bring grist to the mill" of the trader, it cannot, within the meaning of the rule, be money laid out for the purposes of his trade.

Two cases only need specific mention. On both I respectfully concur in everything that has been said by the MASTER OF THE ROLLS, in the *Rushden Heel* case (7) ([1947] 1 All E.R. 699, 702). In *Allen v. Farquharson Bros.* (5) certain observations of FINLAY, J., were relied on by the appellants. I would question whether that learned judge intended to say anything that would support their contention. I do not doubt that as a practical matter the Revenue authorities allow accountancy charges as a deduction in computing profits, both because such charges are necessary for trading as well as tax purposes and it would be vexatious to distinguish between them, and because they must find their own task an easier one if they are dealing with professional men who speak their language and understand their art. I do not think it necessary to decide how far in this direction the Revenue authorities are bound to go, but, if FINLAY, J., meant that an expense incurred solely for the purpose of dispute with the Crown could be deducted, then I must join with the MASTER OF THE ROLLS in expressing my respectful dissent. In *Worsley Brewery Co., Ltd. v. Inland Revenue Comrs.* (8), certain observations of ROMER, L.J., have, as I think, been misunderstood and relied on. I need say no more than that I wholly agree with the explanation of this case given by the MASTER OF THE ROLLS and MORTON, L.J., in the *Rushden Heel* case (7) ([1947] 1 All E.R. 699, 702, 703).

It remains to consider the special reason advanced in this case for allowing the deduction of expenditure incurred in contesting a tax claim. Here, again, I am so fully in agreement with the learned MASTER OF THE ROLLS that I need say little. If the expense of contesting a tax claim is not *per se* a deductible expense, I cannot accept the proposition that some special ulterior motive makes it deductible. I see that money has been laid out for the purpose of contesting a tax claim. I know, for I assume that to have now been decided, that money so laid out is not laid out wholly and exclusively for the purposes of trade. I do not understand by what process of reasoning the contrary result is reached and it is found to be wholly and exclusively laid out for the purposes of trade because there was an ulterior motive. This is to confuse motive with purpose. Finally, on the income tax appeal it was urged that, since under s. 18 (1) of the Finance (No. 2) Act, 1939, the excess profits tax that has been paid may for income tax purposes be deducted as an expense, so also should the cost of ascertaining the amount of the excess profits tax be deductible. I have felt a good deal of sympathy for this argument, but have come to the conclusion that its attractiveness lies rather in its suggestion of what the legislature might, subject to proper limits, have reasonably done than in its correct interpretation of the section. It is clear that, but for the

section, the excess profits tax itself could not be deducted. Making express provision for that deduction, it is silent about the cost of ascertainment. I do not feel at liberty as a matter of construction to say that by implication the one is included in the other. I would dismiss both these appeals.

LORD NORMAND : My Lords, the questions in these appeals are whether the costs and expenses of a successful excess profits tax appeal are a proper deduction in computing profits and gains either for the purposes of income tax or for the purposes of excess profits tax, but these questions can in effect be reduced to the single question whether the costs and expenses are deductible in computing the profits for the purposes of income tax, and it can also be said that it would have made no difference if the costs had been incurred in prosecuting an income tax appeal. Profits for excess profits tax purposes are computed on income tax principles, and, though excess profits tax is, under s. 18 of the Finance (No. 2) Act, 1939, allowed to be deducted in computing profits for the purposes of income tax, this express allowance, which does not extend to the costs and expenses of appeals, is, in my opinion, directed to limiting the total taxation of trade profits and distributing it between the two taxes in accordance with the intention of Parliament. Apart from the provisions of s. 18 of the Finance (No. 2) Act of 1939, excess profits tax would not be deductible any more than income tax itself is deductible in computing profits for income tax purposes. The reason why income tax is not deductible in computing profits for income tax purposes is not merely the logical difficulty pointed out by counsel for the appellants that, if it were, the computation would inevitably drift through the repetition of the deduction into the eddy of an indefinite process. There is the more substantial reason that income tax is an impost made on profits after they have been earned, and that, unless the observations of LORD DAVEY in *Strong & Co., Ltd. v. Woodifield* (1) ([1906] A.C. 448, 453), which have often been referred to and applied in later cases, are to be disregarded, a payment out of profits after they have been earned is not within the purposes of the trade carried on by the taxpayer. But excess profits tax also is levied on profits after they are earned, and, apart from the statutory provision, is *in pari casu* with income tax.

The issue is, accordingly, whether the costs and expenses of an income tax or an excess profits tax appeal would properly be entered on the debit side of an account of disbursements and receipts framed for the purpose of arriving at the full amount of the profits and gains of a company's trade under Case I of sched. D, or whether r. 3 (a) of the Rules Applicable to Cases I and II of sched. D prohibits their deduction as not being money wholly and exclusively laid out or expended for the purposes of the company's trade. Every trading company must keep books of account, and these books are used by the accountants for the purpose of making up the commercial profit and loss account. The accountants may use that account by applying to it the modifications which income tax law requires in order to bring out the profit for income tax purposes, and they may have to negotiate with Inland Revenue officials in order to justify their account of profits, and, perhaps, to obtain a correction of an assessment. It will also be necessary to prepare an account showing the amount of the distributable profits after making provision for the income tax liability. As the first and the last of these accounts are among the purposes of the trade, the taxpayer may say that the whole accounting process, including even the prosecution of an appeal in order to determine the correct income tax assessment, is carried out for the purposes of the trade, and it may be added that the proper conduct of the trade requires that the assessment shall be correct. On the other hand, it may be said that there is in strictness no part of the accounting process which is not directly or indirectly concerned with income tax liability and that, as the payment of income tax is not a purpose of the trade, none of the costs incident to the accounting process is laid out exclusively for the purposes of the trade. That would be an extreme and, I think, an untenable proposition. The Inland Revenue's contention in these appeals did not go nearly so far. It was that the costs and expenses of appeal proceedings before the Commissioners of Inland Revenue or the Board of Referees and from them to the courts are not laid out exclusively for the purposes of the trade, and are, therefore, not permissible deductions. The line drawn by the Inland Revenue would allow deduction of

the costs incurred in negotiations with their officers before an appeal is taken, or where no appeal is taken, either as a concession to the taxpayer or as a practical and convenient settlement of a disputable point. The costs of an appeal against an assessment are incurred at least in part, if not exclusively, for the purposes of reducing the payment which the taxpayer will have to make if he acquiesces in the assessment. The purpose of the appeal is not limited to correcting the assessment itself, for if the assessment involved no liability to pay no one would go to the trouble and expense of appealing against it. So, even if the correction of the assessment is within the purposes of the trade, the expenses and costs of the appeal are nevertheless laid out at least partly for a purpose which is not one of the purposes of the trade. They are accessory to the payment of a tax out of profits and are non-deductible because the tax itself is non-deductible.

A As I understand the judgment of the learned MASTER OF THE ROLLS in the *Rushden Heel* case (7) that is the ground on which he has decided the general question against the appellants. I refer specifically to the following passage, which I would respectfully adopt ([1947] 1 All E.R. 699, 702):

I am prepared to assume (although I do not so decide) that the ascertainment of the proper amount of tax payable ought, as the taxpayers argue, to be regarded as necessary for the proper carrying on of the trade and, therefore, for earning profits in the future, but I cannot agree that the money can be said to have been laid out "wholly and exclusively" for that purpose. It was laid out, as it appears to me, just as much, if not more, for the purpose of ensuring that the company, like any other taxpayer, should pay the proper amount of tax, no more and no less.

C I agree also with the further observation that an accountancy expense incurred solely for the purpose of conducting a tax controversy with the Crown cannot be deducted. In these appeals a subsidiary or alternative argument was presented that the real purpose of the excess profits tax appeal was to retain the services of a valuable employee, but the findings of fact do not go so far as this. They mean only that the directors had that in view as one of the objects of the appeal. Even if it was a principal object it would, nevertheless, not exclude the payment of the correct amount of tax as another important purpose of the appeal. I would refuse the appeals.

E **LORD OAKSEY:** My Lords, the question in this appeal is whether the costs of litigation undertaken for the purpose of arriving at the true profits of a trade for the purposes of taxation are proper deductions in order to arrive at the balance of profits and gains or as expenses wholly and exclusively laid out or expended for the purposes of the trade within the meaning of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918. The contention on behalf of the Crown is that no expenses connected with taxation are deductible because it is said they are not expended for the purposes of the trade and it is sought to limit the words "the purposes of the trade" to the purpose of earning the profits of the trade by the operations of the trade. Reliance is placed on the *dictum* of LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (1) ([1906] A.C. 448, 453), which has frequently been cited with approval in other cases, but it is to be observed that LORD DAVEY did not say earning the profits by the operations of the trade and, in my opinion, the words "the purposes of the trade" ought not to be construed in this way. A trader does not expend money in an action brought for or against him for negligence or breach of contract in the course of his trade for the purpose of earning the profits of the trade in this sense, for it is not an operation of his trade to engage in litigation. It is, of course, an incident which he may think reasonably necessary for the purposes of his trade to bring or defend actions, but so it is an incident which he may think reasonably necessary for the purposes of his trade to engage in litigation as to the amount of his taxes. If he succeeds in either case he increases the profits arising from his trade, and it appears to me to be no straining of language to say that a trader who increases his profits by incurring a certain expense incurs that expense for the purpose of earning the profits.

H In my opinion, the real question which has to be decided in every case is whether the expense is one which is incurred in order to earn gain or profit from the trade, or is the application of the gain or profit when earned: see *per*

LORD SELBORNE, L.C., in *Mersey Docks & Harbour Board v. Lucas* (6) ([1883] 8 App. Cas. 891, 906), and, in my opinion, it cannot be truly said that the expense of paying accountants or of litigating the question of what is the balance of profits and gains for the purposes of taxation is the application of these profits. Profits cannot properly be applied or divided until they are ascertained, and every expense which is properly incurred for the ascertainment of profits is, in my opinion, an expense of earning the profits and not an application of them. That is not to say that all expenses which are incurred in point of time before the profits are ascertained can be deducted. The point of time is unimportant. Some expenses which are clearly the application or distribution of profits may be incurred before the ascertainment of profits, e.g., capital investments or payments of interim dividends, but it is the character of the expense which must be considered. The expense in this case was not a capital investment. It was incurred, not to distribute, but to increase, and, in that sense, to earn, the profits. On the other hand, if it is to be held that such expenses are not deductible, what is to be said of the costs of audit which the Companies Acts make necessary or of that part of the cost of bookkeeping which is used in the preparation of such an audit or of accounts for taxation? They are not incurred for the purposes of earning the profits of the trade in the limited sense contended for by the Crown. It is said that the expense of litigating questions of taxation has never been sought to be deducted, and it may be so, but it is also true that the expense of paying accountants and auditors has been deducted, and, in any event, the fact, if it be the fact, throws no legal light on the construction of the words in question. For these reasons I am in favour of allowing the appeals.

Appeals dismissed with costs.

Solicitors: *Warren, Murton & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents)

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

RUSHDEN HEEL CO., LTD. v. KEENE (INSPECTOR OF TAXES). RUSHDEN HEEL CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS, (Viscount Simon, Lord Porter, Lord Simonds, Lord Normand and Lord Oaksey), April 23, July 14, 1948.]

Income Tax—Deductions—Cost of litigation—Appeal in respect of incidence of excess profits tax—Income Tax Act, 1918 (c. 40), sched. D, Rules Applicable to Cases I and II, r. 3 (a).

Excess Profits Tax—Deductions—Cost of litigation—Appeal in respect of incidence of tax—Finance (No. 2) Act, 1939 (c. 109), s. 14 (1).

In computing their profits for both income tax and excess profits tax the taxpayers sought to charge as a deduction from such profits the costs and expenses of an appeal to the Special Commissioners in respect of the incidence of excess profits tax. Those costs and expenses included solicitors' costs, fees of consulting accountants, fees of accountants acting generally for the taxpayers for professional services specially connected with the appeal, and travelling expenses of witnesses:—

HELD: the costs and expenses were not a disbursement "wholly and exclusively laid out or expended for the purposes of the trade" within the meaning of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, and were, therefore, not allowable as a deduction in the computation of profits for the purposes of either income tax or excess profits tax.

Smith's Potato Estates, Ltd. v. Bolland (Inspector of Taxes). Smith's Potato Crisps (1929), Ltd. v. Inland Revenue Comrs. ([1948] 2 All E.R. 367), followed.

Decision of Court of Appeal ([1947] 1 All E.R. 699), affirmed.

[AS TO EXPENSES WHOLLY OR EXCLUSIVELY EXPENDED FOR PURPOSES OF TRADE, see HALSBURY, Hailsham Edn., Vol. 17, p. 152, para. 312; and FOR CASES, see DIGEST, Vol. 28, pp. 42-44, 56, 57, Nos. 215-226, 286-292.]

Case referred to :

(1) *Smith's Potato Estates, Ltd. v. Bolland (Inspector of Taxes). Smith's Potato Crisps (1929), Ltd. v. Inland Revenue Comrs., p. 367, ante.*

CONSOLIDATED APPEALS by the taxpayers from an order of the Court of Appeal (LORD GREENE, M.R., MORTON and SOMERVELL, L.J.J.), dated Apr. 2, 1947, and reported ([1947] 1 All E.R. 699).

A General Commissioners held that costs and expenses incurred by the taxpayers on an appeal to the Special Commissioners in respect of the incidence of excess profits tax should not be allowed in the computation of the taxpayers' profits for the purpose of assessment either to income tax or to excess profits tax. ATKINSON, J., allowed appeals by the taxpayers, but his decision was reversed by the Court of Appeal. The taxpayers appealed to the House of Lords who now affirm the decision of the Court of Appeal. The facts appear in the judgment of ATKINSON, J., ([1946] 2 All E.R. 141).

B *Millard Tucker, K.C., and John Clements* for the taxpayers.

The Solicitor-General (Sir Frank Soskice, K.C.) and R. P. Hills for the Crown.

The House took time for consideration.

C July 14. VISCOUNT SIMON: My Lords, the dissenting view which I expressed in my opinion in the *Smith's Potato Estates, Ltd.* case (1) would have led me to think that these appeals should be allowed, but the House has laid down in that case that the contrary view is the law of the land. I, of course, accept this as governing the present appeals, and, accordingly, I move that these appeals be dismissed with costs.

D LORD PORTER: My Lords, these appeals were argued at the same time as, and in conjunction with, the appeals in *Smith's Potato Estates, Ltd. and Smith's Potato Crisps (1929), Ltd.* (1). They are concerned with similar cases, nor are there any matters of fact or law which require any qualification in the opinions expressed in those cases. In these circumstances these appeals must be subject to the same treatment and must be dismissed with costs.

E LORD SIMONDS (read by LORD NORMAND): My Lords, these consolidated appeals raise the same general questions in regard to the deduction of certain expenses for the purpose of computing excess profits tax and income tax as have just been discussed in the appeals of *Smith's Potato Estates, Ltd. and Smith's Potato Crisps (1929), Ltd.* (1). There are no facts that require special consideration. The same result must follow and the appeals must be dismissed.

LORD NORMAND: My Lords, I concur in the opinions which have been delivered.

F LORD OAKSEY: My Lords, in view of the order which your Lordships' House has made in the appeal of *Smith's Potato Estates, Ltd. v. Bolland* (1), I agree with the motion which has been proposed.

Appeals dismissed with costs.

Solicitors: *Scott & Son* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

G GOLD COAST SELECTION TRUST, LTD. v. HUMPHREY (INSPECTOR OF TAXES). SAME v. SAME.

H [HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Uthwatt, Lord du Parcq, Lord Oaksey), February 3, 4, 5, 6, 9, July 14, 1948.]

Income Tax—Profits or gains—Shares received as consideration for transfer of property—Company dealing in gold mining concessions—Transfer of concessions to associate company for fully paid-up shares—Shares not disposable during year of transaction—Income Tax Act, 1918 (c. 40), sched. D, case I.

A trust company acquired concessions for land considered likely to bear gold, and on July 28, 1934, after a concession had proved auriferous, agreed to sell it to the M. company in consideration of "the sum of £800,000,

which shall be paid and satisfied by the allotment and issue to the vendor . . . of 3,200,000 shares of 5s. each credited as fully paid up." On Nov. 30, 1934, the shares were duly allotted. The books of the trust company showed the cost to themselves of the concessions to have been £107,875. The question arose what figure, if any, ought to be included in the profits and gains of the trust for the year ending Apr. 5, 1935, in respect of the shares acquired under the said agreement, so as to justify a corresponding assessment to income tax for the year ending Apr. 5, 1936. General Commissioners of Income Tax held that at the date of the allotment the value of the shares received by the trust was par, although it was accepted that the shares as a whole were not immediately realisable.

HELD: (LORD OAKSEY *dissentiente*) although inability to realise in a commercial sense an asset such as a block of shares in the year of receipt might be a reason for reducing its valuation, it was not correct to say that for that reason it could not be valued in money for income tax purposes in that year.

Harrison v. Cronk & Sons, Ltd. ([1936] 3 All E.R. 747) and *Absalom v. Talbot* ([1944] 1 All E.R. 642), *applied*.

As it appeared likely, however, that the commissioners might have been under the impression that the shares must be valued at par because the price agreed to be paid for the concession was a sum to be satisfied by the allotment of shares at par to that amount, all the members of the House agreed that the case should be sent back to the commissioners for their reconsideration of the question of valuation.

Per VISCOUNT SIMON, LORD THANKERTON, LORD UTHWATT and LORD DU PARCQ: when a trader in the course of his trade receives a new and valuable asset, not being money, as the result of sale or exchange, that asset, for the purpose of computing the annual profits or gains arising or accruing to him from his trade, should be valued as at the end of the accounting period in which it was received, even though it is neither realised nor realisable till later. The fact that it cannot be realised at once may reduce its present value, but that is no reason for treating it, for the purposes of income tax, as though it has no value until it could be realised. If the asset takes the form of fully paid shares, the valuation will take into account not only the terms of the agreement but a number of other factors, such as prospective yield, marketability, the general outlook for the type of business of the company which has allotted the shares, the result of a contemporary prospectus offering similar shares for subscription, the capital position of the company, and so forth. There may also be an element of value in the fact that the holding of the shares gives control of the company. If the asset is difficult to value, but is none the less of a money value, the best valuation possible must be made.

Decision of the Court of Appeal ([1946] 2 All E.R. 742), *affirmed in part*.

[AS TO PERIOD OF ACCOUNT TO WHICH TRADE RECEIPTS ARE REFERABLE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 118-120, paras. 223-225.]

Cases referred to:

- (1) *Harrison v. Cronk & Sons, Ltd.*, [1936] 3 All E.R. 747; [1937] A.C. 185; 106 L.J.K.B. 70; 156 L.T. 20; *sub nom.*, *Cronk & Sons, Ltd. v. Harrison*, 20 Tax Cas. 612; Digest Supp.
- (2) *Californian Copper Syndicate, Ltd. v. Harris* (*Surveyor of Taxes*), (1905), 5 Tax Cas. 159; 28 Digest 23 b.
- (3) *Scottish & Canadian General Investment Co. v. Easson*, 1922 S.C. 242; 8 Tax Cas. 265; 28 Digest 20 h.
- (4) *Royal Insurance Co., Ltd. v. Stephen*, (1928) 14 Tax Cas. 22; Digest Supp.
- (5) *Westminster Bank, Ltd. v. Osler*, [1933] A.C. 139; 102 L.J.K.B. 110; 148 L.T. 41; 17 Tax Cas. 381; Digest Supp.
- (6) *Emery (John) & Sons v. Inland Revenue Comrs.*, [1937] A.C. 91; 156 L.T. 87; 20 Tax Cas. 213; 156 L.T. 87; Digest Supp.
- (7) *Absalom v. Talbot*, [1944] 1 All E.R. 642; [1944] A.C. 204; 113 L.J.Ch. 369; 171 L.T. 53; 26 Tax Cas. 166, 188; Digest Supp.
- (8) *Ryall v. Hoare*, *Ryall v. Honeywill*, [1923] 2 K.B. 447; 92 L.J.K.B. 1010; 129 L.T. 505; 8 Tax Cas. 521; 28 Digest 81, 453.
- (9) *Martin v. Lowry*, *Martin v. Inland Revenue Commissioners*, [1927] A.C. 312; 96 L.J.K.B. 379; 136 L.T. 580; 11 Tax Cas. 297.

APPEALS by the Gold Coast Selection Trust, Ltd. (hereinafter called "the trust") from a decision of the Court of Appeal ([1946] 2 All E.R. 742) dismissing appeals from a judgment of WROTTESELEY, J.

A The business of the trust was that of financiers and exploiters of and dealers in gold mining concessions. By three separate transactions the trust sold mining concessions and property to three companies—Marlu, Main Reef and Bremang—for blocks of fully paid up shares. General Commissioners of Income Tax found that on the allotment of the shares there was a realisation of assets sold to the three companies, and that, for the purpose of the assessment of the trust to income tax, the value, at the date of allotment, of the shares received by the trust must be taken to be par, the price agreed to be paid by the purchasing companies. WROTTESELEY, J., upheld the commissioners' decision, and his decision was affirmed by the Court of Appeal. The House of Lords, while accepting the principle that the shares ought to be valued at some figure B in the year of allotment, was of the opinion that that figure was not necessarily par. The facts appear in the opinion of VISCOUNT SIMON.

Sir Cyril Radcliffe, K.C., and Heyworth Talbot for the trust.

The Solicitor-General (Sir Frank Soskice, K.C.), J. H. Stamp and R. P. Hills for the Crown.

The House took time for consideration.

C July 14. VISCOUNT SIMON: My Lords, these are two appeals from orders of the Court of Appeal dismissing appeals by the appellant from orders of the King's Bench Division of the High Court whereby (1) an appeal by the appellant on a Case Stated by the Commissioners for the General Purposes of the Income Tax for the City of London was dismissed and the determination of the said commissioners affirmed, and (2) an appeal by the respondent on the said Case Stated was allowed. The main question involved is one of substantial importance and of considerable difficulty.

D The appellant, the Gold Coast Selection Trust, Ltd. (hereinafter called "the trust"), has at all material times carried on the trade of a dealer in stocks and shares and an exploiter of and dealer in gold-mining concessions in the Gold Coast Colony. Its practice has been to acquire concessions for land considered to have gold bearing possibilities. Concessions so acquired were exploited by E the trust to the extent necessary for the ascertaining of their potentialities. If a concession was proved to be gold bearing, and if it appeared to the trust that further development might result in the profitable production of gold, the trust transferred such concession to a company, the business of which was to work the concessions and market the gold produced. The transferee company was in every case a public company, its directors were drawn from the directorate of the appellant company, and the consideration for the transfer of the concession was in each case satisfied by an issue of fully paid-up shares in the transferee F company. The shares so issued (hereinafter called "vendor shares") were of a par value equal to the price named in the agreement for the sale of the concessions as the sale price. Permission to deal in the shares of the transferee companies was, in due course, accorded by the London Stock Exchange in each case, and dealings in these shares in limited quantities in fact took place. The G vendor shares issued to the trust, together with other holdings acquired by it, were large enough to give the trust control over the company which was acquiring the concession from it. So large a block of shares could not be readily disposed of in the stock market without killing the market, and there was evidence before the commissioners that the proper way to deal with them, if it was desired to turn the block of shares into cash, would be to approach trust companies or financial houses and endeavour to place them. The evidence is of somewhat H ambiguous effect, for, while it indicates that a successful operation of this sort might be accomplished in reference to a substantial fraction of the total holding, it was not clearly stated that the whole block could be realised in this way, at any rate within a short time.

Three sales of a concession by the trust are involved. One, by an agreement made on July 28, 1934, with the Marlu Gold Mining Areas, Ltd. (hereinafter called "Marlu"); the second by an agreement made on July 9, 1935, with the Gold Coast Main Reef, Ltd.; and the third by agreement made on Dec. 2, 1936, with the Bremang Gold Dredging Co., Ltd. The main question of law is the

same in all three cases, and it will be convenient to take the Marlu case as an example. Marlu had been incorporated on July 26, 1934, with an authorised capital of £2,000,000 divided into eight million shares at 5s. each. The consideration moving from Marlu to the trust for the sale and transfer of the concession was stated in the agreement of July 28, 1934, to be :

... the sum of £800,000, which shall be paid and satisfied by the allotment and issue to the vendor or its nominees of 3,200,000 shares of 5s. each credited as fully paid up.

The purchase was completed and the fully paid shares allotted on Nov. 30, 1934. On July 30, 1934, two days after the agreement, Marlu issued a prospectus offering for subscription at par 2,000,000 shares of 5s. each. The trust underwrote 1,600,000 of these shares at par in consideration of an option to subscribe for 1,200,000 shares of 5s. each at the price of 6s. up to July 31, 1936. The whole of the shares offered were subscribed ; the trust itself took up and paid for 10,579. The trust purchased some additional shares in the market, and later bought 545,939 shares at 6s. under its option. The question is whether fully paid shares acquired under the agreement of July 28 by the trust, should, for income tax purposes, be valued at any and what figure in money and thus enter into the computation of the profits and gains of the trust for the year ending Apr. 5, 1935, so as to justify a corresponding assessment to income tax for the year ending Apr. 5, 1936. A similar question arises, with a difference in figures and amounts, in the other two cases.

The books of the trust entered the cost to the trust of the concessions sold to Marlu, *viz.*, £107,875, as the purchase price for the 3,200,000 fully paid shares allotted under the sale agreement. It seems obvious that when the concession has been proved to be auriferous, its value cannot be limited to this. Then, year by year, as shares were sold, the profit on such sales was brought to account. The commissioners found :

1. That when the Marlu, Main Reef and Bremang shares were allotted to the trust there was a realisation of the assets sold to those companies. 2. That at the date of the allotment the value of the shares received by the trust was par, the price agreed to be paid by the purchasing companies.

The appellant does not dispute the first finding, but it challenges the second which, in the case of the Marlu shares, has the result that the 3,200,000 shares credited as fully paid up which were received by the trust as the consideration for parting with the relevant concession to Marlu, must be valued for income tax purposes in the year 1934-5 at the figure of £800,000. The appellant's argument comes to this, that no asset such as a block of shares fully paid-up can, for income tax purposes, be represented by a figure of cash in the year of account in which the transaction takes place, unless the asset is readily convertible into money in that year. If it was not, no money value could be attributed to it, because realisation was not presently possible. The appellant further contended that, on examining the material set out in the Case Stated, the commissioners' conclusion as to value was vitiated since they had proceeded on the assumption that the block of shares must be valued at £800,000 because they were allotted as the agreed method of satisfying a consideration of £800,000. The respondent concedes that, if the commissioners had arrived at their figure on the view that the block of shares must necessarily be valued at the figure named, this was an error, and that the fact that the contract stipulated for an allotment of fully paid shares to an amount which at par was equivalent to the money figure might raise a presumption that this was the correct value, but was not conclusive. If, for example, at the time of the purchase of the concession the shares of the company stood at a high premium, an allotment of 5s. shares as fully paid as the method of discharging the consideration might confer on the company an asset worth more than the par equivalent of the shares. Equally, if contemporary dealings indicated a fall, the money value of the new asset might be less than par, but the respondent argues that it is all a question of valuation, which is a matter for the commissioners to determine, provided they do not proceed on a wrong view of the law, and that the commissioners in this case arrived at the figure, not because they were bound to do so in view of the terms of the agreement, but because, after having considered all the circumstances in the case, they reached the conclusion that this was the right figure.

We are left, therefore, with two issues, and I must express my opinion on both. One is what is the proper way of treating an asset not immediately realisable. The other is whether the commissioners have proceeded on the correct principle.

It seems to me that it is not correct to say that an asset, such as this block of shares, cannot be valued in money for income tax purposes in the year of its receipt because it cannot, in a commercial sense, be immediately realised. That is no reason for saying that it is incapable of being valued, though, if its realisation cannot take place promptly, that may be a reason why the money figure set against it at the earlier date should be reduced in order to allow for an appropriate interval. Supposing, for example, the contract conferring the asset on the taxpayer included a stipulation that the asset should not be realised by the transferee for five years, and that, if an attempt was made to realise it before that time, the property in it should revert to the transferor. This might seriously reduce the value of the asset when received, but it is no reason for saying that, when received, it must be regarded as having no value at all. The commissioners, as it seems to me, in fixing what money equivalent should be taken as representing the asset must fix an appropriate money value as at the end of the period to which the appellant's accounts are made up by taking all the circumstances into consideration. It is a relevant circumstance that £800,000 was the figure fixed on as the appropriate consideration to be satisfied by fully paid shares, but it is also a relevant consideration that the asset could not be realised at once. I adopt the conclusion expressed in the judgment of SOMERVELL, L.J., where he says ([1946] 2 All E.R. 747) :

... when there has been, as is now admitted here, a realisation of a trading asset and the receipt of another asset, and when that latter asset is marketable in its nature and not some merely personal advantage which by its nature cannot be turned into money, the profits and gains must be arrived at for the year in which the transaction took place by putting a fair value on the asset received. The fact that it could not, as we will assume here, owing to its size, be disposed of in the market in that year does not mean that no profit or gain for income tax purposes has been made out of the transaction.

COHEN, L.J., who delivered a separate judgment, reached the same conclusion, saying, with reference to *John Cronk & Sons, Ltd. v. Harrison* (1) (*ibid.*, 749) :

... that case is, I think, clear authority for the view that, if an asset is capable of valuation, it should be valued and brought into the account, even though that value may not be presently realisable in the accounting year . . . It is admitted that the profit and loss account must include assets which have to be valued, and I can see no reason why, if valuation is possible, an artificial value, whether high or low, should be placed on an asset merely because that value cannot be wholly realised in the accounting year. The fact that it cannot be realised in the accounting year is no doubt an element which the commissioners should take into account in estimating the value, but it is not a reason for attributing to the asset a value far below that which other facts, *e.g.*, the terms of the sale agreement, the market quotation and the prices at which the appellant company itself acquired shares in the market, and its own statements to its shareholders about their value, showed that the asset should rightly bear.

By "artificial value" in this passage the Lord Justice meant the figure of £107,875 which was the amount the trust had spent in acquiring the site and proving the concession before they could ascertain that it was auriferous.

Counsel for the appellant called the attention of the House to a number of reported cases in which the valuing of an asset was simplified because the asset was readily realisable, but this circumstance, though dwelt on when deciding that the unrealised asset must none the less be given a money value, is nowhere declared to be the ground of the decision. Thus, in *Californian Copper Syndicate v. Harris* (2), where the syndicate was engaged in acquiring and re-selling mining property, and it was held that the difference between the purchase price of such property and the value of the shares for which the property was exchanged was a profit assessible to income tax, LORD TRAYNER dealt with the contention that there was no realised profit, since the shares had not been sold. He said (5 Tax Cas. 167) :

A profit is realised when the seller gets the price he has bargained for. No doubt here the price took the form of fully paid-up shares in another company, but, if there can be no realised profit, except when that is paid in cash, the shares were realisable and could have been turned into cash, if the appellants had been pleased to do so.

I read this last sentence as rejecting the syndicate's contention that it could not be liable because the shares had not been realised. It should not be understood to mean that the crucial test is prompt realisability.

In *Scottish & Canadian General Investment Co. v. Easson* (3) LORD PRESIDENT CLYDE upheld the conclusion of the commissioners that the profits of the company in the year in which it had received certain debentures should be assessed at a sum equal to 75 per cent. of the face value of those debentures, as representing their actual value. The LORD PRESIDENT said (1922 S.C. 246) :

The question becomes one of ascertaining the amount of the profits and gains of the company. If, instead of receiving cash . . . the company got a saleable security, that saleable security is just part and parcel of the company's profits and gains.

The LORD PRESIDENT pointed out that the debentures themselves were saleable and had a value on the market, but he nowhere suggests that the true test is whether they could be sold immediately. Neither in *Royal Insurance Co. Ltd. v. Stephen* (4) nor in *Westminster Bank, Ltd. v. Osler* (5) do I find the proposition laid down which is essential to the appellant's main argument, that an asset in kind cannot be valued for the purpose of entering into the computation of profits and gains unless it is immediately realisable. In *John Emery & Sons v. Inland Revenue Comrs.* (6), where a firm of builders erected dwelling-houses and thereafter sold them for a cash payment, subject to the ground annuals which they had created and retained in their possession, it was held in the Court of Session, and the decision was approved in the House of Lords, that the realisable value of the ground annuals should be accounted for in ascertaining the firm's trading profits. The judgments point out that ground annuals could be readily realised, but the test of immediate realisability is nowhere declared to be the essential point of the case. There is, indeed, authority to the contrary effect contained in, or, at any rate, implied by, the decisions of this House in *Cronk's case* (1) and in *Absalom v. Tulbot* (7).

In my view, the principle to be applied is the following. In cases such as this, when a trader in the course of his trade receives a new and valuable asset, not being money, as the result of sale or exchange, that asset, for the purpose of computing the annual profits or gains arising or accruing to him from his trade, should be valued as at the end of the accounting period in which it was received, even though it is neither realised or realisable till later. The fact that it cannot be realised at once may reduce its present value, but that is no reason for treating it, for the purposes of income tax, as though it had no value until it could be realised. If the asset takes the form of fully paid shares, the valuation will take into account not only the terms of the agreement, but a number of other factors, such as prospective yield, marketability, the general outlook for the type of business of the company which has allotted the shares, the result of a contemporary prospectus offering similar shares for subscription, the capital position of the company, and so forth. There may also be an element of value in the fact that the holding of the shares gives control of the company. If the asset is difficult to value, but is none the less of a money value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor, indeed, is it possible. It is for the commissioners to express in the money value attributed by them to the asset their estimate, and this is a conclusion of fact to be drawn from the evidence before them.

I, therefore, reject the main contention of the appellant, and agree with the Court of Appeal. This would lead to a dismissal of the first appeal without further inquiry were it not that I entertain considerable doubt whether the commissioners' second finding is not, as its language might imply, a conclusion reached on the view that the shares must be valued at par because the price agreed to be paid for the concession was a sum of £800,000 to be satisfied by an allotment and issue to the appellant of shares which at par would be equivalent to that amount. One of the contentions of the Inland Revenue set out in the Case is : "that the price of the concessions as agreed between the parties was the par value of the shares," and, if the commissioners arrived at the figure of £800,000 on the view put forward that this must be the one and only proper figure of valuation, they were mistaken. The best course seems to be to refer the case back to the commissioners and request them to fix a proper figure of valuation in the light of the material before them as set out in the Case, and of any facts disclosed by further evidence before them. It may be that

they will still arrive at the same figure, but, if so, this will be because the relevant factors, such as I have indicated above, lead them to this conclusion of fact. The correct conclusion, however, is not a figure inevitably forced on the commissioners by the terms of the agreement taken alone, but is a question of fact to be answered after taking into account the relevant surrounding circumstances at the time of the transaction. This view of the matter also determines the question of the second appeal. I, therefore, move that the appeals be allowed, but only to the extent that the matter be referred back to the commissioners to reconsider and fix the proper figure in the light of these directions. There will be no costs awarded in respect of the appeals to this House. The late **LORD THANKERTON**, who took part in the hearing of these appeals, expressed to me before his death his agreement with this conclusion.

LORD UTHWATT : My Lords, I have had the advantage of reading in print and considering the opinion which has just been delivered by the noble and learned Lord on the Woolsack. I feel myself in complete agreement with his conclusions and with his reasoning, and I am content to express my adherence to his opinion.

My Lords, my noble and learned friend **LORD DU PARCQ**, who is unable to be present, desires me to say that he also agrees with the opinion which has just been expressed by the noble and learned Lord on the Woolsack.

LORD OAKSEY : My Lords, in my opinion, the appeal should be allowed and the case remitted to the commissioners on the ground that they appear to have thought that they were bound as matter of law to assume that the shares in question were worth their par value.

It remains to consider what is the true test for the commissioners' decision. It has been argued on behalf of the Crown that the fact, if it be the fact, that all the shares retained by the appellant could not be sold in the years in question is irrelevant, and that the commissioners may put a valuation on the shares regardless of whether they could be realised at that value in the years of computation. In my opinion, this argument is unsound. In the first place, it is, I think, important to consider what is meant by an income tax on annual profits and gains. In my view, it is a tax in money on profits in money which arise to the taxpayer in the year of computation. Income must not be confused with the source of the income. A taxpayer's obligation cannot be satisfied except by money. He has no option to offer other forms of property. The reason why he is not permitted to contend that he has made no profit in a transaction, if he has made a profit but taken it, not in money, but in other forms of property, is that the property is the equivalent of money because it can be sold for money in the year. The word annual must at least connote "in the year" if it is to have any meaning at all, and that it has this meaning was laid down in *Ryall v. Hoare* (8) and approved in *Martin v. Lowry* (9). It follows, in my opinion, that what the commissioners had to decide in the present case, is what profit in money, if any, was, or could be, derived by the appellant company in the years in question from the transactions by which they transferred the concessions to the Marlu, Gold Coast Main Reef, and Bremang Companies for shares in the companies.

Now, it is, of course, true that the concessions had an actual or intrinsic value at the time of the transactions, but value lay in the future and was unknown. It is also true that the appellant company was prepared to part with the concessions on the terms of the prospectuses, that is to say, in the hope of getting capital from the public sufficient to develop the concessions while retaining the shares in question, but the par value of the shares retained was not an estimate of the actual value of the concessions, either at that time or in the future, for both the appellant company and the public who subscribed for shares must have estimated the value of their shares both at the time and in the future at a higher figure. But the fact that the appellant company parted with the concessions does not mean that they realised or could realise at the time the money value of the concessions, for they did not receive cash but still retained in the shares their interest in the concessions. The appellant company will, of course, ultimately realise the value of the concessions to the company by selling their shares or holding them and receiving dividends on them, but all that the commissioners have to do in this case is to assess the profit on the

transactions in the years in question, and for that purpose to bring into the appellant company's accounts the money value of the shares in the years of computation. The only true test of the money value of an article at a certain time is what can be got for it in money at that time. If it cannot be sold at that time or exchanged for something which can be sold at that time, no one can make a profit out of it which can be stated in terms of money at that time. If a picture dealer exchanges a picture for another picture, and it is proved that the picture taken in exchange cannot be sold in the year, not for want of time, but because, it having been put up at auction there is no bid, can the revenue claim that a profit has been made on that transaction? I am assuming, of course, in this illustration that it is proved that the picture cannot be sold in the year. In the present case there was evidence that some of the shares could have been sold, and the figure which they might have realised should, of course, be brought into the appellants' accounts. Moreover, it is not a question whether they could be sold in any particular market such as the London Stock Exchange, but, if the commissioners are satisfied that the shares could not have been sold for money in Paris, New York or London or anywhere in the world in the years in question, then to bring in a cash figure for those shares is, in my opinion, attributing to the years in question profits which might or might not be realised in future years. It is, in my opinion, unsound accounting and unsound law to lay down that the commissioners should value the shares by estimating what they may bring in by way of dividends and sales in future years, and then discounting that figure so as to arrive at their present value. There are no facts on which the commissioners can base such an estimate. It is simply guess work, and as a matter of fact has probably been entirely falsified by the course of events which has included the recent war. If one assumes that the commissioners are satisfied as a matter of fact that the shares could not have been sold in the years in question, such a valuation must either be a contradiction of the fact or an estimate of future value. The commissioners should, in my opinion, come to a conclusion on the evidence how many of the shares in question could have been sold in the years of computation, and at what price, and should bring into the appellant company's account that figure as against the cost of the concessions to the appellant company. To adopt this principle appears to me to be in accord with every case which has been cited to your Lordships' House on this appeal and with the fundamental principles of the Income Tax Acts.

Case remitted.

Solicitors: *Birkbeck, Julius, Edwards & Coburn* (for the appellant trust);
Solicitor of Inland Revenue.

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

CARROLL v. ANDREW BARCLAY &

[HOUSE OF LORDS (Lord Jowitt, L.C., Lord Porter, Normand and Lord Morton of Henryton), May

Factory—Fencing—Transmission machinery—Workman of broken machinery—Factories Act, 1937 (c. 67), s.

Distinguished. GATEHOUSE v. JON SUMMERS & SONS, LTD. [1953] All E.R. 117.

Dicta of LORD PORTER, LORD DU PARCQ and LORD NORMAND, at pp. 390, 391, 393, *considered.* DICKSON v. FLACK. [1953] 1 All E.R. 236.

On a true construction of s. 13 (1) of the Factories Act, 1937, the words: "Every part of the transmission machinery shall be securely fenced" mean that every part of the transmission machinery shall be so fenced as to prevent any person employed or working on the premises from moving into contact with it, and not that every part of the transmission machinery shall be so fenced as to protect any person employed or working on the premises from injury due to flying parts of broken machinery.

In the course of his duties a machinist, employed by a firm of engineers, operated a lathe in his employers' boiler shop. Immediately in front of the lathe at which he was standing and about 6½ ft. away, the motor for driving the main shaft of the shop was placed and over this motor at a height of 25 ft. the main driving shaft was situated. This shaft was operated from the motor by means of a balata belt, 9 ins. wide and ¼ in. thick, which ascended on the side remote from the position in which the workman was

working, passed over a pulley attached to the driving shaft, and was pulled down on the side nearest to him by the motor. The belt did not ascend vertically, but sloped away at an angle from the spot in which the lathe was fixed. The motor, belt, shaft and pulley formed part of the transmission machinery within the meaning of the Factories Act, 1937. There was round the motor a fence 5ft. high, but between the top of that fence and the overhead driving shaft the belt was unprotected. While the workman was working at his lathe the belt broke, lashed out over the fence, and struck him, causing serious injury :—

HELD : the employers had not been guilty of a breach of s. 13 (1) of the Factories Act, 1937, and were not liable to the workman under that subsection.

Per LORD DU PARCQ and LORD NORMAND : While the words "securely fenced" must be given the same meaning in ss. 12, 13 and 14, they may well mean "so fenced as to give security from such dangers as may be reasonably expected." If machines exist, or are hereafter invented and used, which are dangerous because fragments or loose parts of the machinery are sometimes ejected from them, s. 14 may require such machines to be fenced to protect workmen against that danger.

Dictum of LORD SIMONDS in Nicholls v. Austin (Leyton), Ltd. ([1946] 2 All E.R. 92, 98), doubted by LORD DU PARCQ.

[AS TO FENCING OF MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131; and FOR CASES, see DIGEST, Vol. 24, pp. 908-910, Nos. 65-76.]

Cases referred to :

- (1) *Nicholls v. Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.
- (2) *Hindle v. Birtwistle*, [1897] 1 Q.B. 192; 76 L.T. 159; 61 J.P. 70; *sub nom. Birtwistle v. Hindle*, 66 L.J.Q.B. 173; 24 Digest 909, 71.
- (3) *Atkinson v. London & North Eastern Ry. Co.*, [1926] 1 K.B. 313; 95 L.J.K.B. 266; 134 L.T. 217; 90 J.P. 17; Digest Supp.
- (4) *Kindler v. Camberwell Borough Council*, [1944] 2 All E.R. 315; 109 J.P. 81; 2nd Digest Supp.
- (5) *Harrison v. Metropolitan Plywood Co.*, [1946] 1 All E.R. 243; [1946] K.B. 255; 115 L.J.K.B. 187; 174 L.T. 190; 2nd Digest Supp.
- (6) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.

APPEAL by the workman from an order of the Second Division of the Court of Session, dated Mar. 14, 1947, and reported 1947 S.C. 411.

In an action by the appellant workman for damages for injuries alleged to have been sustained by him owing to the failure of the respondent employers to fence a balata belt in a factory occupied by them adequately and securely in breach of their common law duty to take reasonable care and of s. 13 (1) of the Factories Act, 1937, the Sheriff Substitute found for the workman on both grounds and awarded him £500 damages. The Second Division of the Court of Session recalled the interlocutor of the Sheriff Substitute, substantially altered his findings of fact and assoilzied the employers. On appeal to the House of Lords, the claim at common law was abandoned, and the appeal, which, therefore, based only on the statute, was dismissed. The facts appear in the opinion of LORD PORTER.

Paull, K.C., and *Marven Everett* for the workman.

Walker, K.C., and *Sloan* (both of the Scottish Bar) for the employers.

The House took time for consideration.

July 14. **LORD JOWITT, L.C. :** My Lords, I have had the advantage of reading the opinions which my noble friends are about to deliver. They all agree in the result that the appeal must be dismissed. I confess that I have found this a difficult case, but I am not prepared to dissent from their conclusions. At the same time I should desire to leave open for further consideration the question which LORD DU PARCQ raises in his opinion.

LORD PORTER : My Lords, the workman asserts that he is entitled to recover damages from the employers for injuries sustained by him in working

on their premises. The employers carry on business as engineers at the Caledonia Works, in Langland Street, Kilmarnock, and are occupiers of those works within the meaning of the Factories Act, 1937. The workman was a machinist and in the course of his duties operated a lathe in the employers' boiler shop. Immediately in front of the lathe at which the workman was standing, and about 6½ft. away, the motor for driving the main shaft of the shop was placed, and over this motor, at a height of about 25ft., the main driving shaft was situated. This shaft was operated from the motor by means of a balata belt, about 9ins. wide and ¼in. thick, which ascended on the side remote from the position in which the workman was working, passed over a pulley attached to the driving shaft, and was pulled down on the side nearest to him—the tension side—by the motor. The belt did not ascend vertically, but sloped away at an angle from the spot in which the lathe was fixed. The motor, belt, shaft and pulley form part of the transmission machinery of the works within the meaning of the Factories Act, 1937. The workman was protected from the motor by a fence some 5ft. high, but over the 20ft. between that fence and the overhead driving shaft the belt was unprotected and his position at the lathe placed him in a direct line with the revolving belt. On Mar. 16, 1945, while the workman was working at his lathe the belt broke, lashed out over the fence and struck him, causing him serious injury. The finding of the Court of Session as to the circumstances of the accident are binding on your Lordships and should be set out in full (1947 S.C. 411, 413):

The breaking of a balata belt is a very infrequent occurrence, and such an occurrence as a belt coming out from its guard and causing injury to a person working or standing outside the guard enclosing the motor and belt has never been known to have happened within the experience of the witnesses examined on both sides. It was proved that for nearly forty years past, and now, the practice of all comparable factories was and is the same. It is not the practice in comparable factories to fence a motor and vertical belt above a distance of approximately 5 or 6 ft., with a maximum of 8 ft. The practice is to fence to such a height as aforesaid, and that is found sufficient to prevent any operator or other person legitimately on the premises coming into contact with any part of the belt. The solitary example afforded in the whole proof of fencing the upper portion of such vertical belting was the single case of a precaution taken after the accident by the present defenders. The defenders some time after the accident moved the motor itself to a different position in the boiler shop, and, by way of rendering recurrences of such accident less likely they erected a fence on the tension side of the belt to a height of some 15ft. above the floor. In the case of a firm which had a large number of belts operating of the same kind as the belt in this case it might be impracticable from both the structural and commercial points of view to have them guarded from floor to roof and on all sides, both on account of the high cost and of the difficulty of changing and repairing belts, but to fence the tension side of the main driving belts only might be commercially possible, but, with the single exception above referred to, this has not been known anywhere to be done.

The workman claimed damages for his injuries on two grounds, first, for negligence at common law, and, secondly, for breach of the statutory requirement contained in s. 13 of the Factories Act, 1937. Having regard to the findings of the Court of Session, it would be difficult, if not impossible, for the workman to maintain that the employers were guilty of negligence at common law and before your Lordships' House that claim was, as I think, properly and necessarily abandoned, but, even though they were doomed to failure at common law, the workman's representatives maintained that he was entitled to recover owing to the breach by the employers of the obligations imposed by s. 13 (1) of the Factories Act, 1937. That sub-section runs as follows:

Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced.

With this language is contrasted that of s. 14 (1) which makes a similar provision as to dangerous parts of any machinery, and it is contended that, whereas machinery has to be proved dangerous before the duty imposed by s. 14 becomes operative, s. 13 imposes an absolute obligation on the occupier of the premises securely to fence transmission machinery, not only against any risk resulting from its working, but against any dangers, foreseen or unforeseen, foreseeable or unforeseeable, and whether in the course of working or in the accidental breaking of the machinery involved. Its object is to protect the

workman, it is maintained, not only from approaching and being injured by the transmission machinery in action, but also against the breaking of any part of that machinery and its flying out and injuring those who are employed in the works. The duty is not confined to shutting off the workman from danger, but includes shutting in the transmission so that it cannot fly out and strike the workman if it breaks.

My Lords, so to construe the section is to impose a heavy obligation on the employer, but, if the section so enacts, its terms must be followed. The employers, on the other hand, maintain that the sub-section aims at and in words provides only for the protection of the workman against coming into contact with the transmission machinery, not against its escape from the position in which it is placed and its impact on him. Nowhere, it is said, is there any indication that the Act aims at the dangers threatened from broken machinery; it is danger in working which has to be avoided. Moving machinery transmitting power is always dangerous unless the operators are shut off from approaching its working parts, but there is nothing in the Act to show that the occupier is an insurer of the sound construction of the working parts of his machines. At common law, no doubt, he is liable for any negligence in the provision of sound machinery and must give adequate supervision to its upkeep, but no such duty is laid on him by the Factories Act, 1937. That Act is enacted to ensure the workman against the dangers resulting from its working and from nothing else.

My Lords, the correct solution of this problem must depend on the true construction of the terms of the Act. The provisions which deal with fencing are to be found in ss. 12 to 16 inclusive and it is, I think, noteworthy that in the case of the first of these sections, which is concerned with prime movers, there is an absolute obligation to fence without any qualification whatever except for electric generators, and so forth, which by sub-s. (3) are subject to a less stringent rule. Apart from such generators, prime movers, which are defined in s. 152 and do not include the belt in question, must be securely fenced whether they are safe or not and whatever their position or construction. If they are unfenced the occupiers of the factory are guilty of an offence. In the case of electric generators, however, and also in the case of transmission machinery (s. 13) and dangerous machinery (s. 14) fencing is not required if the position or construction of the machinery renders it as safe to everyone employed or working on the premises as it would be if securely fenced. The only difference between transmission and dangerous machinery is that, subject to the qualification mentioned above, the former must be fenced whether it is dangerous or not, whereas the latter must be proved to be dangerous before the duty to fence comes into existence. In either case fencing is obligatory unless the exceptions apply, but it still remains to be determined against what dangers the fencing is to be a safeguard and what circumstances the exceptions embrace. For my own part, I find it difficult to envisage any set of circumstances in which unfenced machinery would be safe owing to its position, or, indeed, construction, if the risk of breakage is to be taken into consideration. In such a case no position, at any rate, could warrant that employees might not be injured or that the machinery would be as safe as if it was securely fenced. And, equally, if breakage is to be guarded against, the distinction between machinery which is dangerous and that which is not seems to disappear. All machinery is potentially dangerous because it may break, but the Act is not concerned with danger in that sense. It is danger in working against which it is framed to give security.

Throughout the relevant sections I can find no hint that the danger of machinery breaking has been taken into account. The words "of such construction" in ss. 12 (3), 13 and 14 deal with types of construction, not with the strength of the machine; ss. 22 to 26 provide for lifts, floors and methods of ingress and egress and have no bearing on the provision of sound machinery. Unless the matter be provided for by regulations made under s. 60, the common law obligation to use due care seems alone to be the sanction against weak or ill-constructed machinery. So far, indeed, from suggesting that the breakage of machinery is under consideration in ss. 12 to 16, indications to the contrary are, I think, to be found. Certainly the provisions of s. 13 (3) and (4) show no tendency to keep in mind the breaking of driving belts and s. 14 not only speaks of a device "which automatically prevents the operator from coming

into contact with that part" (*i.e.*, a dangerous part) in the proviso to sub-s. (1), but in sub-s. (2) refers to preventing "the exposure of a dangerous part of machinery while in motion," and I cannot read those phrases as intending anything more than a device to keep the workman from the dangerous part of the machine. Finally, sub-s. (3) talks of "articles which are dangerous while in motion in the machine." From all these expressions I conclude that it is risk arising from the motion of the machine which is being guarded against, whether the part concerned is the transmission or dangerous in working. Even s. 15 (b) contains the same suggestion when it permits certain work to be done while the machine is in motion if to stop it would seriously interfere with the carrying on of the process.

None of the cases which deal with the matter or were quoted to us seems to me to controvert this view. The latest in your Lordships' House, *Nicholls v. Austin (Leyton), Ltd.* (1), was concerned with injury caused by a piece of wood flying out from a circular saw which was said to be dangerous because of its tendency to throw out such pieces. I can imagine it being said that a circular saw is dangerous because of this tendency and that the obligation to fence dangerous machinery is not to obviate its dangers, yet your Lordships held that the workman could not recover and LORD THANKERTON said ([1946] 2 All E.R. 92, 95):

... the obligation to fence imposed by s. 14 (1), is an obligation to provide a guard against contact with any dangerous part of a machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion ...

On the other hand, where there was danger, which should have been anticipated, that part of the machine (*e.g.*, a spindle) would fly out, as in *Hindle v. Birtwistle* (2), it was held that the machine itself was dangerous in that respect and should have been fenced. So, too, where a driving shaft was situated 13ft. up, but it could not be assumed that the shaft would never be approached by any person employed in the factory, as in *Atkinson v. L. & N.E. Ry.* (3), and in a case where the handle of a machine flew up and in the ordinary course of affairs danger might be anticipated from the use of the machine without protection, as in *Kinder v. Camberwell Borough Council* (4), the employers have been held under a duty to fence. In each case, however, it was injury caused by the working of the machine and the danger which might reasonably be anticipated from its working. Even in the case of the flying spindle it was not a breaking of a part of the machine, but an accident which might have been anticipated from its ordinary working which had to be guarded against. The machine was found to be a dangerous one because of the liability of spindles to fly out, and it was that danger which was liable to occur in the course of its ordinary working, not its abnormal action in breaking, for which a fence had to be provided. *Harrison v. Metropolitan Plywood Co.* (5) was a decision on the construction and effect of the Woodworking Machinery Regulations, 1922, reg. 22, which HILBERY, J., following a decision of the Court of Appeal in *Miller v. William Bootham & Sons, Ltd.* (6) held to supersede s. 14 of the Factories Act, 1937, and not on the wording of the Act itself, and, therefore, whatever its effect, does not deal with the matter now in issue.

In my opinion, it is not necessary for your Lordships to consider in respect of any of these cases how far the facts support the decision. The principle is plain. Any risk arising from the working of a dangerous machine must be guarded against under s. 14 and any danger emanating from the working of transmission machinery must likewise be guarded against under s. 13. The working of transmission machinery is deemed to be dangerous; other machines need not be fenced unless they or some part are, in fact, dangerous. But in neither case does the Act aim at protection against breakage. In the present instance it was, no doubt, the duty of the employers to fence the transmission machinery. That part, however, which a workman could enter on was securely fenced and the belt was in such a position as to be as safe as it would be if securely fenced unless it broke. Had it been in such a position that the workman could come into contact with it, it would not have been so safe, and in that case it would have been necessary to fence it. Fencing, in my opinion, means the erection of a barricade to prevent any employee from making contact with

the machine, not an enclosure to prevent broken machinery from flying out. I should dismiss the appeal.

LORD DU PARCQ : (read by LORD NORMAND) : My Lords, I have had the advantage of reading in advance the opinion which has been delivered by my noble and learned friend LORD PORTER and that which my noble and learned friend LORD NORMAND is about to deliver, and am in general agreement with them. I wish to add, however, that, while I agree with LORD NORMAND that the words "securely fenced" must be given the same meaning in each of the three sections (12, 13 and 14), I think that they may well mean "so fenced as to give security from such dangers as may be reasonably expected." If machines exist, or are hereafter invented and used, which are dangerous because fragments or loose parts of the machinery are sometimes ejected from them, then I am not prepared to say that s. 14 does not require such machines to be fenced for the purpose of protecting workmen against that danger. If the *dictum* of my noble and learned friend LORD SIMONDS in *Nicholls v. Austin (Leyton), Ltd.* (1) ([1946] 2 All E.R. 92, 98), is to be understood as meaning that such a machine need not be fenced, I respectfully doubt its accuracy, and must reserve my opinion on it. Section 13 does not state expressly what is the nature of the danger which is contemplated, but, in the light of the findings of the Court of Session and of such knowledge of these matters as most adult persons may be supposed to possess (for I claim no special knowledge), I think that it would be wrong to hold that the legislature had in mind the remote possibility of the transmission gear breaking and so coming into contact with a workman's body. The construction for which the workman contends would put a heavy burden on employers to little purpose. If Parliament intended to impose such a burden, it would, I think, have expressed its intention plainly. I agree, therefore, that the appeal should be dismissed.

LORD NORMAND : My Lords, the workman was injured when he was working at a turret lathe in the employers' engineering works by a blow from a broken balata driving belt which came apart while it was in use. He sued the employers for damages in the Sheriff Court at Kilmarnock, averring that the accident was caused by a failure to fence the belt adequately and securely in breach of the common law duty of reasonable care and of s. 13 of the Factories Act, 1937. The Sheriff Substitute found for the workman on both grounds and awarded the sum of £500 as damages. An appeal was taken to the Court of Session and the Second Division of the Court recalled the interlocutor of the Sheriff Substitute, substantially altered his findings of fact, and assoilzied the employers. The circumstances out of which the action arose and the relevant findings of fact have been stated by my noble and learned friend, LORD PORTER, and I do not repeat them. The workman, if he did not abandon the case on common law negligence, at least maintained it with little confidence and it is unnecessary to say more than that the findings of fact are destructive of it.

Section 13 (1) of the Factories Act, 1937, requires that every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced. The sub-section imposes an absolute obligation in the sense that the obligation, whatever its meaning and effect, must be actually fulfilled and not merely that the occupier of the factory must do his best to fulfil it, and also in the sense that the obligation is not subject to any relaxation by the Secretary of State on the ground that it is unnecessary or impracticable: see s. 13 (5). The workman maintains that its content also is absolute, and, accordingly, that the transmission machinery must be so "securely fenced" that all persons who are employed or working on the premises shall be protected, not only from the danger of contact with the transmission machinery or any part of it while it is working *in situ*, but also against all parts of it which may fly off if it breaks or comes to pieces. The employers maintain that the obligation is merely to fence the transmission machinery in such a way as to prevent contact between it and persons employed or working on the premises, and that is the meaning put on the section by the learned judges of the Court of Session.

It is common ground that the crucial words are "securely fenced" and that they must have the same meaning wherever they occur in the statute. Section

12 (1) requires that every flywheel directly connected to any prime mover and every moving part of any prime mover except those mentioned in sub-s. (3) shall be securely fenced. "Prime mover" means (s. 152 (1)) every engine, motor or other appliance which provides mechanical energy derived from steam, water, wind, electricity, the combustion of fuel or other source. Section 12 (3) requires that every part of electric generators, motors and rotary converters, and every flywheel connected thereto shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced. Section 14 (1) requires that every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced. But there is a proviso that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of the sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part. I do not find in these provisions or elsewhere in the Act any clear positive instruction that the fencing shall be so constructed as to contain the flying fragments of, e.g., a broken flywheel or a broken driving shaft. If there were such an instruction it would be irrelevant to consider the difficulties of fulfilling it. The workman's counsel, however, submitted that the construction for which he contended results from the intention apparent in s. 13 (1), s. 12 (3) and s. 14 (1), that every person employed or working on the premises should be protected. He also founded his argument on the words "securely fenced," which he treated as unqualified and unrelated to any reasonable apprehension or expectation of danger. But the intention that every person employed or working on the premises shall be protected does not show that danger from flying parts of a broken machine to persons at a distance from it is contemplated. All that it means is that anyone working in a factory who may be, or who may pass, near the machinery to be fenced, though his work is not particularly associated with it, shall enjoy the protection. The word "fence" does not suggest to my mind the massive kind of structure which might be necessary to contain the parts of a large flywheel breaking apart while rotating at high speed. The only express provision in the Act dealing with the kind of fencing required is that it shall be "of substantial construction": see s. 16, but that is scarcely more than an injunction against flimsiness and it is satisfied by the sort of fence that is sufficient to afford good protection to workmen against contact with the machinery when it is working *in situ*. Nor does the word "securely" appear to import absolute protection against all possible contingencies, rather than protection against the danger of contact.

In the absence, therefore, of any clear positive indication that the obligation to fence securely has the meaning attributed to it by the workman the implications of the material sections as a whole must be considered, and practicability becomes relevant to the construction of the obligation. The commercial practicability of the workman's construction would vary according to the size and other characteristics of the machinery to be fenced. It is found as a fact that the fencing of the tension side of main driving belts might be commercially possible, and I assume that a fence such as guarded the lower part of the driving belt in the present instance would contain most driving belts in common use if they were to break, but, if the obligation is to apply to every flywheel and to every moving part of a steam-driven prime mover and to all driving shafts, much heavier and more solid containers would be necessary, and the cost in many factories would become prohibitive. An even more important consideration, especially in a penal statute, is the uncertainty which would result from this construction of "securely fenced," for no clear standard of the strength of fence required to contain the force of flying parts of broken machinery is or could be provided by the Act, and the problem whether the obligation was being fulfilled would in any particular case be incapable of rational solution. There are, besides, in the Act indications which seem to me to show that the purpose of the fencing is to provide against contact with the machinery which, rather than the breaking of machinery, is the characteristic danger to be apprehended by workmen in factories. The various kinds of machinery

dealt with in s. 12 (1) are treated as dangerous in themselves in all circumstances, but the machinery dealt with in s. 12 (3), though also dealt with as dangerous in itself, is not regarded as dangerous in all circumstances, for the statute recognises that it may be as safe as if securely fenced either by reason of its position or by reason of its construction, and then fencing is not required. But on the hypothesis that breakage and flying pieces are among the dangers to be guarded against, position could scarcely confer the same safety as a secure container, and on the same hypothesis, the conception of safety by reason of the construction of the machinery becomes almost meaningless. Section 13 (1) provides for fencing of the transmission machinery in terms identical with those of s. 12 (3) and is subject to the same comments. Section 14 (1) is concerned with dangerous parts of machinery not dealt with in the two preceding sections, and the obligation to fence is expressed once more in the same terms as in s. 12 (3) and s. 13 (1), but there is a distinction that in s. 14 no assumption is made that the machinery is in itself dangerous and the obligation does not apply except to parts of machinery which can be shown to be dangerous. It is possible, therefore, that, if a machine may be expected to throw off detachable or broken parts in working, these parts may fall to be treated as dangerous and subject to the requirements of secure fencing. That is, however, a question on which I express no opinion. The proviso to s. 14 (1) makes it clear that, whereas the best form of fencing for a dangerous part of a machine is a fixed guard, yet the obligation to fence will in defined cases be deemed to be complied with if a device is provided which automatically prevents the operator from coming into contact with that part. The difference between the fence prescribed by the substantive part of the sub-section and the device is not that one is a fence and the other is not, but that the device is a fence which protects only the operator and not every person employed or working on the premises. It is, therefore, necessary to say that it shall be deemed to be compliance with the requirements of the sub-section, but the kind of protection which is given to the operator by the device is the same kind of protection as that given to every person employed or working on the premises by the prescribed fence or guard, and it is protection against contact. These indications that the danger in contemplation is the danger of contact between the workman and the machinery working *in situ* are, I think, conclusive, but there are other indications also to which my noble and learned friend, LORD PORTER, has directed attention. I agree with what my noble and learned friend said about them and I need say no more.

There is nothing in the cited authorities which runs counter to the conclusion to which I have been led by an examination of the relevant statutory provisions. No authority was cited in which the provisions of s. 13 were concerned. In *Harrison v. Metropolitan Plywood Co.* (5) the workman, who was injured when a piece of the cutter of a spindle moulding machine broke away, flew out of its holder, and struck him, was held entitled to recover damages because the employers had been in breach of an obligation to fence under a regulation the wording of which is not identical with that of the Act. The point taken by the employers in the present case that there is no obligation to fence against parts of a machine which break and fly off was not taken. It is not necessary to consider whether that case was rightly decided, and I have already reserved my opinion on the effect of s. 14 in relation to cases resembling it. In *Kinder v. Camberwell Borough Council* (4) the handle of a compressor machine sprang up and injured the workman, who successfully pleaded breach of the obligation to fence under s. 14. There the handle was never detached from the machine of which it was held to be a dangerous part. On the facts the decision may have been right or wrong, but it involves no principle or construction of the Act inconsistent with the employers' contentions. *Nicholls v. Austin (Leyton) Ltd.* (1) was also a case on s. 14. This House held that the obligation to fence a circular saw was satisfied if it was adequately fenced so as to protect workmen against contact with it, but not so as to protect workmen against particles of wood flying from it. LORD SIMONDS said in the course of his speech ([1946] 2 All E.R. 92, 98): "The fence is intended to keep the worker out, not to keep the machine or its product in." So far as the noble and learned Lord dealt with keeping in the machine as opposed to its product, his observation was unnecessary for the decision of the case. Nevertheless, it was a deliberate expression of

opinion which I respectfully adopt, though it may still be necessary to reserve the case of a machine which in working may be expected to throw off loose or broken parts. For these reasons I would dismiss the appeal.

LORD MORTON OF HENRYTON: My Lords, the short but important question which arises in this case can be stated as follows—which of two alternative meanings should be given to the opening words of s. 13 (1) of the Factories Act, 1937, “Every part of the transmission machinery shall be securely fenced.” Do these words mean that every part of the transmission machinery shall be so fenced as to prevent any person employed or working on the premises from moving into contact with it, or do they bear the wider meaning that every part of the transmission machinery shall be so fenced as to prevent contact occurring in any way between any part of the machinery and any person employed or working on the premises? Ultimately, the answer to this question depends on the meaning which should be attached to the word “securely.” No other question falls to be determined by your Lordships’ House. Counsel for the workman at first sought to argue that the employers were guilty of negligence at common law, but when it was pointed out that the findings of fact of the Second Division of the Court of Session were binding on this House, he felt unable to pursue that line of argument.

If the wider meaning stated above is given to the word “securely,” it is obvious that the workman must succeed, since a part of the transmission machinery came violently into contact with him and injured him. If the narrower meaning is given to that word, it is equally obvious that the appeal must be dismissed, as it is not suggested that the five-foot fence round the transmission machinery was insufficient to prevent persons from moving into contact with that machinery. In considering what meaning should be given to the word “securely” in s. 13 (1) I start from this point, that in the ordinary course of events no part of the transmission machinery moves outwards from its normal position, while, on the other hand, there is always a grave risk that persons may move into contact with the machinery and sustain injury unless they are prevented from so doing by a fence. *Prima facie*, a fence to keep persons out would seem more appropriate than a fence to keep the machinery in. Next, it is to be observed that the sub-section contemplates that the transmission machinery may be “in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced.” Now, if the purpose of the fencing is to keep persons from moving into contact with the machinery, this part of the sub-section gives rise to no difficulty. If, however, the fence is to be of such a kind as to prevent any part of the machinery from flying outwards and coming into contact with any person, it is difficult to imagine any position, and still more difficult to imagine any construction, which would render the machinery *as safe* to persons employed or working on the premises as it would be if surrounded by a fence of the kind just described.

If one turns to the other provisions of the Act, there are indications here and there that the narrower meaning should be given to the word “securely.” These indications have been fully stated by others of your Lordships, and I shall not indulge in repetition. Finally, I think that the words “securely fenced” should be given the same meaning wherever they occur in the Act, and, as has been pointed out, if these words are given the wider meaning throughout, great, and, perhaps, insuperable, practical difficulties would face manufacturers all over the country. It does not seem likely that the legislature would intend the provisions of ss. 12 to 16 to have these results. If the words are capable of bearing only one meaning, they must be given that meaning, but if, as I think, they may fairly bear one of two meanings, it is right to have some regard to the practical results.

Taking all these matters into account, and bearing in mind that this is a penal statute, I have come to the conclusion that the narrower construction of the word “securely” is correct. It follows that no breach of s. 13 (1) has been proved in this case, but the injured workman would, of course, have been entitled to succeed if he had established that the employers were guilty of negligence at common law. I agree with the view just expressed by my noble and learned friend, LORD NORMAND, that there is nothing in the cited authorities

which runs counter to this conclusion, and I prefer to express no opinion on the construction of s. 14 (1) as the present appeal is concerned only with s. 13. At the moment, and without further argument and further consideration, I feel unable to express assent to the observations which have been made on the former section and its predecessor and the cases decided thereunder. I agree that the appeal must be dismissed.

Appeal dismissed with costs.

A Solicitors: *Digby Brown & Co.*, Glasgow, D. G. *M'Gregor, W.S.*, and W. H. *Thompson* (for the workman); *Martin & Co.*, agents for *Biggart Lumsden & Co.*, Glasgow, and *Morton, Smart, Macdonald & Prosser, W.S.*, Edinburgh (for the employers).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

ENGLISH AND SCOTTISH JOINT CO-OPERATIVE WHOLESALE SOCIETY, LTD. v. ASSAM AGRICULTURAL INCOME TAX COMMISSIONER.

[PRIVY COUNCIL (Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott, Sir Madhavan Nair and Sir John Beaumont), March 16, 17, April 27, 1948.]

Income Tax—Profits of trade—Co-operative society—Loans to society by members—Produce sold exclusively to members—Assam Agricultural Income Tax Act (No. IX of 1939), s. 3.

The principle of *New York Life Insurance Co. v. Styles* (14 App. Cas. 381), cannot apply to an association, society or company which grows produce on its own land or manufactures goods in its own factories, using either its own capital or capital borrowed from its members or from others, and sells its produce or goods to its members exclusively.

A society incorporated in the United Kingdom under the Industrial and Provident Societies Act, 1893, and non-resident in British India had an unlimited capital divided into shares of £5 each, its objects, as set out in its rules, being, *inter alia*, to carry on the business of planters, growers, producers, merchants, and manufacturers and brokers of tea. The society, which consisted of two members, a co-operative society in England and another in Scotland, owned an estate in Assam where it grew and manufactured tea, and, except for a small portion of produce which was unfit for export and sold locally, the whole of the society's output of tea was sold to its two members at market rates and was exported to England and Scotland. Each year the members of the society advanced to the society sums of money to meet the cost of tea to be supplied by the society to the members. The market prices of the tea with which the members were supplied were debited against those payments and the supplies were recorded as sales to the members. Out of the proceeds from the sales the expenses of production and management and the interest on loans were paid or provided. By the rules of the society its net profits were applied (a) in depreciation of land (except agricultural land and tea gardens) buildings, live and rolling stock; (b) payment of interest not exceeding 6 per cent. per annum on the share capital; (c) appropriation to a reserve fund; (d) appropriation to a special fund for making grants as determined in general meeting; (e) payment of a dividend to members rateable in proportion to the amount of purchases made by them from the society, and (f) the remainder, if any, carried forward to the next account.

Held: the society was not exempt from liability to Assam agricultural income tax under the Assam Agricultural Income Tax Act, 1939, s. 3, in respect of profits from the sale to its members of tea cultivated or manufactured at its Assam estate.

Principle of New York Life Insurance Co. v. Styles (1889) (14 App. Cas. 381), not applied.

[AS TO MUTUAL TRADING, see HALSBURY, Hailsham Edn., Vol. 17, pp. 101-104, paras. 195-197; and FOR CASES, see DIGEST, Vol. 28, pp. 58-61, Nos. 296-309.]

Cases referred to :

- (1) *English and Scottish Joint Co-operative Wholesale Society v. Madras Income Tax Comr.*, (1929), 3 I.T.C. 385.
- (2) *New York Life Insurance Co. v. Styles*, (1889), 14 App. Cas. 381; 59 L.J.Q.B. 291; 61 L.T. 201; *sub nom. Styles v. New York Life Insurance Co.*, 2 Tax Cas. 460; 28 Digest 59, 300.
- (3) *Last v. London Assurance Corp.*, (1885), 10 App. Cas. 438; 55 L.J.Q.B. 92; 53 L.T. 634; 50 J.P. 116; 2 Tax Cas. 100, H.L.; *varying* (1884), 14 Q.B.D. 239, C.A.; 28 Digest 58, 297.
- (4) *Cornish Mutual Assurance Co. v. Inland Revenue Comrs.*, [1926] A.C. 281; 95 L.J.K.B. 446; 134 L.T. 545; 12 Tax Cas. 842.
- (5) *Liverpool Corn Trade Assocn., Ltd. v. Monks*, [1926] 2 K.B. 110; 95 L.J.K.B. 519; 134 L.T. 756; 10 Tax Cas. 442; 28 Digest 18, 91.
- (6) *Thomas v. Evans (Richard) & Co.*, *Jones v. South West Lancashire Coal Owners' Assocn.*, [1927] 1 K.B. 33; 95 L.J.K.B. 990; 135 L.T. 673; 11 Tax Cas. 790, C.A.; *affd. sub nom.*, *Jones v. South-West Lancashire Coal Owners' Assocn.*, [1927] A.C. 827; 96 L.J.K.B. 894; 137 L.T. 737; Digest Supp.
- (7) *Municipal Mutual Insurance, Ltd. v. Hills*, (1932), 147 L.T. 62; 16 Tax Cas. 430; Digest Supp.

APPEAL by the appellant society from a judgment of the High Court of Judicature at Fort William in Bengal (delivered Apr. 24, 1945, and reported [1945] 13 I.T.R. 295), answering in the affirmative a question of law submitted to it by the Assam Board of Agricultural Income Tax, namely, whether the society was chargeable to Assam agricultural income tax in respect of the cultivation and/or manufacture at its Assam estate of tea and sale exclusively to its members. The appeal was dismissed. The facts appear in the judgment.

Donovan, K.C. and *S. C. Isaacs* for the appellant.

Millard Tucker, K.C., and *B. Sen* for the respondent.

The Board took time for consideration.

Apr. 27. The following judgment of the Board was delivered by

LORD NORMAND : The appellant, a society incorporated in the United Kingdom under the Industrial and Provident Societies Act, 1893, submits to review in this appeal a judgment of the High Court at Fort William in Bengal in a reference made under s. 28 (1) of the Assam Agricultural Income Tax Act, 1939. By that judgment the High Court answered in the affirmative a question of law submitted by the Board of Agricultural Income Tax in relation to the assessment of the appellant for the year 1939-40. The question is "whether the society is chargeable to Assam agricultural income tax in respect of the cultivation and/or manufacture of tea at its Deckiajuli estate in the province of Assam, and sold to its members." The question is neither grammatical nor intelligible as it stands, and the statement of facts omits to state some of the facts regarded by the parties as material for the decision of the question which the Board seems to have intended to submit.

That question emerges clearly enough from a consideration of the proceedings which took place while the company's assessment was under consideration. The Assam Agricultural Income Tax Act, 1939, applies to all agricultural income derived from land situated in the province of Assam (s. 5) and it provides by the charging section (s. 3) that agricultural income tax at the rate specified in the annual Assam Finance Acts shall be charged for each financial year on the total agricultural income of the previous year. The part of the definition section (s. 2) which is relevant to the present case defines agricultural income as any income derived from land used for agricultural purposes by agriculture. The Indian Income Tax Act, 1922, s. 4 (3) (viii), contains a definition of agricultural income in the same terms, but by the Indian Income Tax Rules, 1922, r. 24, made under it: "Income derived from the sale of tea grown and manufactured by the seller in British India shall be computed as if it were income derived from business and 40 per cent. of such income shall be deemed to be income profits and gains liable to tax." The scheme of the Assam Act is to tax the remaining 60 per cent. only of the income derived from the sale of tea grown and manufactured by the seller in Assam and that result is secured by suitable provisions which need not be recited: see the explanation to s. 2, the proviso to s. 8, and r. 5 made under the Act. Under the Act appeals against

assessment lie to the assistant commissioner of agricultural income tax (s. 24) and from him to the commissioner (s. 26). When a question of law arises in the course of any assessment the Assam Board of Agricultural Income Tax may, either of its own motion or on reference from any agricultural income tax authority subordinate to it, draw up a statement of the case and refer it with its own opinion to the High Court (s. 28).

The procedure which led to the reference under s. 28 can be briefly summarised. While the assessment was under consideration the appellant petitioned the Board of Agricultural Income Tax, Assam, to state a Case to the High Court. The petition stated that the appellant society was a co-operative society incorporated under the Industrial and Provident Societies Act, 1893, and that the tea produced on its estates belonged to and was distributed entirely to its members, except certain inferior grades of dust teas which were sold in the Calcutta market, and that no profit accrued by such sales as the prices obtained were below the cost of production. The petition also stated that the question of law was whether the appellant society, owning tea estates in Assam, the produce of which is distributed only among its members, is liable to assessment to Assam income tax. The Board refused the prayer of the petition, but subsequently changed its view and of his own motion the Board member stated the present Case. It is unfortunate that he neither consulted the parties about the facts which were necessary to raise the supposed question of law, nor about the formulation of the question of law itself. For some reason he rejected the formulation suggested in the petition and substituted a question of his own. As the accompanying statement of facts merely stated that the tea produced by the appellant society (apart from the dust tea) was sold to its members and said nothing of the price, it can be inferred that the Board member intended to submit the question whether a business carried on by a society or company, whether incorporated or not, which cultivates produce on its own land and sells it exclusively to its own members, is by its nature incapable of begetting profits as that term is understood in the Assam Agricultural Income Tax Act, 1939, or, since there is no distinction on this point, the Indian or the United Kingdom Income Tax Acts. It is unfortunate that this question is presented in an abstract and general way without any statement of facts setting out or summarising the society's accounts for the year of computation. The statement of facts is also defective for, besides failing to refer to the price at which the tea was sold, it omits to mention certain loans made to the appellant society by its members to which the appellant's counsel attached much importance. This Board was urged by both parties to proceed with the appeal as if the statement of facts contained in the judgment of GENTLE, J., in the High Court were substituted for the findings of fact in the submission. It is with reluctance that their Lordships would grant such an indulgence, but, taking into account the circumstances that the present case began not long after the Assam Agricultural Income Tax Act, 1939, came into operation, and making allowance for the lack of experience which may have been the cause of the inadequate presentation of the case in the submission, they will accede to the parties' request.

The facts as stated by GENTLE, J., are ([1945] 13 I.T.R. 295, 303) :

As previously mentioned the society is incorporated in the United Kingdom under the Industrial and Provident Societies Act, 1893. It has an unlimited capital divided into shares of £5 each. It is non-resident in British India. Its objects, as set out in its rules, *inter alia*, are : "To carry on the business of planters, growers, producers, merchants and manufacturers and brokers of tea." The society consists of two members, *viz.*, the Co-operative Wholesale Society, Ltd. and the Scottish Co-operative Wholesale Society, Ltd. The society owns the Deckiajuli estate where it grows and manufactures tea. Except a small portion of produce, which is unfit for export and which is sold locally, the whole of the society's output of tea is sold to its two members at market rates and is exported to England and Scotland. Each year the members of the society pay, by way of advances to the society, sums of money to meet the cost of tea to be supplied by the society to the members. The market prices of the tea, with which the members are supplied, are debited against these payments. The supplies are recorded as sales to the members. Out of the proceeds from the sales, the expenses of production and management and the interest on loans are paid or provided. By the rules of the society its net profits are applied (a) in depreciation of land (except agricultural land and tea gardens), buildings, live and rolling stock ;

(b) payment of interest not exceeding 6 per cent. per annum on the share capital; (c) appropriation to a reserve fund; (d) appropriation to a special fund for making grants as determined in general meeting; (e) payment of a dividend to members rateable in proportion to the amount of purchases made by them from the society; and (f) the remainder, if any, carried forward to the next account.

An argument was addressed to their Lordships by counsel for the appellant in which the advances made annually by the two members to the society were treated as contributions by the members in cash which afterwards came back to them in kind when the tea was sold to them. This is a view of the transaction which their Lordships cannot accept. The advances were a loan to the society for the purpose of enabling it to produce tea on its own land. When the tea was produced it was sold to the lenders, and the price was set off against the amount of the loan. There was, therefore, a dual relationship between the appellant and its members—there was a mutual creditor-debtor relationship and there was a buyer and seller relationship. There was nothing notional about either of these relationships. They were not mere conventional machinery to give efficacy to a relationship which was, in substance, that of principal and agent. On the facts stated the members genuinely made a loan to the appellant, the appellant genuinely owned the land which it itself genuinely cultivated, and it genuinely sold the tea at a genuine market price to its members.

The statement of facts shows that, in the ordinary sense of the word, profits might well result, for the proceeds of the sales might and probably did exceed the expenses of production and management and the interest on loans; that profits would result was, in fact, contemplated; and there are rules providing for the application of the net profits. These rules are made under the Industrial and Provident Societies Act, 1893, s. 10, which contemplates that a society registered under the Act will be a profit-making concern, and, therefore, requires that all societies registered under the Act shall make such rules. The application of net profits which may be made under the rules is, in essentials, not different from the application of net profits which might be made by any trading company, and it need not result in the distribution of all profits among the members of the society. Thus, any net profits applied under heads (a), (c), (d) and (f) would be retained by the appellant society. When the constitution, rules and business practice of the appellant society so closely conform to the pattern of an ordinary profit-making concern, how can it plausibly be maintained that no profits can result? The answer to this question is to be found, if anywhere, in *English and Scottish Joint Co-operative Wholesale Society v. Madras Income Tax Comr.* (1), a case under the Indian Income Tax Act, 1922, decided in the High Court at Madras, in which it was held, on facts indistinguishable from those stated by GENTLE, J., in this case, that this very society was a purely mutual co-operative society making no profits and, being within the ruling of *New York Life Insurance Co. v. Styles* (2), was not liable to be assessed to income tax. It is on this decision that the appellants found their claim to exemption from the Assam Agricultural Income Tax Act. The High Court in the present case refused to follow the Madras decision and GENTLE, J., after considering it, *Styles'* case (2), and other authorities, expressed himself thus ([1945] 13 I.T.R. 295, 308):

In the view which I hold, the society is a trading concern and carries on business as growers, manufacturers and sellers of tea; out of this business it derives profits; the dividends which it pays to its members are a distribution amongst them of its trading profit; and the payments of these dividends are not a return to the members of balances from the sums which they have subscribed to the society . . . The circumstance that the society's produce is sold to its members does not affect the position and would not do so even if the society were restricted to selling to its members alone.

In *English and Scottish Joint Co-operative Wholesale Society v. Madras Income Tax Comr.* (1) COUTTS TROTTER, C.J., expressed the opposing view, which is the view now supported by the appellant's counsel. He says (3 I.T.C. 385, 396):

Before its incorporation there existed two large co-operative societies in Great Britain, one in England known as the Wholesale Co-operative Society, Ltd., and the other in Scotland known as the Scottish Co-operative Society, Ltd. They were co-operative societies of the familiar type which deliver goods to their members on a system the object of which is to eliminate the profits of the middleman as between

those societies and their individual members. The goods they were to distribute to their members the societies had of course to purchase in the market. A portion of the goods so distributed were products of southern India, notably tea. The idea then occurred that a further elimination of outside profits could be effected by producing their own tea and other products. Accordingly the corporation now sought to be assessed was founded with the object of acquiring and working estates in various parts of the world including southern India to supply the two original co-operative societies with the goods they required direct . . . In fact the only shareholders in the English and Scottish society are the two original co-operative societies registered in England and Scotland respectively and the object of the society sought to be assessed is simply to run the estates, grow the produce required and ship it to the two component societies which are its shareholders . . . The society cannot make taxable profits out of its own component elements, and, with that starting point established, it is to my mind immaterial that the monies that came into the hands of the apex society are distributed in the form in part of a dividend to the shareholders so long as those shareholders do not include any person or body who is not a member of the co-operative society.

He, therefore, concluded that the case fell within the principle of *Styles'* case (2). The foregoing passage has been cited *in extenso* lest injustice should be done to it by condensing it in a summary. The learned Chief Justice has treated the motive for setting up the appellant society as material. There was in the case no finding about the motive, and the learned Chief Justice has assumed it, but motive is altogether irrelevant. The component members may have wished and intended that middlemen's profits should be eliminated, but the question is whether profits have, in fact, been earned by the appellant society which they set up. The learned Chief Justice has also failed to notice that tea grown on estates which belonged to the appellant society was not tea which the members could correctly describe as "their own tea," but the crucial part of the judgment is the affirmation that the society could not make taxable profits out of its own component elements. The proposition is derived by the Chief Justice from *Styles'* case (2).

In *Styles'* case (2) and in the other cases in which the principle established by it was applied the business carried on by the company or society sought to be taxed was mutual insurance. The essence of that kind of business (with the exception of life insurance) is that a number of persons form an association which collects from the members contributions to a common fund which the members authorise the association to use for payments in indemnity of the losses assured against, for defraying the expenses of management, and for repayment to themselves of any balance. In life insurance business the association is authorised to use the common fund not for payments in indemnity of losses but for payment of sums payable on the death of a member. But in the nature of things there are no profits to be made out of a mutual arrangement to share losses, and there are no profits to be made out of a mutual arrangement to pay a sum to executors or assignees on the death of an associate. It is also to be observed that in *Styles'* case (2) and similar cases the contributors to the common fund and the participators in it are two identical bodies. The role of the association is to collect from the associates the contributions to the common fund and to make the payments from it in accordance with the contributors' mandate, and this mandate may be and usually is written into the constituent documents of the association, which may or may not be a corporation. The association is, therefore, no more than a convenient agent for carrying out what the associates might more laboriously do for themselves. What kinds of business other than mutual insurance may claim exemption from liability to income tax under the principle of *Styles'* case (2) need not be here considered, but their Lordships are of opinion that the principle cannot apply to an association, society or company which grows produce on its own land or manufactures goods in its own factories, using either its own capital or capital borrowed whether from its members or from others, and sells its produce or goods to its members exclusively. In the present case the appellant society is not bound by its rules to sell its tea only to its members, but it could make no difference if it were. No matter who the purchasers may be, if the society sells the tea grown and manufactured by it at a price which exceeds the cost of producing it and rendering it fit for sale, it has earned profits which are, subject to the provisions of the taxing act, taxable profits.

It is next necessary to show that this view truly represents the judgments

in *Styles'* case (2) and is in accordance with judicial comments subsequently made on them. The appellant in *Styles'* case (2) was a life insurance company, the members of which were the holders of participating policies, each of whom was entitled to a share of the assets and liable for all losses. The company collected as premiums from members a sum to cover its requirements on a calculation of the probable death rate and of the probable expenses and other liabilities. An account was taken annually and the greater part of the surplus of premiums over expenditure was returned to the policyholders as bonuses, either by addition to the sums insured or in reduction of future premiums. The remainder of the surplus was carried forward as funds in hand to the credit of the general body of the members. It was held that no part of the premium income received under the participating policies was liable to be assessed to income tax as profits or gains under sched. D. LORD WATSON having distinguished the case from the earlier case of *Last v. London Assurance Corpn.* (3) on the ground that in *Last's* case (3) some of the policyholders were outsiders whereas in *Styles'* case (2) the policyholders and they alone were members of the company, said (14 App. Cas. 381, 393):

The individuals insured and those associated for the purpose of receiving their dividends, and meeting policies when they fall in, are identical; and I do not think that their complete identity can be destroyed, or even impaired, by their incorporation. The corporation is merely a legal entity which represents the aggregate of its members; and the members of the appellant company are its participating policyholders. When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits.

LORD HERSCHELL, after stating that the Attorney-General had conceded that the fact that the persons associating themselves together for the purpose of mutual assurance had been incorporated was immaterial, added (*ibid.*, 408):

I think the Attorney-General was correct in thinking it immaterial that the persons thus associated had been incorporated, and that a legal entity had been created distinct from the members of which it was composed. This being so I shall, for the sake of simplicity, consider the questions that arise as though the association were unincorporated.

He later says (*ibid.*, 409):

Persons who agree to contribute to a common fund for mutual insurance, certainly would not in ordinary parlance be regarded as carrying on a trade or vocation for the purpose of earning profit. Let us see how the so-called profit arises. It is due to the premiums which the members are required to pay being in excess of what is necessary to provide for the requisite payments to be made upon the deaths of members, and not being, as the case states they were intended to be, commensurate therewith. . . . The members contribute for a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and, therefore, more than ought to have been contributed by them, for this object, and accordingly their next contribution is reduced by an amount equal to their proportion of this excess. I am at a loss to see how this can be considered as a "profit" arising or accruing to them from a trade or vocation which they carry on.

From these quotations it appears that the exemption was based on (1) the identity of the contributors to the fund and the recipients from the fund, (2) the treatment of the company, though incorporated, as a mere entity for the convenience of the members and policyholders, in other words as an instrument obedient to their mandate, and (3) the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves.

Cornish Mutual Assurance Co. v. Inland Revenue Comrs. (4) was a case similar to *Styles'* case (2) and would have had the same result but for a provision in s. 53 (2) of the Finance Act, 1920, which expressly provided that the surplus arising from the transactions between mutual trading concerns and their members should be treated as profits. The only importance for present purposes of the judgments in the case is that LORD CAVE, L.C., took occasion to question and correct LORD WATSON's opinion that the company in *Styles'* case (2) was not carrying on a trade. It was carrying on a trade, but one in which no profits

could be earned by it. In *Liverpool Corn Trade Association, Ltd. v. Monks* (5) a company incorporated with the object of promoting the interests of the corn trade, with power to declare dividends, collected entrance fees from its members and made charges, both against members and other persons, for the use of various facilities provided by it. It was found liable to income tax. The case is consistent with the view expressed by their Lordships because the shareholders and the contributors to the fund out of which dividends were paid were not identical. *Thomas v. Richard Evans & Co.*, (6) was held by ROWLATT, J., to fall within the principle of *Styles'* case (2). The association was a purely mutual assurance association and the contributors and the assured persons were identical bodies: any surplus of contributions over payments to policyholders was ultimately returned to contributors. ROWLATT, J., said ([1927] 1 K.B. 33, 47):

Where all that a company does is to collect money from a certain number of people—it matters not whether they are called members of the company or participating policyholders—and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribe it, then, as I understand *Styles'* case (2), there is no profit. If the people were to do the thing for themselves there could be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference; there is still no profit. This is not because the entity of the company is to be disregarded; it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it.

The judgment came before the House of Lords and was affirmed. LORD CAVE, L.C., said ([1927] A.C. 827, 832):

Sooner or later, in meal or in malt, the whole of the company's receipts must go back to the policyholders as a class, though not precisely in the proportions in which they have contributed to them; and the association does not in any true sense make a profit out of their contributions.

LORD DUNEDIN's judgment was to the same effect.

In *Municipal Mutual Insurance, Ltd. v. Hills* (7) a company formed primarily for the purpose of mutual insurance against fire also carried on employers' liability and other miscellaneous insurance business. It was admitted that the fire insurance business was purely mutual and did not attract tax, but it was found as a fact that on the other side of the business the redundant part of the premiums was not returnable to the contributors of the premiums, and it was, therefore, held that the surplus was subject to tax. LORD MACMILLAN, dealing with the tax exemption of surpluses arising in the conduct of mutual insurance, said (147 L.T. 62, 68):

... the cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors, to the common fund; in other words, there must be complete identity between the contributors, and the participators. If this requirement is satisfied the particular form which the association takes is immaterial.

The requirement is not satisfied in the present case, for there is no common fund to which the members of the appellant society contribute and in which they participate.

For these reasons the appeal fails, and *English and Scottish Joint Co-operative Wholesale Society v. Madras Income Tax Comr.* (1) in which the appellant society was concerned must be held to have been wrongly decided. In the course of the debate the suggestion was thrown out that on the facts and accounts of a particular year the appellant society might be in a position to maintain that a payment to its members under para. (e) of the rules for the application of profits fell to be treated as a discount having the effect of reducing the price of the tea sold to the members, and so reducing, or, perhaps, eliminating, the profits. Their Lordships are not concerned to discuss that suggestion in this appeal and express no opinion, favourable or unfavourable, on it. It is expedient, in view of the defects of the question, to answer it, not by a simple affirmative, but by declaring that the society is not exempt from liability to Assam agricultural income tax in respect of profits from the sale to its members of tea cultivated or manufactured at its Deckiajuli estate in the province of Assam. Their Lordships will, therefore, humbly advise His Majesty that the judgment of the High Court should be varied by the substitution for an affirmative answer to the

question this following answer :—" The society is not exempt from liability to Assam agricultural income tax in respect of profits from the sale to its members of tea cultivated or manufactured at its Deckiajuli estate in the province of Assam," and that subject thereto the appeal should be dismissed. The appellant must pay the costs of this appeal.

Appeal dismissed with costs.

Solicitors : *Coward, Chance & Co.* (for the appellant) ; *Commonwealth Relations Office* (for the respondent).

[*Reported by C. R. L. PHILLIPS, Esq., Barrister-at-Law.*] A

W. T. LAMB & SONS v. RIDER. SAME v. SAME.

[COURT OF APPEAL (Scott, L.J., and Romer, J.), June 14, 15, 30, July 7, 1948.] B

Execution—More than six years after judgment—Application for leave to issue—Previous application refused—New material—Explanation of delay—Validity of R.S.C., Ord. 42, r. 23 (u).

On Nov. 14, 1938, the plaintiffs issued a specially endorsed writ against the defendant claiming the balance of the price of goods sold and delivered, and on Dec. 8, 1938, judgment was entered for the full amount with costs. No steps to enforce the judgment were taken until Mar. 25, 1946, when the plaintiffs issued a summons in the action applying for leave to proceed to execution notwithstanding that six years had elapsed since judgment was entered, and, on May 7, 1946, the master refused to grant leave. No appeal was entered by the plaintiffs against this order, but on Apr. 6, 1948, they issued a further summons, which was identical in form with that of Mar. 25, 1946, and on May 4, 1948, the master granted the plaintiffs leave to proceed under R.S.C., Ord. 42, r. 23, on the judgment, notwithstanding that six years had elapsed. The defendant appealed against this order to the judge in chambers. The judge rescinded the order, but, although no application for such leave had been made by the plaintiffs and without affording the defendant an opportunity to give evidence, the judge granted leave to the plaintiffs to appeal out of time against the original refusal, on May 7, 1946, to make an order under R.S.C., Ord. 42, r. 23. The plaintiffs appealed to the Court of Appeal against the rescission of the master's order and the defendant appealed against the granting of leave to appeal against the previous order out of time :— C

HELD : (i) the dismissal of a summons for relief under R.S.C., Ord. 23, did not, of itself, shut the door against a subsequent application for the same relief, but the later application should be granted only if founded on material which was not before the court on the first occasion, and, there being no such fresh material in this case, the order was rightly rescinded. D

(ii) the granting of leave to appeal out of time was a matter of discretion, but before granting such leave the plaintiffs should have been required to adduce evidence explanatory of their long delay and the defendant should have been given an opportunity of answering it, and, there not being before the judge evidence of new facts sufficient to entitle him to exercise so exceptional a discretion in favour of the plaintiffs, the order should be set aside. E

(iii) R.S.C., Ord. 42, r. 23, did not conflict with s. 2 (4) of the Limitation Act, 1939, and the plaintiff had no right to proceed to execution except with leave of the court under that rule. F

Lougher v. Donovan ([1948] 2 All E.R. 11), distinguished. G

Per cur. : The right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution on it. The two conceptions have been the subject of different legislative treatment, and the definition of "action" in s. 31 of the Limitation Act, 1939, has not the effect of merging the two together. Execution is essentially a matter of procedure—machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders. The H

Common Law Procedure Act and R.S.C., Ord. 42, were concerned, and concerned alone with procedural machinery for enforcing a judgment when attained.

[AS TO LEAVE TO ISSUE EXECUTION AFTER SIX YEARS, see HALSBURY, Halsbury's Laws of England, Vol. 14, p. 8, para. 13; and FOR CASES, see DIGEST, Vol. 21, p. 425, No. 64.]

Cases referred to :

- (1) *Watson v. Birch*, (1847), 15 Sim. 523; 16 L.J.Ch. 188; 8 L.T.O.S. 531; 21 Digest 419, 20.
- (2) *Jay v. Johnstone*, [1893] 1 Q.B. 189; 62 L.J.Q.B. 128; 68 L.T. 129; 57 J.P. 309.
- (3) *Lougher v. Donovan*, [1948] 2 All E.R. 11.

APPEAL by the plaintiffs from an order of PRITCHARD, J., dated May 19, 1948, in so far as it rescinded an order of the master giving the plaintiffs leave to proceed under R.S.C., Ord. 42, r. 23, on a judgment notwithstanding six years had elapsed since such judgment, and APPEAL by the defendant from the same order in so far as it gave liberty to the plaintiffs to appeal out of time against an order previously made by the master. Judgment was given in favour of the defendant on both appeals. The facts appear in the judgment of the court.

Edward Terrell for the plaintiffs.

Dare for the defendant.

Cur. adv. vult.

July 7. SCOTT, L.J., read the following judgment of the court. These are two appeals, one by the defendant and one by the plaintiffs, from an order made in chambers on May 14, 1948, by PRITCHARD, J. By that order the learned judge rescinded an order made by the master on May 4, 1948, and the appeal by the plaintiffs is against that rescission. The order of the learned judge, however, also gave leave to the plaintiffs to appeal out of time against an order which the master had made on May 7, 1946, and it is against that part of PRITCHARD, J.'s order that the defendant has presented his appeal.

This action was started by specially endorsed writ issued on Nov. 14, 1938, and by it the plaintiffs claimed a sum of £500 6s. 6d., being the balance of the price of goods sold and delivered. The defendant, who was a building contractor, found himself in financial difficulties in that year. All his creditors, however, except the plaintiffs, accepted a compromise under which they were to be paid, and were paid, a sum of 4s. 3d. in the pound in satisfaction of their claims. The plaintiffs did not come into this settlement and brought their action instead. The defendant did not appear to the proceedings, and on Dec. 8, 1938, the plaintiffs signed judgment for the whole amount of their claim together with £11 18s. 6s. costs. This judgment was not satisfied and no steps were taken by the plaintiffs to enforce it until Mar. 25, 1946, when they issued a summons in the action applying "under the Courts (Emergency Powers) Act, 1943, for leave to proceed to execution or otherwise to the enforcement of judgment under R.S.C., Ord. 14, r. 1, herein dated Dec. 8, 1938, notwithstanding six years have elapsed since such judgment." The relief sought by the latter part of this summons was referable to R.S.C., Ord. 42, r. 23. The plaintiffs filed no evidence in support of the summons, but the defendant put in an affidavit which was sworn on Apr. 27, and filed on May 7, 1946. By this affidavit the defendant, after referring to the above-mentioned composition with his other creditors in 1938, said :

The plaintiffs took no steps whatever to enforce the judgment and have by their own neglect allowed over six years to elapse since the date of the judgment. I am in no better financial position now than I was at the date of the judgment and I respectfully submit that any steps to enforce judgment which the plaintiffs may be advised to take could have been taken in 1938. Owing to the plaintiffs' attitude and the continual threat of further proceedings and possible bankruptcy in this matter I am unable to recommence my business as a builder. I retained the amount required to pay the plaintiffs the composition of 4s. 3d. in the pound on the amount of their debt for as long as possible and offered it to them on various occasions. On the outbreak of war I was again in serious financial difficulties and was obliged to use this money for living expenses.

The defendant then gave details of his financial position with a view to making out a case for relief under the Courts (Emergency Powers) Act, 1943. The summons came before the master on May 7, 1946, and he endorsed it as follows : "No order for leave under R.S.C., Ord. 42, r. 23. No costs." No appeal

was entered by the plaintiffs against this order. On Apr. 6, 1948, the plaintiffs issued a further summons identical in form with that of Mar. 25, 1946. Two affidavits were filed on behalf of the plaintiffs in support of this summons, one sworn by Mr. Lamb and the other by Mr. Carr. Mr. Lamb's affidavit was as follows :

1. That I am a director of the above-named plaintiffs a company incorporated under the Companies Act, 1929, who obtained judgment herein on Dec. 8, 1938, against the above-named defendant for £500 6s 6d., and £11 18s. 6d. costs, making a total of £512 5s. 0d. 2. That no part of the said judgment has been paid or satisfied. 3. That I have read what purports to be a copy of an affidavit by the defendant sworn on Apr. 27, 1946, and filed on May 7, 1946, in opposition to a former summons by the plaintiffs for leave to proceed under the Courts (Emergency Powers) Rules, 1943. 4. That the plaintiffs pressed the defendant for payment of their judgment debt at intervals from the date of the said judgment until about November, 1943, when they lost trace of the defendant until about January, 1946, since when they have continued to press him. 5. That the correspondence between the plaintiffs and the defendant and between the plaintiffs' solicitors and the defendant and his solicitors prior to June 29, 1943, which was handed to the plaintiffs' solicitors, Messrs. A. M. Longhurst & Butler, of 136, Fenchurch Street, in the said city of London, was lost or destroyed through enemy action when one of their offices were destroyed. 6. The bundle of correspondence now produced and shown to me and marked "A.L." contains letters and copies of letters between the plaintiffs and the defendant showing that the plaintiffs were pressing the defendant for payment in 1943. 7. In response to enquiries I have made from the plaintiffs' bank as to the defendant's credit, I am informed that his credit is considered good for £100. 8. I respectfully submit that the defendant's said affidavit herein shows he did not pay the plaintiffs' debt because he was insolvent and that his inability to pay (if he was unable to pay) was not by reason of circumstances attributable to the recent war and that the defendant's said affidavit shows that he owns a house and is in receipt of income which now enables him to make some payment on account of the plaintiffs' judgment debt.

It is not necessary to refer in detail to the correspondence exhibited to this affidavit. It shows that between June and November, 1943, the plaintiffs were unsuccessfully pressing the defendant to pay them the amount which was due under the judgment. The defendant was then living, as he still is, at 59, Graham Road, Wealdstone, Middlesex, and by a letter written to the plaintiffs by a Mr. Gibbs, of their London Office, Mr. Gibbs told them that the defendant had informed him that letters to that address would find him and if he was away on a contract they were forwarded on to him. Mr. Carr is a traveller in the plaintiffs' employment and by his affidavit he said :

On July 21, 1943, I called at 123, Somerville Road, Chadwell Heath, Essex, and interviewed Mrs. Maskell, who lived there. Mrs. Maskell informed me that she collected the rent of the house she occupied, No. 123, Somerville Road aforesaid, and paid it into the banking account of the defendant. She informed me that she had not seen the defendant for some two years, but to the best of her knowledge, information and belief he was in work at Harrow in the county of Middlesex at that time.

The defendant filed no evidence in answer to these affidavits of Mr. Lamb and Mr. Carr. The summons came before the master on May 4, 1948, when he made the following order :

It is ordered that the plaintiffs have leave to proceed under R.S.C., Ord. 42, r. 23, on the judgment under R.S.C., Ord. 14, r. 1, herein dated Dec. 8, 1938, notwithstanding six years have elapsed since such judgment. And it is further ordered that the plaintiffs' application for leave to proceed to execution or otherwise to the enforcement of the said judgment dated Dec. 8, 1938, under the Courts (Emergency Powers) Act, 1943, be adjourned for ten days or first open day.

The defendant appealed and PRITCHARD, J., made the order to which we have earlier referred and against which the two appeals before us have been brought. The operative part of the order of the learned judge is as follows :

It is ordered that the said order be rescinded and that the defendant's appeal be allowed with costs. Certificate for counsel. It is further ordered that the plaintiffs be at liberty to appeal out of time against the original refusal dated May 7, 1946, to make an order under R.S.C., Ord. 42, r. 23, and to file the affidavits sworn Apr. 17 and 22, 1948. Liberty to either party to apply generally.

On the hearing of the appeal before this court the defendant asked for leave to read and file an affidavit which he had sworn since the hearing before PRITCHARD, J., and we gave him leave accordingly. We need not refer to the affidavit

in detail. It was directed (successfully as we think) to negating the suggestion contained in Mr. Lamb's and Mr. Carr's affidavits that the defendant had concealed his whereabouts from the plaintiffs.

A The first point which we propose to consider is whether the learned judge acted rightly in rescinding the order which the master had made giving leave to the plaintiffs to proceed under R.S.C., Ord. 42, r. 23, notwithstanding that six years had elapsed since the date of the judgment. The defendant's appeal from the master's order to the judge in chambers was, as we understand, founded on the view that, having regard to the order which the master had made dismissing the plaintiffs' similar summons some two years previously, the matter was *res judicata* and could not be reopened. We do not know whether this was the view on which the learned judge acted, but we do not think that it was right. The dismissal of a summons for relief under R.S.C., Ord. 42, r. 23, does not, in our opinion, of itself shut the door against a subsequent application for the same relief. On the other hand, the subsequent application should only be granted if founded on material which was not before the court on the first occasion, and the question, accordingly, is whether the master was right in acceding to the plaintiffs' second application having regard to the evidence by which it was supported. In our judgment, there was no sufficient evidence to justify the order which the master made and the learned judge acted rightly in rescinding it. Mr. Lamb does not appear to have applied his mind in his affidavit sworn on Apr. 22, 1948, to explaining why the plaintiffs had remained inactive for so long or to showing in what way, if at all, the position had changed since their first summons was before the master two years previously. The affidavit is directed in the main to considerations which are relevant only to an application for leave to proceed under the Courts (Emergency Powers) Act, 1943—and, indeed, para. 3 of the affidavit indicates that Mr. Lamb regarded the plaintiffs' former application as having been made under that Act alone. D Apart from this, the affidavit suggests (as also does the affidavit of Mr. Carr) that the defendant had in some way tried to conceal his whereabouts from the plaintiffs, a suggestion which is, in our opinion, altogether wanting in substance. Finally, Mr. Lamb exhibits the correspondence (already mentioned) which passed between the plaintiffs and the defendant in 1943 without explaining why it was not before the master, if the plaintiffs placed any reliance on it, on the application which they had made in 1946. There was, accordingly, no evidence at all on the second summons which was in any way relevant to the relief which the plaintiffs were seeking under R.S.C., Ord. 42, r. 23, and, in the absence of such evidence, this summons should, in our opinion, have followed the fate of the first.

E Next comes the question whether the learned judge was right in giving the plaintiffs leave to appeal out of time against the dismissal by the master of their earlier summons by the order made on May 7, 1946. This matter was not really before the learned judge at all. The subject-matter that was before him was the plaintiffs' summons of Apr. 6, 1948, and nothing else, and neither in that summons nor in the plaintiffs' evidence in support of it was there any suggestion that the plaintiffs were dissatisfied with the master's order of two years before. In these circumstances it is not difficult to believe counsel for the defendant when he tells us, as he did tell us, that he was very much taken by surprise by the suggestion that the plaintiffs should belatedly have leave to appeal from this order. Unfortunately, counsel are at variance in their recollection of what precisely did occur before the judge on this point. Counsel for the defendant is, however, clear that he did indicate to the judge that he had no evidence with which to meet the proposal and, indeed, that the plaintiffs themselves had filed no evidence to support it. He further says that he applied H for an adjournment to consider the question and to file evidence on it, but that this request was refused. Whatever may have been said or done before the learned judge so far as this matter is concerned, it is clear that it was not entertained with the defendant's consent, and, in the absence of agreement by the defendant, we cannot think it right that it should have been summarily disposed of in the plaintiffs' favour without any evidence being adduced by the plaintiffs and without an opportunity being afforded for evidence by the defendant. The granting of leave to appeal out of time is, of course, a matter of discretion, and we are not at all suggesting that the discretion can never be exercised

except where there is evidence to support it. The order in question, however, had been made more than two years previously and the plaintiffs were not even in the application then before the court asking for leave to appeal from it. In these circumstances, we are of opinion that before such leave was granted the plaintiffs should have been required to adduce evidence explanatory of their long delay and the defendant should have been given an opportunity of answering it. In our judgment, accordingly, this court should hold that there was not before the learned judge evidence of new facts sufficient to entitle him to exercise so exceptional a discretion in favour of the plaintiffs. Indeed, if need be, we should feel bound to hold that his order was unfair to the defendant and on that ground must be set aside.

As we have arrived at conclusions adverse to the plaintiffs on both of the points which we have been considering it becomes necessary to deal with the final argument which counsel for the plaintiffs addressed to us on their behalf and which is founded on the alleged invalidity of R.S.C., Ord. 42, r. 23 (a). The relevant parts of this rule are as follows :

In the following cases, *viz.* : (a) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution ; . . . the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution accordingly. And such court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such court or judge may impose such terms as to costs or otherwise as shall be just.

This rule in its present form dates back to 1883 and the argument for the plaintiffs on this appeal is to the effect that it is in conflict with s. 2 (4) of the Limitation Act, 1939, and must, therefore, be treated as ineffective. Section 2 (4) of the Act of 1939 is as follows :

An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

The definition of "action" in s. 31 of the Act is in the following terms :

"Action" includes any proceedings in a court of law, including an ecclesiastical court.

The argument of the plaintiffs, put shortly, is that the execution of a judgment is a "proceeding in a court of law," that under the Act of 1939 such "proceeding" may be brought at any time within twelve years from the date on which the judgment became enforceable and that, accordingly, R.S.C., Ord. 42, r. 23, is *ultra vires* in so far as it cuts down the right of execution by subjecting it to the discretion of a judge if not exercised within six years of the judgment. The matter is to some extent historical. By s. 40 of the Real Property Limitation Act, 1833, it was provided that no action or suit or other proceeding should be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged on or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same should have accrued to some person capable of giving a discharge for or release of the same subject to the qualification as to part payment thereafter mentioned. The result of this provision was that a judgment became barred after twenty years : *Watson v. Birch* (1). While this Act was still in force the Common Law Procedure Act, 1852, was passed. Prior to the passing of this statute the law presumed a judgment to have been satisfied when a year and a day had elapsed without execution being issued on it, and at common law the only remedy in such a case (in personal actions) was by an action of debt on the judgment, though by the Statute of Westminster the Second, 1285, a *scire facias* or warning could be issued on which, failing appearance or defence, execution might be obtained : see *DAY'S COMMON LAW PROCEDURE ACTS*, 4th ed., p. 148. The Act of 1852 relaxed this practice. By s. 128 it was provided :

During the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and

within six years from the recovery of the judgment, execution may issue without a revival of the judgment.

A Section 129 provided that in cases where it should become necessary to revive a judgment by reason either of lapse of time, or of a change, by death or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution might either sue out a writ of revivor or apply to the court of a judge for leave to enter a suggestion upon the roll to the effect that it manifestly appeared to the court that such party was entitled to have execution of the judgment and to issue execution thereupon, and (by s. 130) on such application, in case it manifestly appeared that the party making the same was entitled to execution, the court or judge should allow the suggestion to be entered and execution to issue thereupon, but in case it did not manifestly so appear the court or judge should discharge the rule or dismiss the summons, in which case the party making such application should be at liberty to proceed by writ of revivor or action on the judgment. It is, perhaps, material to observe at this point that inasmuch as by the Real Property Limitation Act, 1833, a successful plaintiff had twenty years within which to bring an action, suit or other proceeding to recover (*inter alia*) money secured by a judgment, an argument similar to that which was presented to us might very well have been urged at any time between 1833 and 1852 on the ground that the restrictions on the plaintiffs' right to execution were inconsistent with his rights as recognised by s. 40 of the Act of 1833. And, indeed, after 1852 a plaintiff might have argued that the enactors of the Common Law Procedure Act, 1852, could not have intended to have cut down such right by, as it were, a side wind. No case was brought to our attention in which any such arguments were advanced; nor, as we think, could they have been advanced with any prospect of success for the reasons hereinafter stated. To continue the history of the matter, s. 40 of the Act of 1833 was re-enacted in substantially similar terms by s. 8 of the Real Property Limitation Act, 1874, with the substitution of twelve years for twenty, and in *Jay v. Johnstone* (2) it was held by the Court of Appeal that the expression "judgment" refers to judgments generally and is not restricted to judgments which operate as charges on land. The provisions of the Common Law Procedure Act, 1852, to which we have referred became, after the Judicature Acts, 1873-1875, the subject of Rules of the Supreme Court. R.S.C., Ord. 42, r. 18 (now r. 22) provided that, as between the original parties to a judgment, execution might issue at any time within six years from the recovery of the judgment. The predecessor of the relevant part of the present r. 23 was r. 19 of Ord. 42. That rule to some extent varied the practice which existed under the Common Law Procedure Act, 1852. It preserved alternative processes, according to whether the right of execution was or was not sufficiently clear to be enforced summarily, but it simplified the procedure by providing that if the right was clear the judge might order execution to issue while, if it was not, he could direct the question to be tried. Finally, the limitation of actions on judgments is now dealt with by s. 2 (4) (to which we have already referred) of the Limitation Act, 1939, which statute repealed the Real Property Limitation Acts, 1833 and 1874.

G It follows from the above brief survey that the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it and that the two conceptions have been the subject of different treatment. Execution is essentially a matter of procedure—machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders. A refusal by the court, whether before or after the passing of the Common Law Procedure Act, 1852, to place this machinery at a plaintiff's disposal in no way affected his right to sue on the judgment at any time within the statutory limit of time—as indeed was expressly recognised by the proviso to s. 130 of that Act. Counsel for the plaintiffs, however, as we understood him, said that, whatever may have been the position previously, a successful plaintiff is now entitled, by virtue of the Limitation Act, 1939, to issue execution at any time within twelve years of the judgment. He relied particularly on the definition of "action" in s. 31 of the Act and said that it is an extremely wide definition, and should be contrasted with such earlier definitions as that in s. 100 of the Judicature Act, 1873, and s. 225 of the Judicature Act, 1925. It is true that the definition of "action" in s. 31 of the

Limitation Act, 1939, is wide, but we are unable to see how this fact gets the plaintiffs within measurable distance of the conclusion which they seek to found on it. The reason for including "any proceeding in a court of law" in the meaning of the word "action" is sufficiently apparent when one sees that many of the actions dealt with by the Act (e.g., foreclosure and redemption actions) are normally commenced by originating summons and not by writ. No more weight can be attached to this definition than could have been attached to s. 40 of the Act of 1833 in which the words "action or suit or other proceeding" were prefatory to a number of different kinds of proceedings, some at common law, some in equity, and would require, accordingly, to be read distributively. The language of s. 2 (4) of the Act of 1939 in itself is plain and re-enacted existing law. To resort to the definition section, not otherwise required, in order to show that the legislature were intending to blend together matters respectively of substantive law and of procedure which had never been blended before is to adopt what is, to our mind, a bold but illegitimate course. The relevant provisions of the Real Property Limitation Acts, 1833 and 1874, and of the Limitation Act, 1939, dealt, in our opinion, with the substantive right to sue for and obtain a judgment, and with that alone. The Common Law Procedure Act, 1852, and R.S.C., Ord. 42, were concerned, and concerned alone, with procedural machinery for enforcing a judgment when obtained. The two subjects were formerly quite independent and distinct, the one from the other, and we are quite unable to attribute to the definition of "action" in the Limitation Act, 1939, the effect of merging the two together. We are satisfied that the plaintiffs' attack on the validity of R.S.C., Ord. 42, r. 23 (a), is without foundation, and, accordingly, that he has no right to proceed to execution except with the leave of the court under that rule. As to the necessity for such leave, counsel for the plaintiffs further argued that even after the expiration of six years a plaintiff is entitled to execution as of right unless a change has taken place by death or otherwise in the parties entitled or liable to execution. In our judgment, however, the issue of execution is within the discretion of the court after six years have elapsed, even where no such change has occurred.

At the request of counsel for the plaintiffs, after we had reserved judgment, we consented to hear him and if necessary counsel for the defendant on the bearing of *Lougher v. Donovan* (3), reported after the hearing of this appeal. Having now heard him, we do not think that decision relevant. There the plaintiff's right of action was on an order of the court made in 1929 and the twelve years' limit of the Limitation Act, 1939, had brought the original right of action on the order of 1929 to an end five years before the vain attempt of the plaintiff to resuscitate it was made in 1946. The defendant's appeal must be allowed and the plaintiffs' appeal dismissed with costs here and below.

Appeal of defendant allowed; appeal of plaintiffs dismissed; with costs in Court of Appeal and below.

Solicitors: A. M. Longhurst & Butler (for the plaintiffs); Davenport, Lyons & Barker (for the defendant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

CHAPLIN v. CHAPLIN.

[COURT OF APPEAL (Tucker, Bucknill and Somervell L.JJ.), July 2, 1948.]

Divorce—Pregnancy at date of marriage by person other than petitioner—Petition filed more than a year after marriage—Concealment by wife—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (d), proviso (ii).

The Matrimonial Causes Act, 1937, s. 7 (1) provides: "In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground . . . (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner; Provided that . . . the court shall not grant a decree unless it is satisfied—(i) that the petitioner was at the time of the marriage ignorant of the facts alleged; (ii) that proceedings were instituted within a year from the date of the marriage; and (iii) that material intercourse . . . has not taken place since the discovery by the petitioner of the existence of the grounds for a decree."

The parties were married on Oct. 31, 1944, and a child was born on May 30, 1945. The husband, who was serving overseas, became aware that his wife was pregnant as a result of a letter from her, dated May 15, 1945, in which she said the child would be coming before its time because she had had a fall and a fright. In August, 1945, the husband came home on leave and his suspicions were aroused, but a neighbour was called in who confirmed the wife's story as to the fall and fright. The husband accepted that explanation and the parties lived together until July, 1946, when the wife left the husband. On Sept. 20, 1946, the husband made inquiries of the doctor who had attended the wife in her confinement and was informed by him that the child was a nine months' child. On Mar. 8, 1947, the husband filed a petition under s. 7 (1) (d) of the Act of 1937. The trial judge rejected the petition. On appeal, it was contended on behalf of the husband that, in effect, proviso (ii) to s. 7 (1) was in the nature of a statute of limitation and that equitable principles should be applied in its interpretation, and, accordingly, if it were established that the husband's right under the sub-section had been concealed by the fraud of the wife, the period provided for in the sub-section should be extended until the discovery of the fraud.

HELD : there was no provision in the sub-section for the extension of the period on the ground of concealment by fraud ; it was impossible to imply such a provision ; and, therefore, the appeal must fail.

[FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 7 (1), see HALSBURY'S STATUTES, Vol. 30, p. 339.]

APPEAL, by the husband, from an order of HODSON, J., dated Nov. 11, 1947, refusing a decree under s. 7 (1) (d) of the Matrimonial Causes Act, 1937, on the ground that the proceedings were commenced more than a year after the date of the marriage, the husband having discovered the existence of the grounds for a decree within that period. The appeal was dismissed. The facts appear in the judgment of TUCKER, L.J.

Fairweather for the husband.

The wife was not represented.

TUCKER, L.J. : This is an appeal from a decision of HODSON, J., rejecting a husband's petition for nullity brought under s. 7 of the Matrimonial Causes Act, 1937. That section is as follows :

(1) In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground : (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage ; or (b) that either party to the marriage was at the time of the marriage of unsound mind or a mental defective within the meaning of the Mental Deficiency Acts, 1913 to 1927, or subject to recurrent fits of insanity or epilepsy ; or (c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form ; or (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner : Provided that, in the cases specified in paragraphs (b), (c) and (d) of this sub-section, the court shall not grant a decree unless it is satisfied—(i) that the petitioner was at the time of the marriage ignorant of the facts alleged ; (ii) that proceedings were instituted within a year from the date of the marriage ; and (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

The section then goes on :

(2) Any child born of a marriage avoided pursuant to paragraphs (b) or (c) of the last foregoing sub-section shall be a legitimate child of the parties thereto notwithstanding that the marriage is so avoided.

It is to be observed that that paragraph does not apply in cases, like the present, which fall under para. (d).

In the present case the parties were married on Oct. 31, 1944, and the petition was presented on Mar. 8, 1947. It is clear on the face of it that more than a year had then expired from the date of the marriage, and, therefore, the case comes within the proviso that the court shall not grant a decree unless it is satisfied that the proceedings were instituted within a year from the date of the marriage. The marriage having taken place on Oct. 31, 1944, a child was born

on May 30, 1945, so that it would have been a premature birth if the husband was the father. The husband became aware that his wife was pregnant as the result of a letter which she sent to him on May 15, 1945. I think it is probable that he had had some communication before that, but that is the first document in the case produced at the trial. In that letter of May 15 the wife said that the child would be coming before its time because of a fright and a fall that she had had. On June 14, after the birth, she wrote again referring in more detail to her accident and fright. In August, 1945, the husband came home on leave and his suspicions were aroused, but a neighbour was called in who confirmed the wife's story as to her fall and the husband accepted that explanation and they lived together until July, 1946, when she left him. He then made inquiries of the doctor who had attended her in her confinement, and on Sept. 20, 1946, he was informed by the doctor that the baby at birth was apparently a nine months' child. He thus became aware of the position, but the petition was not filed until Mar. 8, 1947. The learned judge held that it was impossible to say that the husband had not discovered the existence of the grounds for the decree until a date subsequent to his visit in August, 1945. He said :

On these facts, the husband's suspicions having been aroused when the child was born, and enquiries having been made by him to confirm those suspicions very shortly after his wife left him, it is, in my opinion, impossible to say that he did not discover the existence of the grounds for a decree until after the later date. It may be that his affection for his wife induced him to remain with her at first and to give her the benefit of any doubt there might be, but the result is that he has failed to prove that marital intercourse has not taken place since the discovery of the existence of grounds for a decree.

I do not think it is necessary to express any view with regard to that part of the case, because I think it is clear that the husband is debarred from bringing these proceedings by reason of the fact that a period of considerably more than a year passed between the date of the marriage and that of the institution of the proceedings.

The argument that has been presented to us by counsel for the husband with a view to overcoming this difficulty is as follows. He says that, in effect, proviso (ii) in s. 7 (1) is in the nature of a statute of limitation and that equitable principles should be applied to its interpretation, and, accordingly, if it be established that the husband's right in this respect has been concealed by the fraud of the wife, the period provided for in the sub-section should be extended until the discovery of the fraud. Counsel concedes that this section does not come within s. 26 of the Limitation Act, 1939, which provides for the extension of the period of limitation in actions based on fraud, or where the right of action was concealed by the fraud, or where the action is for relief in consequence of mistake, because that section only covers actions for which the period of limitation is prescribed by that Act and the Act does not prescribe any period of limitation with regard to this matter. In support of the submission that s. 7 (1) of the Matrimonial Causes Act, 1937, should be regarded as a statute of limitation, counsel refers us to the Limitation (Enemies and War Prisoners') Act, 1945, which provides, in s. 1 (1) :

If at any time before the expiration of the period prescribed by any statute of limitation for the bringing of any action any person who would have been a necessary party to that action if it had then been brought was an enemy or was detained in enemy territory, the said period shall be deemed not to have run while the said person was an enemy or was so detained, and shall in no case expire before the end of twelve months from the date when he ceased to be an enemy or to be so detained, or from the date of the passing of this Act, whichever is the later . . .

In s. 2 it is provided that for the purpose of this Act " 'statute of limitation' means any of the following enactments, i.e., : the Limitation Act, 1939," and a number of other Acts, including the Copyright Act, 1911, the Moneylenders Act, 1927, certain sections of the Law Reform (Miscellaneous Provisions) Act, 1934, and s. 7 (1) of the Matrimonial Causes Act, 1937.

The mere fact that Parliament thought fit, in the special case of persons who were enemies or were detained in enemy territory, to provide that some extension of time should be given for bringing proceedings under sub-s. (1) of s. 7 of the Matrimonial Causes Act, 1937, does not, in my view, bind us to decide that the sub-section should be interpreted as meaning that Parliament has intended

to enable the courts, in applying the sub-section, to invoke equitable principles with the result that in many cases the period of twelve months would be considerably extended. I do not think that this case can be dealt with merely by considering whether or not this sub-section is for some purposes a statute of limitation. The question turns on the construction of the sub-section as a whole. One must appreciate the subject-matter with which it is dealing, *viz.*, proceedings to alter the status of the parties, the result of which will affect the children of the marriage, and that in all the cases specified in the sub-section Parliament has thought fit to prescribe in the clearest possible language that the court shall not grant a decree unless it is satisfied that proceedings were instituted within a year of the date of the marriage. It would be wrong for this court to extend that period in a way which might, in some cases, involve bastardising children that had been born of the union which it was sought to avoid. There are cases of bigamy and insanity in which marriages are void or voidable on grounds other than those specified in the sub-section and their avoidance may involve children who have been born of those marriages, but that is no reason why, by our interpretation of this Act, we should enlarge the area of such cases. It seems to me on the clear wording of this section that the husband is out of court and that the appeal on that ground must fail.

BUCKNILL, L.J. : I agree for the reasons given by my Lord.

SOMERVELL, L.J. : I agree. If it is desired to lay down a period of limitation after the expiry of which actions cannot be brought, there are, broadly, two ways in which the period can be delimited. One is to take a fixed period as from a certain date irrespective of whether the person seeking relief has, or could have, knowledge of his rights. The other is to make the period dependent on and running from the date at which the person seeking relief could, or should, have had knowledge of his rights. Those two broad principles are very familiar. They can be combined, and in the present statute Parliament might have provided that proceedings must be instituted within a year from the date of the marriage or within, say, six months from the discovery by the petitioner of the existence of the grounds in question, whichever period was the longer. Counsel is asking us to imply into this sub-section a provision based on what I describe as the second broad method by which the period can be delimited. I can see no reason why we should imply any such provision and a good many reasons against it. Reference has been made by my brother to the Limitation Act, 1939, and I think that a study of the material sections of that Act reinforces the reasons which he has given for arriving at his conclusion. In the first part of that Act one finds certain periods of limitation set out. According to counsel's argument, I think he would have said that the equitable principle as to fraud would have had to be applied to them even if there had been no mention of it in the Act, but, in fact, one finds that extension on the ground of concealment by fraud is specifically set out in the Act. There is no such provision in this Act, and it seems to me impossible to imply it even if the equitable principle had any application (and I rather doubt whether it has) to the subject-matter with which we are concerned in this appeal.

Appeal dismissed with costs.

Solicitors : *Duthie, Hart & Duthie* (for the husband).

[*Reported by H. McC. MORRISON, Esq., Barrister-at-Law.*]

HADLUM v. HADLUM.

[COURT OF APPEAL (Tucker, Bucknill and Somervell, L.JJ.), July 8, 1948.]

Divorce—Evidence—Adultery—Period of gestation—Three hundred and forty-nine days.

The husband, a serving soldier, having last cohabited with his wife on Aug. 28, 1944, went overseas and remained there until July 7, 1945. The wife gave birth to a child on Aug. 12, 1945, *i.e.*, 349 days after the husband had left her. In a petition for divorce by the husband on the ground of her adultery with an unknown man the foundation for the allegation of adultery was the abnormal length of the pregnancy, suggestions that there was other evidence which might tend towards proof of adultery being rejected by the court. Medical evidence was given that it was not impossible for the husband to be the father of the child.

HELD: the court would not infer that the wife had committed adultery.

Gaskill v. Gaskill ([1921] P. 425; 126 L.T. 115), *applied*.

Wood v. Wood ([1947] 2 All E.R. 95), *considered*.

[AS TO PERIOD OF GESTATION, see HALSBURY, Hailsham Edn., Vol. 10, p. 663 *n.*; and FOR CASES, see DIGEST, Vol. 27, pp. 298, Nos. 2753, 2754.]

Cases referred to:

(1) *Gaskill v. Gaskill*, [1921] P. 425; 90 L.J.P. 339; 126 L.T. 115; 27 Digest 298, 2753.

(2) *Morris v. Davies*, (1837), 5 Cl. & Fin. 163; 3 Digest 359, 12.

(3) *Banbury Peerage Case*, (1811), 1 Sim. & St. 153; 3 Digest 358, 2.

(4) *Head v. Head*, (1823), Turn. & R. 138; 1 Sim. & St. 150; 3 Digest 359, 11.

(5) *Wood v. Wood*, [1947] 2 All E.R. 95; [1947] P. 103; [1948] L.J.R. 784.

Raeburn, K.C., and *B. A. Harwood* for the husband.

Montagu, K.C., and *Seymour Collins* for the wife.

Appeal dismissed with costs on Poor Person's scale.

Solicitors: *J. C. Hodgson*, Law Society Services Divorce Department, agent for *C. A. Potter*, Law Society's Service Divorce Department, Bristol (for the husband); *Blyth, Dutton, Wright & Bennett*, agents for *A. C. Kingswell*, Gosport (for the wife).

[Reported by H. McC. MORRISON, Esq., Barrister-at-Law.]

[NOTE—The case does not call for a full report.—Ed.]

HUBBOCK v. HUBBOCK.

[COURT OF APPEAL (Tucker, Bucknill and Somervell, L.JJ.), July 7, 1948.]

Divorce — Pleading — Answer — Particulars — Condonation — Knowledge — R.S.C., Ord. 19, r. 22.

By R.S.C., Ord. 19, r. 22: "Wherever it is material to allege . . . knowledge . . . it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred."

A husband petitioned for divorce on the ground of his wife's adultery. By her answer the wife admitted the adultery, but alleged that the husband, with full knowledge, had condoned it by living with her and having sexual intercourse with her during a stated period. The registrar, on an application by the husband, ordered the wife to give further particulars of her answer, stating the source of her information as to the husband's knowledge and the date on which he acquired it, and this order was affirmed by the judge. On appeal,

HELD: by R.S.C., Ord. 19, r. 22, the wife was not compelled to give the information sought by the husband.

[AS TO PLEADING CONDITION OF MIND, see HALSBURY, Hailsham Edn., Vol. 25, p. 245, para. 406, and DIGEST, Pleading, p. 37, No. 305.]

APPEAL by the wife from an order of BARNARD, J., dated June 17, 1948, affirming an order of the registrar that the wife should give further particulars of her answer. The appeal was allowed. The facts appear in the headnote and the judgment of TUCKER, L.J.

Hale for the wife.

Herbert Clifford Mortimer for the husband.

TUCKER, L.J. : This is an appeal from an order of **BARNARD, J.**, confirming an order made by the registrar that the wife should give further particulars of her answer. The petition was based on the grounds of her adultery. By her answer the wife admits she committed adultery, but she alleges that her husband, with full knowledge of that adultery, condoned it by living with her and having sexual intercourse from Dec. 21, 1947, to Jan. 21, 1948. It seems to me immaterial to show the precise date when the husband acquired that knowledge. The wife cannot be ordered to give the source of her information and the same can be said with regard to the date. This appeal succeeds on the ground that she is asked to give something she is not compelled to give.

BUCKNILL, L.J. : The answer is quite clear. The information the husband seeks is in his possession and I cannot see how he is prejudiced in preparing his case.

SOMERVELL, L.J. : I agree.

Appeal allowed.

Solicitors : *Kenneth Brown, Baker, Baker* (for the wife) ; *Pritchard, Englefield & Co.* (for the husband).

[*Reported by H. McC. MORRISON, ESQ., Barrister-at-Law.*]

Applied, *WILLOUGHBY*
v. *WILLOUGHBY*
[1951] P. 184

ALLEN v. ALLEN.

[**COURT OF APPEAL** (Wrottesley and Evershed, L.JJ.), June 25, 1948.]

Infants and Children—Custody or upbringing—Welfare—Paramount consideration—Moral and physical welfare—Guardianship of Infants Act, 1925 (c. 45), s. 1.

The Guardianship of Infants Act, 1925, s. 1 provides : " Where in any proceeding before any court . . . the custody or upbringing of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration . . . "

After a decree of divorce had been granted to a husband on the ground of his wife's adultery an order was made granting to the husband the custody, care and control of the daughter of the marriage, aged 8 years, who, until then, had been in the care and under the control of the mother. Since the decree absolute the mother had married the co-respondent. The judge, in deciding to make the order, regarded the moral welfare of the child as of paramount importance and took the view that the wife, having once committed adultery, was likely to do so again, and that, as the husband was re-married to a wife against whose moral character no charge could be made, he was more fit to have the care of the child. There was little to choose between the accommodation offered by the parties, but it was undisputed that the child was happy with her mother and making good progress at school, and there was medical evidence to the effect that the child's health would suffer if she were separated from her mother. On an appeal by the wife against the order,

HELD : the judge had not applied the proper test, the welfare of the child, both moral and physical, being the paramount consideration, and, therefore, the appeal must be allowed.

[AS TO ORDERS FOR CUSTODY, see *HALSBURY*, Hailsham Edn., Vol. 10, pp. 752-755, paras. 1181-1189 ; and FOR CASES, see *DIGEST*, Vol. 27, pp. 418-420, Nos. 4232-4253.]

APPEAL, by the wife, against an order of **WALLINGTON, J.**, dated May 31, 1948, in so far as it granted to the husband the care and control of the child of the marriage. The appeal was allowed. The facts appear in the judgment of **WROTTESELEY, L.J.**

H. Forbes for the wife.

Trevor Reeve for the husband.

WROTTESELEY, L.J. : In this case we are not concerned with the custody of the child, which remains with the father, but with its care and control. The parties were married on Sept. 9, 1939, and the only child of the marriage was born on Apr. 17, 1940. The father, who was serving in the Army, went overseas in April, 1941, became a prisoner of war in July, 1942, and returned to England in May, 1945. On his return he discovered that the mother had formed an adulterous association with the co-respondent. He began divorce proceedings, the suit was undefended, and, on May 9, 1947, he obtained a decree *nisi* on the ground of the adultery of his wife with the co-respondent. No order as to custody was made. After the decree was made absolute the mother married the co-respondent and the father married a widow, who had a son aged six and a stepdaughter aged sixteen. The child has always been with the mother. On May 31, 1948, on the father's application, WALLINGTON, J., ordered that the child of the marriage should remain in the custody and care and control of the father on his undertaking to use tact and understanding in transferring the child to his care. The order would have the effect that the child would be uprooted from the home provided by the mother and transferred to the father where she would have to make a new start.

There is no dispute about the facts. The child is living with her mother at East Ham. There are three rooms, one being used as a bedroom for the mother and her husband, one for the child, and one as a living-room. The father, who is a workman earning about £9 a week, is in occupation of a house consisting of two large bedrooms and one small one, and two living-rooms. One bedroom is occupied by the father and his second wife, one by his step-son, and one by the step-daughter. It is proposed that the child should sleep in the bedroom of the step-daughter. It is not disputed that the child is happy with her mother and making good progress at her school in East Ham. There was the uncontradicted evidence of a doctor that the child's health would be affected adversely if she were transferred to the father and separated from her mother. The child has always lived with her mother, and one has to take into consideration that for some months the father never tried to see the child. There is nothing against the mother except that she formed an adulterous association with the co-respondent while her husband was abroad with the Forces. On the other hand, one has all sympathy with the father who has great affection for the child and could provide for her a good home where his second wife would be a good step-mother.

Counsel for the father told us the reasons for the decision of WALLINGTON, J. The learned judge said that there was little difference in so far as accommodation was concerned. He then considered the other circumstances, which were partly in favour of the child remaining with the mother, and, finally, he dealt with the question how the child's welfare would be influenced by living with her mother, who had committed adultery and was, as he thought, likely to do it again. He adjourned the case to hear evidence as to the moral character of the father and his second wife, and, as nothing disparaging was forthcoming, he made the order which is now before us. Here one has to differ from the learned judge. He obviously regarded the moral welfare of the child of paramount importance, and was of opinion, on the one hand, that a woman who has once committed adultery was likely to do it again, and, on the other, that the father now had a wife who had not committed adultery and was, therefore, more fit to look after the welfare of the child. That was not the proper test to apply. The welfare of the child, both moral and physical, was the paramount consideration. It was impossible to say, because a woman had once committed adultery she was not a fit person, *vis-a-vis* one who had not, to look after a child. There was no suggestion that the mother was promiscuous, or a bad mother, or a bad housekeeper, or anything which made it undesirable for her to look after the child. All the evidence in the case is strongly in favour of leaving the child with her, and the appeal must be allowed.

EVERSHED, L.J. : This court is always loath to interfere with the discretion of a learned judge, but I agree that here we are compelled to do so. The learned judge seems to have read the word "moral" into s. 1 of the Guardianship of Infants Act, 1925, before "welfare." Further, he has inferred that a woman who has once committed adultery will always repeat it.

Both suppositions are wrong. It would not be right to snatch this female child of eight from her mother and force her to make a new start with her father and a step-mother. The court has sympathy with the father who has been gravely wronged, and, if he wants access to the child, not only on odd days, but for a substantial period during the holidays, he is entitled to have it.

Appeal allowed. No order as to costs, the father holding a poor person's certificate.

Solicitors: *E. Edwards, Son & Noice* (for the wife); *W. O. Nicholls*, Law Society, Services Divorce Department (for the husband).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

WRIGHT v. DEAN.

[CHANCERY DIVISION (Wynn-Parry, J.), June 30, July 1, 2, 1948.]

Lease—Option to purchase reversion—Option not registered as land charge—Sale of reversion—Rejection by purchaser of purported exercise of option—Liability of lessor—Measure of damages.

By a lease, dated Jan. 15, 1937, the defendant, thereafter "called the lessor which expression where the context so admits includes the persons deriving title under him," granted to the plaintiff, thereafter "called the tenant which expression where the context so admits includes the persons deriving title under him," certain property for a term of twenty-one years from Dec. 25, 1936, "in consideration of the rent . . . and of the covenants on the part of the tenant." Clause 8 of the lease provided "that if at any time after the expiration of the third year of the said term the tenant shall be desirous of purchasing the reversion in fee simple in the premises hereby demised at the price of £650 and shall at any time after the expiration of the said third year . . . give to the lessor a notice in writing to that effect then and in such case the person giving such notice shall be the purchaser of the said reversion at the said price of £650." That option was capable of registration as an estate contract under the Land Charges Act, 1925, but it was not registered. In April, 1944, the defendant sold the property to B. There was no formal contract, and no reference was made in the conveyance to the lease or to the option. In April, 1947, notice in proper form was given on behalf of the plaintiff to B., purporting to exercise the option, but B. rejected the notice as ineffective on the ground that the option was not registered. In June, 1947, a notice was sent to the defendant purporting to exercise the option, but the defendant refused to recognise that he had any liability. The plaintiff now claimed damages for breach of contract.

HELD: (i) on the construction of the lease, the word "lessor" in cl. 8 meant primarily the defendant and the word "tenant" therein meant primarily the plaintiff, and the defendant did not cease to be within the scope of the word "lessor" merely by parting with the reversion. Furthermore, as the defendant did not effectively assign the burden of the contract, the context forbade the term "lessor" to include anyone but the defendant, who, therefore, remained bound by the contract contained in cl. 8, and liable in damages for its breach.

Goffin v. Houlder, (1920) (124 L.T. 145), *applied*.

(ii) at the time the contract in cl. 8 was made it must have been in the contemplation of the parties that should the plaintiff exercise the option he would either have the property conveyed to him or have damages which represented the loss which he suffered by not having it conveyed to him, and, therefore, the damages would not be merely nominal, but would be the value of the property in the open market in June, 1947, less the £650 payable under the option and a sum representing the value of the remainder of the lease.

Per cur.: there was no duty on the plaintiff to mitigate possible damage by registering the option as an estate contract under the Land Charges Act, 1925, and there was no breach of an express or implied term of the contract by the plaintiff's omission so to register the option.

[AS TO OPTION TO PURCHASE CONTAINED IN A LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 65-68, paras. 69-73; and FOR CASES, see DIGEST, Vol. 30, pp. 472-477, Nos. 1351-1393.]

Cases referred to :

- (1) *London & South Western Ry. Co. v. Gomm*, (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 37 Digest 79, 195.
- (2) *Worthing Corpn. v. Heather*, [1906] 2 Ch. 532; 75 L.J.Ch. 761; 95 L.T. 718; 37 Digest 81, 212.
- (3) *Goffin v. Houlder*, (1920), 90 L.J.Ch. 488; 124 L.T. 145; 40 Digest 264, 2291.
- (4) *Stuart v. Joy*, [1904] 1 K.B. 362; 73 L.J.K.B. 97; 90 L.T. 78; 31 Digest 432, 5768.
- (5) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 17 Digest 93, 101.

WITNESS ACTION.

The plaintiff claimed specific performance and damages for breach of contract in respect of the non-performance by the defendant of a covenant contained in a lease by the defendant to the plaintiff to convey the freehold reversion of the demised premises to the plaintiff on the exercise by him of the option to purchase contained in the lease. By selling the reversion the defendant had rendered himself unable to comply with this covenant. WYNN-PARRY, J., held the defendant liable in damages.

Milner Holland, K.C., and *G. D. Johnston* for the plaintiff, the lessee.
Salt, K.C., and *J. W. Mills* for the defendant, the lessor.

WYNN-PARRY, J. : This is an action in which the plaintiff claims damages from the defendant for breach of a contract contained in a lease by the defendant to the plaintiff whereby an option was conferred on the plaintiff during the lease to purchase the freehold reversion of the premises comprised in the lease, the freehold of which reversion was vested in the defendant. In the action the plaintiff originally claimed specific performance of the contract comprising the option, but that claim is not pursued. I propose to deal with the question whether or not the defendant is liable to the plaintiff in damages, before considering any question of the quantum of damages.

In 1937, the defendant was the owner of the property in question, which consisted of a plot of land on the south side of the road leading from Arundel to Chichester at Fontwell, on which were erected certain premises where the defendant then carried on the business of a cafe proprietor. Early in January, 1937, the defendant sold his business to the plaintiff, and, as part of the transaction, granted to the plaintiff a lease of the land and premises in question. The lease is dated Jan. 15, 1937, and it is expressed to be made between the defendant: "... of Fontwell Cafe, Fontwell, in the county of Sussex, cafe proprietor (hereinafter called the lessor which expression where the context so admits includes the persons deriving title under him) of the first part ..." and the plaintiff, whose address is given, "(hereinafter called the tenant which expression where the context so admits includes the persons deriving title under him) of the second part," and the plaintiff's wife, as surety, of the third part. The document proceeds:

In consideration of the rent hereinafter reserved and of the covenants on the part of the tenant hereinafter contained This deed witnesseth and it is hereby agreed and declared as follows.

There follows the demise in cl. 1 by the defendant to the plaintiff of the property in question for a term of twenty-one years from Dec. 25, 1936, at the yearly rent of £62 payable monthly. Clause 8, which contains the option, opens with these words:

Provided always that if at any time after the expiration of the third year of the said term the tenant shall be desirous of purchasing the reversion in fee simple in the premises hereby demised at the price of £650 and shall at any time after the expiration of the said third year of the said term give to the lessor a notice in writing to that effect then and in such case the person giving such notice shall be the purchaser of the said reversion at the said price of £650 subject to the following conditions namely ...

Then is set out the machinery for carrying the purchase into effect if the tenant should give notice electing to exercise the option. The option, conferring an interest in the land, was capable of registration as an estate contract under the

Land Charges Act, 1925, but no step was taken by the plaintiff, or on his behalf, to have the option registered under that Act. In April, 1944, the defendant agreed to sell the equity of redemption in the property (for it was then subject to a mortgage) to a Mr. Broome. No formal contract in writing relating to that arrangement was brought into existence, but the matter was completed by a conveyance dated Apr. 26, 1944, between the defendant, as vendor, and Mr. Broome, as purchaser. I need not refer to the terms of that document in any detail. It is sufficient to say that in it there is no reference whatsoever to the lease between the defendant and the plaintiff and no provision dealing in any way with the option contained in cl. 8 of the lease. In April, 1947, notice in proper form was given on behalf of the plaintiff to Mr. Broome purporting to exercise the option. The purported exercise of the option was rejected on behalf of Mr. Broome as being ineffective in view of the fact that the option had not been registered under the Land Charges Act, 1925. After certain correspondence, to which I need not refer, in June, 1947 a further notice in proper form was sent on behalf of the plaintiff to the defendant's solicitors purporting to exercise the option. After a claim had been made on behalf of the plaintiff that he was entitled to damages in the event of the defendant not fulfilling the bargain contained in the option, which he clearly could not do in the circumstances, the writ in this action was issued on July 29, 1947.

It is admitted that no effective proceedings can be taken against Mr. Broome, and it is further admitted that specific performance of the contract contained in the option cannot be claimed against the defendant. Thus, the only issues which are left in the matter are: (i) whether or not the defendant is liable in damages to the plaintiff for breach of the contract contained in the option, and (ii) if so, the extent of such damages.

The option confers a right to call for a conveyance of the freehold, and, therefore, it creates an interest in land. As appears clearly from *London and South Western Railway Co. v. Gomm* (1), and also the judgment of WARRINGTON, J., in *Worthing Corp'n. v. Heather* (2) as the contract creates an interest in land, equity, if properly invoked, will intervene to decree specific performance of the contract. Before Jan. 1, 1926, equity would have intervened against the defendant, or in the case of a transfer of the property against any person to whom the land had been transferred other than a purchaser for value without notice. The position has been altered by the Land Charges Act, 1925, s. 10, and the Law of Property Act, 1925, ss. 198 and 199, the effect of this legislation being to make obligatory a statutory form of notice if protection is sought, and to obviate the necessity which previously existed of establishing notice as a fact. In the present case, as the option was not registered as an estate contract under the Land Charges Act, it is void against Mr. Broome, the purchaser of the property. In the result, the equitable remedy has gone, but it still remains necessary to examine the common law aspect of the matter. On the execution of the lease, the option contained in cl. 8 was a valid contract at common law binding the defendant, and one for the breach of which he would be liable for damages so long as he continued to be bound by it. That is clearly demonstrated by *Goffin v. Houlder* (3). On the authority of that case, it is clear that if, at the time of the exercise of the option in June, 1947, the defendant was still bound by that contract, he would be liable in damages to the plaintiff because he had put it out of his power to perform the contract, and it is further clear from that authority that the damages for which he would be liable might be substantial.

The question is whether the defendant is still bound by the contract. *Prima facie* he is still bound, but it was urged on his behalf that, on the true construction of the lease, this is not the case. It was argued that the definition of the words "lessor" and "tenant" at the beginning of the deed include, in each case, the persons deriving title under him. Therefore, the lease contemplates a possible assignment by the tenant of the benefit of the lease and a possible assignment by the lessor of the reversion. So it follows, it is said, that cl. 8 contemplates by the word "tenant" the person then tenant within the definition as being the person who will give the notice exercising the option, and by the word "lessor" the person then within the definition as being the person to whom it will be given and who will be liable to comply with the notice. It is said that on this construction it becomes necessary to imply, as a term of

the contract, that the plaintiff, as the first holder of the option, shall register it as an estate contract because in that way alone can protection be obtained against persons other than the defendant for the time being entitled to the reversion. I cannot accept this reasoning. It is true that the definition both of "lessor" and "tenant" includes the words "the persons deriving title under him," but the parties to the lease are the plaintiff and the defendant. For purposes of convenience, the defendant is described as "hereinafter called the lessor," and the plaintiff as "hereinafter called the tenant." Those terms are extended to include in each case the persons deriving title under them, subject, however, to the qualification imported by the words "which expression where the context so admits . . ." In cl. 8 the word "lessor" primarily means the defendant, and the word "tenant" primarily means the plaintiff. The defendant does not by the force of the language of that clause cease to be within the scope of the word "lessor" as defined merely by parting with the reversion. On the contrary, the force of the language requires that he remain within the scope of that word. In my view, it would require much stronger language than is to be found in cl. 8 to bring about the result that, on parting with the reversion, the defendant ceased to be a party bound by the contract, because that is what the argument involves.

As regards a covenant running with the land, it has been held that a lessor is not discharged by an assignment of the lease: see *Stuart v. Joy* (4). This case appears to me to be *a fortiori* because the option does not run with the land. It cannot be said that a purchaser of the reversion is to be held to have accepted at law the burden of the contract merely by taking a conveyance of the property with knowledge of the terms of the lease. To bring about such a position would require novation, and novation could not be brought about in those circumstances, but, if the original lessor does not take steps to see that his purchaser is bound at law to perform the contract in his place or pay damages for his default, why should the original lessor be regarded at law as free of his contractual bargain? It appears to me that unless the original lessor effectively assigns the burden of the contract so that the tenant has the obligation of the purchaser of the reversion in substitution for the original lessor's obligation, then the case is one in which the context, not merely does not permit, but forbids, the term "lessor" to include anyone other than the original lessor, in this case the defendant. For these reasons I have come to the conclusion that the defendant remains bound by the contract contained in cl. 8 of the lease and in the circumstances which I have stated, is liable in damages to the plaintiff for his breach of that contract.

With regard to the quantum of damages, it was submitted on behalf of the defendant that the damages should be only nominal, that argument being based on the well-known passage from the judgment in *Hadley v. Baxendale* (5) (9 Exch. 354):

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

This question concerns a common law contract to which the common law rule as to damages applies. It appears to me that what must have been in the contemplation of each party was that, should the plaintiff exercise the option, he would as a result either have the property conveyed to him or have damages which represented the loss which he suffered by the circumstance that the property was not conveyed to him. It cannot be urged, and it is not sought to be urged, that there was any duty on the plaintiff to mitigate possible damage by registering the option as an estate contract under the Land Charges Act prior to the breaking of the contract. Further, it cannot be said that there was any breach of an express or implied term of the contract by the plaintiff's omission to register the charge. It appears to me that the case is completely covered, as regards this aspect of it, by the decision and the reasoning of *EVE, J.*, in *Goffin v. Houlder* (3) to which I have already referred. I must, therefore, assess the damages on the basis that the plaintiff is not confined to nominal

damages. In my view, the correct approach to this matter is that put forward by counsel for the plaintiff, namely, that one must see, first, what was the value of the property in question in the open market if offered for sale with vacant possession in the summer of 1947. From that sum so arrived at, there must be deducted the amount payable under the option, £650, and a sum representing the value of the remainder of the lease.

HIS LORDSHIP reviewed the evidence of the valuers called by each party and applying the principle stated above, he assessed the damages at £900.

Judgment for the plaintiff with costs.

Solicitors: *Petch & Co.*, agents for *Bowles & Stevens*, Worthing (for the plaintiff); *Carleton-Holmes & Co.*, agents for *Holmes, Campbell & Co.*, Littlehampton (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

GLYN v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Singleton, J.), July 5, 1948.]

Income Tax—Settlement—Interest of settlor in settled property—Income deemed to be income of settlor—Appointment of trusts by settlor and son jointly—Finance Act, 1938 (c. 46), s. 38 (3), (4).

Section 38 of the Finance Act, 1938 provides: “(3) If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person . . .

(4) For the purpose of the last foregoing subsection, the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever . . .”

By a settlement of 1907 certain investments and other property were held on trust for the taxpayer for life, and, subject thereto, to the use of his son in tail male. On Dec. 29, 1928, the taxpayer and his son executed a re-settlement disentailing the settled property, including the investments. Under this re-settlement the trustees were to hold the investments on such trusts as the taxpayer and his son should from time to time jointly appoint, and they were directed to accumulate the income from the investments until the happening of one of certain events recited in the deed, with power thereafter to pay or transfer the accumulations of income to the son for his own use and benefit. No material appointment had been made and none of the events bringing the accumulation provisions to an end had occurred. The income from the investments was accumulated by the trustees and no part of it was distributed within the meaning of s. 38 (3) of the Act of 1938.

HELD: on a true construction of sub-ss. (3) and (4) of s. 38, the taxpayer must be deemed to have an interest in the income from the investments within the meaning of the sub-sections, because by arrangement between him and his son the income at any time might become payable for the taxpayer's benefit, and, as none of it had been distributed in the years of assessment, the whole of it must be treated as the income of the taxpayer for the purposes of sur-tax for those years.

[FOR THE FINANCE ACT, 1938, s. 38 (3) and (4), see HALSBURY'S STATUTES, Vol. 31, pp. 349-350.]

Cases referred to:

- (1) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 1 K.B. 64; 90 L.J.K.B. 113; *affirmed*, [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358; Digest Supp.
- (2) *Canadian Eagle Oil Co., Ltd. v. R.*, [1945] 2 All E.R. 499; [1946] A.C. 119; 114 L.J.K.B. 451; 173 L.T. 234; 2nd Digest Supp.

CASE STATED by the Special Commissioners of Income Tax, who held that the taxpayer should be deemed to have an interest, within the meaning of s. 38 (3) and (4) of the Finance Act, 1938, in income from investments subject to a settlement, and that, therefore, the income must be treated as his for the purposes of sur-tax. The appeal was dismissed. The facts appear in the judgment.

N. C. Armitage for the taxpayer.

Uppjohn, K.C., J. H. Stamp and *R. P. Hills* for the Crown.

SINGLETON, J.: This case arises out of a re-settlement of certain investments which were formerly held under a settlement of the year 1907, with other investments and property, on trust for Sir Richard Glyn, the taxpayer, for life, and, subject to that, to the use of Mr. R. H. Glyn in tail male with divers remainders over. At some date shortly before Dec. 29, 1928, Mr. R. H. Glyn, the eldest son of Sir Richard Glyn, came of age, and the father and the son agreed to execute a re-settlement to disentail all the settled property, including the investments under consideration in this case. The re-settlement or trust instrument is dated Dec. 29, 1928, and is made between Sir Richard Glyn, of the first part, Mr. R. H. Glyn, of the second part, Lady Glyn, Sir Richard's wife, of the third part, and three trustees. The material parts of the re-settlement are in cl. 10 to 15. Clause 10 reads:

Sir Richard Glyn as settlor hereby surrenders unto Mr. Glyn all that the life interest of Sir Richard Glyn in all and singular the investments mentioned in the fifth schedule hereto to the intent that as regards the last mentioned investments the said life interest shall be wholly extinguished.

Those are the investments the income from which gives rise to this question. They were £20,000 Irish 2½ per cent. Guaranteed Land Stock, and £25,000 Great Western and Great Central 3½ per cent. Guaranteed Stock. By cl. 11:

In exercise of the powers for this purpose conferred on him by the disentailing assurance and of all other powers Mr. Glyn hereby appoints to the trustees all and singular the investments mentioned in the fifth schedule hereto to be held by the trustees upon the trusts and subject to the powers and provisions hereinafter declared concerning the same.

Clause 12:

The trustees shall stand possessed of the investments mentioned in the fifth schedule hereto upon such trusts as Sir Richard Glyn and Mr. Glyn shall from time to time by any deed or deeds revocable or irrevocable jointly appoint and in default of and subject to any such joint appointment upon trust that the trustees may either allow the same or any of them or any part or parts thereof respectively to remain as actually invested so long as the trustees shall think fit . . .

or they may change the investments specified in that clause. Clause 13:

The trustees shall until the death of Mr. Glyn or until the date when he attains the age of 31 years if he has prior to attaining that age married with the consent of Sir Richard Glyn or (if Sir Richard Glyn is not living at the date of such marriage) with the consent of the majority of the trustees or if Mr. Glyn marries with such consent as aforesaid after he attains the age of 31 years but before he attains the age of 35 years then until the date of such marriage or if Mr. Glyn does not marry with such consent as aforesaid before he attains the age of 35 years then until the date when he attains the age of 35 years (whichever shall be the earliest) accumulate the income of the investments mentioned in the fifth schedule hereto and of the property for the time being representing the same by investing the same and the resulting income thereof in any of the investments mentioned in or authorised by the last preceding clause and the power to vary or transpose investments hereinbefore contained shall apply to the investments representing such accumulations or any part thereof.

Clause 14:

If Mr. Glyn shall be living at the date (hereinafter called "the said date") when the provisions hereinbefore contained for the accumulation of the said income cease to be operative or to have effect the trustees may at any time or times thereafter during his life and at their absolute discretion pay or transfer the said accumulations of income (all of which are intended to be comprised in the expression "the accumulated fund" hereinafter used) to Mr. Glyn for his own use and benefit.

Clause 15:

The trustees shall as from the said date hold the investments specified in the fifth schedule hereto and the property for the time being representing the same and (subject as aforesaid) the accumulated fund upon the trusts and subject to the powers and provisions upon and subject to which capital money arising under the Settled

Land Act, 1925, from the farm properties or investments representing the same would be held but not so as to increase or multiply charges or powers of charging.

The Case sets out that "no appointment material to this appeal has yet been made by Sir Richard Glyn and Mr. R. H. Glyn pursuant to cl. 12, and in the years material to this appeal the income of the investments specified in the said fifth schedule was accumulated by the trustees pursuant to the provisions of cl. 13, and no part of it was distributed within the meaning of s. 38 (3) of the Finance Act, 1938." The years in question are the tax years 1937-38 and 1938-39 in respect of additional assessments to sur-tax, and the year 1939-40 in respect of a first assessment to sur-tax.

From the terms of the re-settlement three matters appear clear, and, indeed, they are admitted. First, that there was a re-settlement; secondly, that Sir Richard Glyn was the settlor; and, thirdly, with regard to the investments in the fifth schedule the trustees were to hold them on such trusts as Sir Richard Glyn, the settlor, and his son, Mr. Glyn, should from time to time by any deed or deeds revocable or irrevocable jointly appoint. Then, in cl. 13 of the re-settlement the trustees had a duty to accumulate the income from the investments until one of the events mentioned in that clause happened, and in all the years in question they were accumulating income within the meaning of that clause. In other words, the income from those investments was not distributed. The next thing to be observed is that when one of the events happened, that is, at such date as is defined in cl. 13, thereafter the trustees could at their absolute discretion pay or transfer the accumulations to Mr. Glyn for his own use and benefit. That date had not arrived in any of the three years which are dealt with or covered by this appeal. In the circumstances the question was raised by the Commissioners of Inland Revenue as to the position under s. 38 of the Finance Act, 1938, that part of the Act which deals with income arising under certain settlements which may fall to be treated as the income of the settlor. I thought at one time that sub-s. (2) of s. 38 might apply to this case, but both the learned counsel tell me that it does not, and that is stated in the Case as an admission by the Commissioners of Inland Revenue. All I have to consider is sub-ss. (3) and (4) of s. 38.

Sub-section (3) is in these terms :

If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person . . .

I need not read the provisos, because nothing turns on them. Sub-sect. (4) reads :

For the purpose of the last foregoing sub-section, the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever.

That is, as everyone agrees, a very wide provision.

It is said by the Crown in this case that, in view of the provision in sub-s. (4) that the settlor shall be deemed to have an interest in income arising under a settlement if any income is, or will or may become, payable to the settlor in any circumstances whatsoever, the fact that there is a joint power in the settlor and his son to appoint in regard to the investments in the fifth schedule means that the settlor has an interest in that income, and that the income, not being distributed in the years in question, is all to be treated for the purpose of the Income Tax Acts as the income of the settlor for those years. It seems a little hard that it should be so. On the other hand, one has to remember the purpose of this section. As ROWLATT, J., said in *Cape Brandy Syndicate v. Inland Revenue Comrs.* (1) ([1921] 1 K.B. 64, 71) :

It is urged by Sir William Finlay that in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

Those words were repeated by LORD SIMON, L.C., in the House of Lords, in *Canadian Eagle Oil Co., Ltd. v. R.* (2) ([1945] 2 All E.R. 499, 507), and, in considering the whole matter, one has to remember what is the purpose of this section. It is to make subject to the Income Tax Acts income arising under certain settlements which prior to the passing of that section was not treated as income of the settlor at all.

Counsel for the taxpayer argued that the words at the end of sub-s. (4), "in any circumstances whatsoever," are so wide that some limitation must be placed on them, and, in construing them, the court ought not to include the contingency of a beneficiary disposing of funds in favour of the settlor. Counsel pointed out that the settlor in this case has not, and never had, power to do anything by himself. The power to appoint is joint. I agree, but I think one has to bear in mind that this was a settlement executed by, and brought about by, a joint arrangement between father and son. The father had the life interest in those funds beforehand, and a change was made with the result which I have mentioned. Counsel for the Crown put it in this way. If the power to appoint in respect of these investments had been in the settlor alone, the case would not have been arguable. If, on the other hand, there was power of appointment reserved to the son alone, then the settlor would have had no interest whatever in the fund, but in the circumstances of re-settlement the power is joint, and the exercise of such a power is not merely a disposition by a beneficiary.

The Special Commissioners, in their findings, accept the argument that the words "in any circumstances whatsoever" cannot be read as including a mere voluntary application of income by a beneficiary to the settlor outside the provisions of the settlement itself. They say:

We should be unable to regard an exercise of the power of appointment under cl. 12 in favour of the taxpayer as being of this nature. In our opinion, the effect of cl. 12 is that "income which may at any time arise under . . . that settlement . . . may become payable to . . . the settlor . . . in any circumstances whatsoever" within the meaning of sub-s. (4), with the result that the taxpayer is to be deemed to have an interest in the income of the said investments within the meaning of sub-ss. (3) and (4).

The joint power cannot be exercised unless both father and son are agreed on it. There is no resultant power to one to do anything in regard to the funds if the other has died. The power must be exercised jointly. One cannot exercise it without the other. Counsel for the Crown was rather inclined to argue that this was the sort of thing which is often reserved in a settlement and is equivalent to an arrangement. It may be, he said, that at some time after the date of the settlement the son would want money. In such circumstances the son could not get money from this trust, he being under the age of 31 or 35 as the case may be, without the consent of the father. The father might be in difficulties, or he might marry again. There might be difficulties arising in regard to the estate or estate management, and the farm properties had been made over to the son for his life interest. Difficulties of all kinds might arise, and in those circumstances the father might be approached by the son or the son might be approached by the father. They could jointly appoint the funds embraced in the fifth schedule. They could appoint them wholly to the son or wholly to the father, or half and half. In those circumstances counsel submitted that the natural meaning of the words of sub-s. (4) was that the father, the settlor, should be deemed to have an interest in income arising under the settlement because the income at any time might become payable for his benefit. It could only do so, as far as I can see, by an arrangement between the father and the son, but that is the sort of arrangement which is often made between father and son.

Although I regret having to come to this decision I think that this case does fall within the words of sub-s. (4), and, consequently, of sub-s. (3). I must give the words their ordinary, natural meaning. It follows that the finding of the Special Commissioners is right, and this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Bircham & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown). [Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

**Re HAYNES' WILL TRUSTS. PITT AND ANOTHER
v. HAYNES AND OTHERS.**

[CHANCERY DIVISION (Roxburgh, J.), June 16, July 2, 1948.]

Will—Forfeiture clause—Gift to son of share in residuary estate subject to forfeiture on alienation—Provision in son's marriage settlement for transfer to settlement trustees of part of son's share in testator's residue after payment thereof to him.

By his will the testator gave his residuary estate on trust for all his children equally subject to certain prior trusts, and, in the case of the sons' shares, he declared that each son was to be paid his share for his own absolute use and benefit if at the time of distribution he had not done or suffered anything whereby his share would, if belonging absolutely to him, have become vested in or payable to some other person or persons, "but if such son shall at the said time of distribution . . . have done or suffered anything whereby his said share . . . would through his act or by operation or process of law or otherwise if belonging absolutely to him have become vested in or payable to some other person or persons," then "his said share" was to be held on other trusts. The testator died in 1884, and in 1888 T.H.H., a son of the testator, executed a marriage settlement whereby, after reciting the forfeiture clause of the testator's will, he covenanted that, when the share in the testator's residuary estate "to which he . . . may become entitled at the time of distribution . . . shall have been paid or transferred to him," he would "forthwith pay or transfer one-third part of such share to" the marriage settlement trustees:—

HELD: (i) on its true construction, the marriage settlement was intended to effect an equitable assignment.

Re Gillott's Settlement, Chattock v. Reid ([1934] Ch. 97), *applied*.

(ii) on the true construction of the will, the words "or any part thereof" ought to be implied after the words "whereby his said share" in the forfeiture clause, and, accordingly, the equitable assignment under the marriage settlement brought the forfeiture clause into operation.

Re Dennis's Settlement Trusts, Dennis v. Dennis ([1942] 1 All E.R. 520), *applied*.

Observation of ROXBURGH, J., in Fraenkel v. Whitty ([1947] 2 All E.R. 646), *not applied*.

[AS TO FORFEITURE ON ALIENATION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 421-423, paras. 468, 469; and FOR CASES, see DIGEST, Vol. 44, pp. 1231-1233, Nos. 10646-10660.]

Cases referred to:

- (1) *Re Gillott's Settlement, Chattock v. Reid*, [1934] Ch. 97; 102 L.J.Ch. 332; 149 L.T. 419; Digest Supp.
- (2) *Fraenkel v. Whitty*, [1947] 2 All E.R. 646; [1948] 1 Ch. 55; [1948] L.J.R. 322.
- (3) *Re Wightman, Bradbury v. Cambridge University*, (Apr. 17, 1945), [1947] 2 All E.R. 647, *note*.
- (4) *Re Dennis's Settlement Trusts, Dennis v. Dennis*, [1942] 1 All E.R. 520; [1942] Ch. 283; 111 L.J.Ch. 166; 166 L.T. 243; 2nd Digest Supp.
- (5) *Re Brewer's Settlement, Morton v. Blackmore*, [1896] 2 Ch. 503; 65 L.J.Ch. 821; 75 L.T. 177; 5 Digest 656, 5855.

ADJOURNED SUMMONS to determine whether a marriage settlement executed by a son of the testator was intended to effect an equitable assignment of part of his share in the testator's residuary estate with the result that the share was forfeited under a forfeiture clause in the testator's will. ROXBURGH, J., held that an equitable assignment was intended and that the share in question was, accordingly, forfeited. The facts and the relevant provisions of the will and the marriage settlement appear in the judgment.

B. S. Tatham for the plaintiffs (trustees of the testator's will).

R. W. Goff, R. Cozens-Hardy, Horne, E. Blanshard Stamp and Wigan for defendants (a trustee of the son's will and persons claiming thereunder).

ROXBURGH, J.: The testator, William Haynes, made his will on Aug. 11, 1882, and died on Sept. 19, 1884. By his will he declared that his trustees should stand possessed of his residuary estate in trust for all his children living at his death or born in due time afterwards who being sons or a son should

attain the age of 21 years or being daughters or a daughter should attain that age or marry, and, if more than one, in equal shares, but so nevertheless that the share of each such child should be held and applied upon the trusts and with and subject to the powers, provisos and declarations thereafter declared of and concerning the same. The trust of residue was subject to certain prior trusts which I need not specifically mention. The testator then directed and declared that his :

. . . said trustees and trustee shall hold the share in my residuary estate of each son of mine upon trust if such son shall not at the failure or expiration of the aforesaid trust for payment of the said mortgages and incumbrances (herein referred to as "the time of distribution") have been or be outlawed or a bankrupt or have done or suffered anything whereby his share in my said residuary estate would through his act or default or by operation or process of law or otherwise if belonging absolutely to him have become vested in or become payable to some other person or persons to pay and transfer the share of such son to him for his own absolute use and benefit but if such son shall at the said time of distribution have been or be outlawed or a bankrupt or have done or suffered anything whereby his said share in my said residuary estate would through his act or by operation or process of law or otherwise if belonging absolutely to him have become vested in or payable to some other person or persons my said trustees and trustee shall stand possessed of his said share in my said residuary estate . . .

on certain other trusts.

William Haynes had a son, Thomas Henry Haynes, who executed a marriage settlement on Apr. 17, 1888. The marriage settlement, after reciting the forfeiture provisions of the testator's will, proceeds as follows :

Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the said intended marriage it is hereby agreed and declared and the said Thomas Henry Haynes doth hereby for himself his executors and administrators covenant with the said Charles Edward Haynes and James Adams Hewitt their executors administrators and assigns that in case the said intended marriage shall take place the said Thomas Henry Haynes his executors or administrators will when the share in the residuary estate of the said William Haynes deceased to which he or they may become entitled at the time of distribution referred to in the said recited will shall have been paid or transferred to him or them forthwith pay or transfer one-third part of such share to . . .

the marriage settlement trustees.

The intended marriage took place, and the question which I have to determine is whether the marriage settlement operated as a forfeiture. It is reasonably plain that it was not intended so to operate, but that cannot conclude the matter. The real question must be whether on its true construction the deed was intended to bring about a state of affairs which is in law regarded as an equitable assignment. Fortunately for me the matter has been fully considered by MAUGHAM, J., in *Re Gillott's Settlement, Chattock v. Reid* (1), and I find myself unable to distinguish the present case from that case. My attention has been drawn by counsel for the defendants to a number of authorities which run close to that case and yet have been decided in a different manner, but after considerable hesitation I am satisfied that nothing is contained in any of them which would justify me in disregarding *Re Gillott's Settlement* (1).

That does not, however, conclude the matter, because in the present forfeiture clause there is not the usual phrase "or any part thereof." I regret to find that I have to accept responsibility for introducing some confusion into this problem. In *Fraenkel v. Whitty* (2), where I was dealing with a forfeiture clause which did contain the words "or some part thereof," I observed ([1947] 2 All E.R. 646, 647) :

If the words "or some part thereof" had been omitted, it would have been as impossible to argue in this case that all the sums of money vested in the Custodian as it was to argue that the income of a trust fund vested in him in *Re Wightman* (3).

That remark of mine was plainly *obiter dictum*, because in the case which I had to decide the words "or some part thereof" did occur. When I wrote that judgment, I had before me the transcript of the judgment of ROMER, J., in *Re Wightman, Bradbury v. Cambridge University* (3), which is much more extensive than the short note of the decision which is appended to the report in *Fraenkel v. Whitty* (2), and I should have been glad if that transcript had now been available to me, but that has not proved possible. I do, however, remember

clearly that *Re Dennis's Settlement Trusts*, *Dennis v. Dennis* (4) was not cited either to ROMER, J., or to myself. There is probably no particular reason why it should have been cited to me, but there was every reason why it should have been cited to ROMER, J. In *Re Dennis's Settlement Trusts* (4), which contained a forfeiture clause indistinguishable, so far as I can see, from the present clause for this purpose, FARWELL, J., said ([1942] 1 All E.R. 520, 523) :

It is not, in my judgment, possible for the court to supply words in a forfeiture clause in an instrument of this kind. That seems to be the effect of the judgment of CHITTY, J., in *Re Brewer's Settlement* (5). CHITTY, J., said ([1896] 2 Ch. 503, 507) : "In construing clauses of cesser or forfeiture such as that before me, the court is not at liberty to depart from the language of the document. The words 'or cease to be payable to himself' are not in the settlement ; and I find myself unable to say that, by any just method of construction applicable to such clauses, I ought to supply those words." Therefore, in my judgment, I am bound to construe the words which are actually used, and not to extend them or to read into the clause words which in fact are not there. The first point that was taken on behalf of the son was on the words : "... whereby the income of the trust funds would, if belonging to the son absolutely, become vested in or charged in favour of some other person or persons or corporation." It is said that there is not inserted here the words "Whereby the income or any part thereof would if belonging to the son become vested in or charged to some other person," and that the clause must be read as though it only took effect in the event of the whole of the income being vested in or charged in favour of some other person or persons. I am not able to adopt that view. In my judgment, it clearly is intended that the forfeiture is to take effect if any part of the income becomes vested in or charged in favour of some other person or persons.

I find some little difficulty in applying that decision for the following reasons. The words of the forfeiture clause are :

... but if such son shall at the said time of distribution have been or be outlawed or a bankrupt or have done or suffered anything whereby his said share in my residuary estate would through his act or by operation or process of law or otherwise if belonging absolutely to him have become vested in or payable to some other person or persons my said trustees and trustee shall stand possessed of his said share . . .

It is common ground that "his said share," when the phrase is last used, means "the whole of his said share" and I find some difficulty in giving a different meaning to the phrase "his said share" when it occurs a little earlier in the clause, having regard to the principle which was stated by CHITTY, J. ([1896] 2 Ch. 503, 507) in *Re Brewer's Settlement* (5) and which FARWELL, J., recognised and approved, *viz.* :

In construing clauses of cesser or forfeiture such as that before me, the court is not at liberty to depart from the language of the document.

It seems to me that the logical manner of arriving at the view that the document was intended to operate when there was an assignment, not only of the share, but of any part thereof, would be to say that the words "or any part thereof" ought to be implied by necessary implication from the tenor of the instrument as a whole, and yet that might appear to be proceeding in a manner not authorised by the principle laid down in *Re Brewer's Settlement* (5). However that may be, in my judgment, the decision of FARWELL, J., in *Re Dennis's Settlement Trusts* (4) is indistinguishable. The decision of ROMER, J., in *Re Wightman* (3) is not fully reported, and the whole text of his judgment is not available. It is certain that the decision of FARWELL, J., in *Re Dennis's Settlement Trusts* (4) was not cited to him. My own observation in *Fraenkel v. Whitty* (2) is plainly *obiter dictum*, and, in those circumstances, I feel that I ought to follow and apply the judgment of FARWELL, J., in *Re Dennis's Settlement Trusts* (4).

Declaration accordingly. Costs of all parties between solicitor and client to be paid out of T. H. Haynes' share.

Solicitors : *Pontifex, Pitt & Co.* (for the plaintiffs and some of the defendants) ; *Church, Rendell* (for other defendants).

[Reported by H. McC. MORRISON, ESQ., Barrister-at-Law.]

Re SEARLE (deceased). SEARLE v. SIEMS AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), June 30, July 1, 1948.]

Family Provision—Time for application—Summons issued before representation taken out—Statement in will of reasons for dispositions—Admissibility of evidence as to reasons—Inheritance (Family Provision) Act, 1938 (c. 45), ss. 1 (7), 2 (1).

The Inheritance (Family Provision) Act, 1938, s. 2 (1) provides: “. . . an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out.”

The testator died on Oct. 29, 1946, and the summons in an application under the Act of 1938 was issued on Mar. 18, 1947. Representation was not granted until May 6, 1947.

HELD: the application, although made before representation was taken out, was made before Nov. 6, 1947, when the period of six months from the date of the grant expired, and it was, therefore, within the provisions of s. 2 (1).

Quære: whether under R.S.C., Ord. 54F it is permissible to start an application before probate, provided it can be discovered who are named as executors in the will, irrespective of whether they ultimately prove the will or not.

Section 1 (7) of the Act provides: “The court shall also, on any such application, have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision . . . for a dependant, and the court may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the testator and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.” The testator stated in his will his reason for making no provision for his wife.

HELD: the statement in the will did not, on the construction of s. 1 (7), preclude the taking of evidence of the testator's reasons for excluding his wife, nor were those claiming through the testator estopped by the statement from adducing such evidence.

[AS TO PROTECTION OF TESTATOR'S FAMILY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505; and FOR CASES, see DIGEST Supp.]

ADJOURNED SUMMONS by which the plaintiff applied under the Inheritance (Family Provision) Act, 1938, for provision to be made for her support out of her deceased husband's estate, from participation in which she had been excluded by her husband's will for a reason therein stated. The application was dismissed.

Montgomery White, K.C., and Ruttle for the plaintiff, the widow.

B. S. Tatham for the first and second defendants, the executors of the will.

Jennings, K.C., and M. J. Albery for the third and fourth defendants, persons interested under the will.

ROXBURGH, J.: This is a short, but important, point. The Inheritance (Family Provision) Act, 1938, s. 2 provides:

(1) Except as provided by s. 4 of this Act, an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out.

Section 4 is, for the present purpose, immaterial, and I do not think any other section of the Act is relevant, but R.S.C., Ord. 54F, rr. 1 and 2, are material. They are as follows:

(1) An application to the High Court under s. 1 of the Inheritance (Family Provision) Act, 1938 (in this Order called the Act) shall be made in the Chancery Division by originating summons . . . and shall be intitled in the matter of the estate of the deceased to which the summons relates and in the matter of the Act. (2) (1) On an application under s. 1 of the Act the person applying shall be plaintiff and the executor or other personal representative of the testator's estate shall be defendant.

The testator died on Oct. 29, 1946; the summons was taken out on Mar. 18, 1947; no representation was granted until May 6, 1947; and, therefore, the summons was taken out before probate. Was the application good within s. 2 (1) of the Act? The question of construction is not easy, but I propose to guide myself by two considerations. The first arises from the submission made by counsel that for the purposes of s. 2 (1) time begins to run from the date of the grant of representation, and that, therefore, an application made before the grant must necessarily be made before the commencement of the period of time within which application may be made and so be a nullity. If that construction be correct, as far more than six months have now elapsed since the date of the grant, this blunder, if it be a blunder, would be fatal to the plaintiff's claim. That any blunder of that sort should completely and finally deprive a litigant of recourse to the court would challenge the foundations of natural justice. That is one principle by which I propose to guide myself. The other is that the obvious purpose of this section is to prevent applications from being made too late when parties have altered their position in face of the dispositions made by the testator. It seems to me improbable that Parliament ever thought of applications which might be made too soon.

Bearing those considerations in mind, I propose to construe the section in this way. It is to be noted, first, that s. 2 directs the attention of the court, not to the application, but to the order and it provides: "... an order ... shall not be made save on an application made within six months from the date on which representation ... is first taken out." The time to look at the matter, it seems to me, is the time when the court is about to make an order, and the court must then see what was the application on which the order is sought. For that purpose it looks at the date on which representation was first taken out, in this case May 6, 1947. It then calculates six months from that date which brings one to Nov. 6, 1947. Then it asks: "Was the application made before Nov. 6, 1947?", and, if the answer is "Yes," then, in my judgment, the application was made within six months from the date on which representation in regard to the testator's estate for general purposes was first taken out. I am not sure that I should have been able so to construe these words but for the important considerations to which I have referred. I think, however, that those responsible for drafting the rules applicable to this matter may have had some inkling of what might happen, because r. 2 provides that the executor or other personal representative shall be the defendant and that the matter should be intitled in the matter of the estate of the deceased. I think that the draftsmen of these rules must have had in mind the time when the application could first be made, but the rules do not make the position clear.

Counsel for the plaintiff has strenuously argued that it is permissible under these rules to start an application before probate, provided you can find out who are named as executors in the will, irrespective of whether they ultimately prove the will or not. I am not proposing to decide as a matter of construction whether such a course is permissible under the rules, because it appears to me that, if and so far as the only irregularity is under the rules, it is too late to take the point. It is a point of no substance on the merits because the very persons who were named as defendants and are described as the persons who claim to be the executors of the will, did, in fact, become the executors. I wish to say nothing to encourage the idea that applications of this character should be made before the grant of representation, though, if somebody is bold enough to try the experiment again and objection is taken in due time, it would be for the court which has to hear the objection to decide whether or not the applicant was out of time. Accordingly, I dismiss the preliminary point. I shall make no special order as to costs.

The next point which I have to determine is what evidence is admissible as a matter of law under s. 1 (7) of the Act. It is necessary to determine that point before reading the evidence in this case. Section 1 (7) provides:

The court shall also, on any such application, have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the testator and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall

have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

In this will the testator has made a statement of his reasons. For the purpose of this point it is immaterial to read that statement, and as this case is one of some general interest I do not want to encumber it with matters of a personal nature.

The proposition of law advanced by counsel for the plaintiff is that, as the testator has made a statement of his reasons in his will, no evidence can be given as to the reasons he had for not making any provision for his wife. First, counsel bases his submission on the construction of the statute, but it appears to me that every line of the statute indicates the opposite conclusion. The direction to the court is couched in the widest possible language. The court is directed to "have regard to the testator's reasons, so far as ascertainable." That would not lead one to expect that the Act meant "so far as is stated in his will if so stated." The sub-section continues: "and the court may accept such evidence of those reasons as it considers sufficient." That is an invitation to the court to do something which, if counsel's construction is correct, a court has, none the less, no jurisdiction to do. It proceeds: "including any statement in writing signed by the testator and dated." I suppose some wills are not dated, although they usually are, and if there was any such presumption as counsel has suggested, it is strange to find that phrase which while it includes a will, includes innumerable other forms of statements. In my view, that is giving the court power either to accept or reject any statement in, among other things, the will. Then the sub-section says:

... that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

Counsel, secondly, based his submission on a doctrine of estoppel, his argument being that defendants who claim through a testator are, by a principle of law, estopped by statements in his will. Counsel cited no authority in support of this as a principle for the construction of a statute or in any context comparable with that with which I am now dealing, and I decline to hold that the discretion which, in my judgment, is conferred on the court expressly by s. 1 (7) is so to be curtailed.

Solicitors: *Goodman, Brown & Co.*, agents for *Derrick Bridges & Co.*, Barnet (for the plaintiff); *Haslewood, Hare & Co.*, agents for *Bosley & Co.*, Brighton (for all defendants).

[Reported by H. McC. MORRISON, Esq., Barrister-at-Law.]

Re DIPLOCK'S ESTATE. SIMPSON AND OTHERS v. LILBURN.

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley and Evershed, L.JJ.), July 26, 27, 1948.]

Money—How far money can be followed Money paid to charitable institutions by executors under a mistake as to the construction of a will—Directions in will void for uncertainty—Right of those entitled under an intestacy to trace—Money paid by charity into its "general fund."

A charitable institution had a general banking account into which all money received by it was paid, but it kept a number of separate accounts, with separate balance sheets, relating to the special objects covered by its charitable activities. In addition to the special funds the charity had a general fund which had its own account dealing with any money which was not allocated to a special fund. Pursuant to a direction in a testator's will (which was later declared void for uncertainty) executors paid £1,500 to the charity which, the money not being allocated to any special fund, paid it into its banking account to the account of its general fund. Subsequently, the testator's next of kin challenged the direction in the testator's will, and the executors wrote to the charitable institution informing it of the challenge and calling on it not to deal with the £1,500 until further notice. Before this intimation had been received £500, and after its receipt £1,000, was withdrawn by the charity from its banking account and placed on deposit at the Post Office Savings Bank. In an action by the testator's next of kin to recover the money which had been wrongly paid to the charity:—

HELD: the accounts treated the banking account and the Savings Bank deposit account as a conglomerate mass and attributed slices of them to the various special funds; there was nothing to show that the charity had definitely attributed any particular bank monies to any particular account; and, therefore, it was impossible to treat any item held by the charity as identifiable wholly or in part with the testator's money, the right to trace was non-existent and the rule in *Clayton's case* (1816) (1 Mer. 529, 572) applied. The claim *in rem*, accordingly, failed and the next of kin had only their rights under their personal claim.

Devaynes v. Noble, Clayton's Case (1816) (1 Mer. 529, 572). *Rule applied.*

[AS TO RIGHT TO FOLLOW ASSETS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 200-202, paras. 192, 193; and FOR CASES, see DIGEST, Vol. 43, pp. 1017-1023, Nos. 4580-4624.]

Case referred to:

(1) *Devaynes v. Noble, Clayton's Case*, (1816), 1 Mer. 529, 572; 12 Digest 483, 3961.

APPEAL from a judgment of WYNN-PARRY, J., delivered on Mar. 11, 1947, and reported *sub nom.*, *Re Diplock's Estate. Diplock and Others v. Wintle and Others (and Associated Actions)*, [1947] 1 All E.R. 522.

The action was brought by persons entitled to share in such part of an estate as to which the testator died intestate to recover certain sums of money paid to the defendant, a charitable institution, by the executors of the testator's will under a direction which was subsequently declared by the House of Lords to be void for uncertainty; *Chichester Diocesan Fund v. Simpson* ([1944] 2 All E.R. 60). The action was one of a group of actions and WYNN-PARRY, J., held, *inter alia*, that the rule that money paid under a mistake of law was irrecoverable was of general application and that the plaintiffs could not maintain a claim for the return of the money as money had and received. On July 9, 1948 (reported *ante*, p. 318) the Court of Appeal allowed the appeals on the general grounds: (i) that the plaintiffs had a right *in personam* in equity against the recipients which was not liable to be defeated by the fact that the payment to them had been made under a mistake of law by the executors, and (ii) that the plaintiffs had a right *in rem* to the money recognised by equity, which would enable them to trace the money, providing only that it was possible to identify or disentangle it where it had been mixed with assets of the recipients. In the case of the money paid to the National Institute for the Deaf, the defendants

in the present case, on the facts as then supposed the Court of Appeal held that the plaintiffs had a right *in rem* to the money on the ground that it had been earmarked, for the purposes of the charity's own accounts, as Diplock money (*ante*, pp. 363, 364). On it being learned that the facts were not as supposed, the court admitted a new agreed statement of facts, heard argument thereon, and delivered the following supplementary judgment, holding that the rule in *Clayton's* case (1) applied, that all the plaintiffs could claim against the charity was a personal claim, and that their right to trace was non-existent. The facts appear in the judgment of LORD GREENE, M.R.

*Pascoe Hayward, K.C., J. L. Arnold and Cockle for next of kin.
Neville Gray, K.C., and Dunbar for the charitable institution.*

LORD GREENE, M.R. : The present question arises in the case of the National Institute for the Deaf. In our original judgment, in dealing with that case we took the view that *Clayton's* case (1) did not, on the facts as then supposed, come into question because the charity had in its own accounts treated a certain Post Office Savings Bank deposit account as representing the £1,500 of Diplock money. The view we took on that basis was as follows (p. 363 *ante*) :

Here, however, the charity has earmarked the sums withdrawn from its account and deposited at the Post Office Savings Bank. It seems to us that equity cannot disregard this. A volunteer, who mixes what turns out to be trust money with his own, can surely himself "unmix" it subsequently if he thinks fit to do so. And as the operation of equity is directed to preventing the volunteer doing what is unconscionable, surely it would be unconscionable for the volunteer, who, for his own purposes, has earmarked the trust money, to assert that what he has earmarked is not trust money but money which he is entitled to keep as his own.

The facts as they were then supposed to exist amounted to a clear case of what we described as earmarking, and we took the view that the charity, by doing that, had precluded itself from asserting that the specific item round which it had tied a label "Diplock money" was, in fact, their own free charity money. It turns out that the facts as they were stated in the agreed statement of facts were not as supposed. The earmarking of this money as Diplock money was not an earmarking generally, but was done for the sole purpose of precaution over against the possibility which was then contemplated that the Diplock money might have to be repaid. On that basis it is now agreed that that cannot be treated as a specific earmarking of that deposit account as representing Diplock money.

We have given leave to make some consequential amendments in the defence and we have admitted a new agreed statement of facts which now forms the basis of the present discussion. The case as now presented in respect of this deposit account is of a quite different character. It is said : "We do not now find anywhere in the accounts or anywhere else a specific earmarking of that particular account to the Diplock money, but we do find in the charity's accounts an account of its general fund to which this particular Post Office deposit account is attributable." It is admitted that, if that argument does not prevail, the rule in *Clayton's* case (1) will operate against the plaintiffs, because on the basis of that rule the whole of the Diplock money has been spent and so has disappeared. The present attempt to avoid that result, based on the propositions that we accepted in our original judgment, is founded on the form of the accounts kept by the charity. The charity kept several accounts. I am looking at the year ending March, 1937, when there was an account called the Hospital for Deaf Boys' Fund, an account called Mrs. F. E. Richards' Bequest, and an account for the Bath Homes for Deaf and Dumb Women, and a general account of what is called "General Fund." That system of accounting runs on during the relevant period. Each of those funds has its own separate balance sheet. There is no suggestion that separate bank accounts were kept for those different funds. The charity had one banking account. In each case the capital account for the fund is set out. On the left-hand side of this balance sheet appear assets which are attributed to that fund, and there is a balancing figure, described as "cash at bank," consisting of the attribution to each particular fund of what one may call a slice of the charity's banking account. Turning

to the year ending Mar. 31, 1939, the capital account of the general fund starts with the entry on its left-hand side of £21,559 "as per last account." Reference to the account of the general fund as at Mar. 31, 1937, shows that the Diplock £1,500 had in that year gone into the general fund, as is specifically referred to in the balance sheet of that year. The capital account general fund appears to have been an account into which legacies and gifts were carried which were not earmarked or allocated to one of the separate funds. Into it there was carried at the end of the year any excess of income over expenditure. Similarly, in every year in which the balance was the other way and there was an excess of expenditure over income, the deficit was carried to the debit of the capital account general fund. That account, therefore, was obviously a mere residuary account of what was left in the assets and liabilities of the charity after segregating the assets and liabilities attributable to the special funds.

The claim here relates merely to the £1,500. It is said that the plaintiffs can identify the £1,500 deposited at the Post Office Savings Bank and attribute it, or, rather, some rateable proportion of it, to the Diplock money on the basis that that particular deposit has been earmarked, to use the language of our previous judgment, as containing some proportion of the Diplock money. I do not read these accounts or the agreed statement of facts as leading to any such conclusion. This method of accountancy does not appear to me to amount to the sort of earmarking with which we were dealing on the original supposed facts. On the face of it, as I have said, it does nothing more than attribute to each particular fund which is comprised in these accounts, including the general fund, a slice of the charity's banking account. The charity, in point of fact, had money at the Post Office Savings Bank, as we know, and also a large sum of money in its general banking account. The figure described as "cash at bank" attributed to the various funds in these accounts makes no attempt to differentiate between these two accounts. There is nothing to show that the charity has definitely or finally or for some particular purpose attributed any particular bank monies to any particular account. There is nothing, on the face of the accounts, to prevent the charity applying the Savings Bank money for one of the other funds. What the accounts do is to treat the two banking accounts as a conglomerate mass and attribute slices of it to the various funds. That, no doubt, was a very convenient method of accountancy.

I do not find it necessary to go very deeply into an analysis of these various accounts. What I have said is, I think, sufficient to show that, in my opinion, this Savings Bank deposit money cannot be regarded as having been earmarked in the sense in which we used that expression in our earlier judgment. On the facts then before us we thought that there had been a definite clear segregation of a particular investment—a particular investment put away, so to speak, in the drawer as being and representing the Diplock money. I cannot find here that the Savings Bank deposit account has been treated in any comparable way, either in its entirety or in regard to some part of it. In the result, the claim, in my opinion, fails and all that the plaintiffs can claim against the National Institute for the Deaf, *Clayton's* case (1) having the effect which I have already stated, is a claim under a personal judgment and their right to trace is non-existent.

WROTTESELEY, L.J. : I agree.

EVERSHED, L.J. : I also agree. For the purpose of recording the matter and correcting the judgment, it seems to me that a convenient course would be to treat that part of the judgment (see pp. 363 C-D-364 (top) *ante*) beginning, "but before the applicability" down to and including the words, "could discuss *Clayton's* case (1) at all," as struck out and to substitute words to this effect : "On the facts of this case, as appearing from the defence which we have given leave to amend, the statement of admitted facts, and the supplementary statement of admitted facts now before the court, it seems impossible to treat any item held by this defendant as now identifiable wholly or in part with the Diplock money. We see, therefore, no ground for saying that the rule in *Clayton's* case (1) does not apply, and the plaintiff's claim *in rem* against this defendant fails accordingly."

LORD GREENE, M.R. : I entirely agree. It would be a very convenient course to treat the judgment as having been revised in the sense my brother has put it.

WROTTESELEY, L.J. : I also entirely agree.

Solicitors : *White & Leonard* (for next of kin) ; *Trollope & Winckworth* (for the charitable institution).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] A

LONDON COUNTY TERRITORIAL & AUXILIARY FORCES ASSOCIATION v. NICHOLS AND ANOTHER.

[COURT OF APPEAL (Scott and Asquith, LJJ., and Romer, J.), June 18, 21, July 16, 1948.] C

Rent Restriction—Crown property—House owned by territorial association—Application of Acts—Territorial Army Regulations, 1936 (S.R. & O., 1936, No. 1166), reg. 918.

The Crown is not bound by the Rent Restrictions Acts.

Wirral Estates, Ltd. v. Shaw, ([1932] 2 K.B. 247) and *Wheeler v. Wirral Estates, Ltd.* ([1935] 1 K.B. 294), followed. D

Clark v. Downes (1931) (145 L.T. 20) ; *Rudler v. Franks* ([1947] 1 K.B. 530) ; and *Territorial Forces Association v. Philpot* ([1947] 2 All E.R. 376), approved. E

A territorial association, like a Minister or organ of the central government, is a direct emanation from the Crown, and is entitled to this immunity of the Crown when it acts in pursuant of Crown purposes, not only in so far as it occupies land or buildings by itself or its military staff or officers, but also in so far as it exercises its powers, under reg. 918 of the Territorial Forces Regulations, 1930, of leasing redundant or unused premises to members of the public, that being a "Crown purpose."

[AS TO WHEN CROWN BOUND BY STATUTE, see HALSBURY, *Hailsham Edn.*, Vol. 31, p. 521, para. 681 ; and FOR CASES, see DIGEST, Vol. 42, pp. 689-693, Nos. 1036-1082.] F

Cases referred to :

- (1) *Clark v. Downes, Clark v. Mawby*, (1931), 145 L.T. 20 ; Digest Supp.
- (2) *Wirral Estates, Ltd. v. Shaw*, [1932] 2 K.B. 247 ; 101 L.J.K.B. 370 ; 147 L.T. 87 ; 96 J.P. 143 ; Digest Supp.
- (3) *Wheeler v. Wirral Estates, Ltd.*, [1935] 1 K.B. 294 ; 104 L.J.K.B. 30 ; 152 L.T. 111 ; Digest Supp.
- (4) *Rudler v. Franks*, [1947] 1 K.B. 530 ; [1947] L.J.R. 658 ; 176 L.T. 326.
- (5) *Territorial Forces Association v. Philpot*, [1947] 2 All E.R. 376.
- (6) *Mersey Docks v. Cameron, Jones v. Mersey Docks*, (1865), 11 H.L. Cas. 443 ; 20 C.B.N.S. 56 ; 6 New Rep. 378 ; 35 L.J.M.C. 1 ; 12 L.T. 643 ; 29 J.P. 483 ; 38 Digest 466, 286.
- (7) *Carr v. London & North Western Ry. Co.*, (1875), L.R. 10 C.P. 307 ; 44 L.J.C.P. 109 ; 31 L.T. 785 ; 39 J.P. 279 ; 21 Digest 288, 1020.
- (8) *West v. Jones*, (1851), 1 Sim. N.S. 205 ; 20 L.J.Ch. 362 ; 35 Digest 687, 4295. H

APPEALS by the tenants from orders of CROOM-JOHNSON, J., dated Nov. 25, 1947, granting to the landlords, a territorial association, possession of parts of a house held by the tenants on tenancies which had been determined by valid notices to quit. The appeals were dismissed. The facts appear in the judgment.

Pritt, K.C., and *Bernstein* for the tenants.

Roy Wilson for the association.

Cur. adv. vult.

July 16. **SCOTT, L.J.**, read the following judgment of the court. On Dec. 28, 1928, the Territorial Association for the County of London, acquired the freehold of a house, No. 75, Devonport Road, Hammersmith. By a written agreement of Feb. 11, 1941, the association let the ground floor and basement to the tenant, Nichols, on a weekly tenancy from Feb. 24, 1941, at 27s. 6d. a week. In October, 1943, the association orally let the first and second floors, also on a weekly tenancy, to the tenant, Parker. In August, 1947, both of the tenants were served by the association with notices to quit, the validity of which, as notices, is not challenged. Neither moved out. The association then sought, and, in the result, obtained from CROOM-JOHNSON, J., orders for possession. The present appeals are from those orders.

The main point raised in the two appeals is identical, but the tenant, Nichols, relies in addition on a ground of appeal, namely, estoppel, which is not open to the tenant, Parker. The main point raises three questions: (a) whether the Crown is or is not bound by the Rent Restrictions Acts, and (b) if it is not, whether the immunity of the Crown extends to entities so related to the Crown as is a territorial association; and if so, (c) whether it so extends for purposes which include the two lettings involved in the present case. If the association had been an ordinary lessor there would have been no ground for making (and, indeed, no jurisdiction to make) an order for possession. The notice to quit would merely have operated to constitute the tenants statutory as opposed to contractual tenants. If, however, the association are "the Crown," or a body invested with the Crown's relevant immunities, and if these exclude the operation of the Rent Restrictions Acts, the notices to quit are effective, the tenants have no answer to the claim, and the judgment *a quo* must be affirmed.

As regards the first question: "Is the Crown bound by the Rent Restrictions Acts?" we entertain no doubt that the general answer (leaving aside questions as to who or what is to be taken to be "the Crown") is "No." There are five direct authorities on the point all giving the same answer, two of them being decisions of this court and binding on it: *Clark v. Dounes* (1) in the Divisional Court; *Wirral Estates, Ltd. v. Shaw* (2) in the Court of Appeal; *Wheeler v. Wirral Estates, Ltd.* (3) in the Court of Appeal; *Rudler v. Franks* (4) in the Divisional Court; and *Territorial Forces Association v. Philpot* (5), a decision of a court of first instance. It is quite true that in the Court of Appeal decisions the point was in some degree assumed, certainly not elaborately contested, but authorities were cited (as appears from the summary of the argument in *Wirral Estates, Ltd. v. Shaw* (2) ([1932] 2 K.B. 247, 252)), and the court clearly decided that the Crown was not bound. Counsel for the tenants contended, notwithstanding these specific and binding decisions on the actual statutes involved in the present case, that while, in general, the Crown was not bound by a statute except by express provision therein or necessary implication, yet this rule was subject to an exception in the case of all statutes passed "for the public good," and that the Rent Restrictions Acts were of this character. For this proposition he relied on a passage in BACON'S ABRIDGMENT, cited in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 31, pp. 521, 522, footnote (g). We do not know what precise meaning attached to the words "for the public good" when BACON'S ABRIDGMENT was published. Possibly the words had a meaning narrower than would attach to them today. It is difficult to suppose at the present day that any public statute is not, in theory at least, directed to the welfare of the public, and counsel's argument on this point, if accepted, would compel us to say that such statutes as the Income Tax Act, 1842, and the Public Health Acts (neither of which are binding on the Crown) are not for the public benefit. But if the ancient rule ever had, in fact, the wide meaning claimed for it, we can only conclude that it has been eaten away by exceptions. In any case we are precluded from giving effect to that wide meaning in the particular case of the Rent Restrictions Acts by decisions which, as indicated above, bind us.

Accordingly, we have to consider next whether, assuming the Crown is immune from the operation of the Rent Restrictions Acts, the association enjoys that immunity in respect of the tenancies involved in these appeals. Such an inquiry logically falls into two parts: (1) Is the association a sufficiently intimate "emanation" from the Crown to attract the contagion of the Crown's immunity; (2) if so, can it claim that immunity in respect of these particular transactions,

namely, leases of property owned by the association to ordinary, non-military tenants. These questions, though logically distinct, in practice tend to coalesce in the sense that the answer to both depends to a great extent on the provisions of the Territorial and Reserve Forces Act, 1907, which not only affect the status of territorial associations, but the specific transactions in which they must, or may lawfully, engage. To these provisions, accordingly, we next advert. The material provisions are, in the main, the following: s. 1 (1), (2), and (3) (b); s. 2 (1) and (2) (a) and (c); s. 3 (1); and s. 4 (1) (b). Under s. 4, which empowers the Army Council to make regulations, a number of regulations were made, of which the most important for the present purpose is reg. 918 of the Territorial Army Regulations, 1936. This reads as follows:

Property vested in or held by an association may be let or sub-let in any manner (political meetings not excluded) consistent with the military requirements of the T.A., and with the terms on which the property is held, provided that—(a) proper guarantees are obtained that any damage caused will be made good by the users; (b) the rent charged for the use of the property is fixed at an amount which is at least sufficient to cover the expenses incidental to the letting, due regard being had to the fact that, if association property is so let or sub-let, it becomes liable to assessment for local rates on the value of the use for other than military purposes.

It seems to us to emerge clearly from a conspectus of these provisions: (1) that the Army Council and the Secretary of State for War, who is its head and mouthpiece, are direct emanations from the Crown, that they share its privilege of immunity from the operation of statutes except in so far as the contrary intention appears expressly or by necessary implication from the terms of the statute or statutes in question, and that the contrary intention does not appear in the Rent Restrictions Acts, and hence a lease granted by the Army Council itself would not be a lease to which those Acts apply; (2) that under the Territorial and Reserve Forces Act, 1907, certain administrative functions of the Crown are transferred to the territorial associations; (3) that these functions are to be exercised by such associations under the strictest control and supervision by the Army Council; (4) that one of such functions is that of holding land and letting it (when not usable or being used for direct military purposes) to ordinary members of the public.

What light do these considerations throw on the two logically distinct, but interlocked, questions which we have formulated above? (A) As regards *status*, we are of opinion that a territorial association is, like a Minister or organ of the central government, a direct emanation from the Crown, and not in this respect comparable with local government authorities. These last do not, in general, attract the relevant Crown privilege in respect of statutes, though they do so in exceptional cases where they fulfil functions which, though chargeable on the local rates, are of nation-wide scope and import, e.g., the provision of buildings (such as judge's lodgings and assize courts) for the administration of justice. We think that the function of helping to raise a Territorial Army is typically a function of this order (the King is the fountain of justice and the head of the armed forces), and contrasts sharply with functions, semi-commercial and discharged previously by private commercial bodies, such as are vested in public corporations like the Mersey Docks Board, which were held by the House of Lords, accordingly, in *Mersey Docks & Harbour Board v. Cameron* (6) not to exempt that body from rates. This matter is discussed at length in an article by the late SIR WILLIAM HARRISON MOORE in 23 LAW QUARTERLY REVIEW, p. 12, *et seq.* The article acknowledges and illustrates the obscurity of the question who, for purposes such as the present, is to be treated as the Crown or as a body "around which the Crown's shield is thrown." We are, however, clearly of opinion that the Territorial Association falls on the "privileged" side of a line which cannot be precisely drawn. (B) If it is a pre-requisite of enjoying the privilege that the body concerned should not only enjoy Crown status but be, in the transaction under review, acting in the pursuit of Crown purposes, we are of opinion that territorial associations attract Crown immunity, not only in so far as they occupy land or buildings by themselves or their military staff or officers, but also in so far as they exercise the powers (granted them by the present statute) of leasing redundant or unused premises to members of the public. This, in our decided view, is a "Crown purpose." The relevant "purpose," in our view, is that of the territorial association as

lessor, not that of the unofficial lessee. To the lessee, no doubt, nothing matters except that he is getting somewhere to live. That is his "purpose," and to him it is a matter of indifference why, how, or from whom he comes to obtain his lease. The purpose of the lessor association, on the other hand, is, if and when and so far as premises at its disposal are not needed for the occupation of armed forces, but may in time be needed for that purpose again, to ensure, in pursuance of the powers and duties conferred and imposed on it by the Act, that in the interim such premises do not run to waste unused and unlet, but rather that they shall be economised and exploited for the benefit of the public and the Exchequer. Much confusion is caused in this matter by importing liability to rates as a relevant criterion. In rating, occupation is the test. So long as the Crown occupies premises by its servants, those servants do not themselves occupy, and are, therefore, not rateable, and the Crown itself, on whose behalf they are there, is immune from rates. So soon, however, as the Crown lets to an independent occupier, that occupier becomes rateable because he occupies. Regulation 918 is careful to affirm this position as to rateability when a territorial association lets to a private individual. This circumstance has, in our view, no bearing whatever on the problem presented by the present appeals. To say that, if the association lets premises acquired and held by it for Crown purposes to X and X thereby becomes rateable, it follows that the association ceases to hold the premises for Crown purposes is a *non sequitur*. Our conclusion, therefore, on this, the main point in the appeal, is that the association is not bound by the Rent Restrictions Acts in respect of the material leases and is not precluded by those Acts from asserting its claim to possession.

[His LORDSHIP added that in the case against Nichols a further point was relied on by the tenant, founded on estoppel. In the amended particulars the point was pleaded as follows :

The plaintiffs are estopped from alleging that the premises are not controlled premises by reason of the representation, express or implied, made by their agents in two rent books to the effect that the premises were controlled premises, on which representation the defendant acted to his detriment by not thereafter seeking other premises to occupy in lieu thereof.

CROOM-JOHNSON, J., in delivering judgment in the case, referred to the well-known passages on the subject of estoppel contained in the judgment of BRETT, J., in *Carr v. London & North Western Ry. Co.* (7) (L.R. 10 C.P. 307, 316, 317). LORD CRANWORTH, V.-C., expressed himself in similar terms in *West v. Jones* (8) (1 Sim N.S. 205, 207) as follows :

... where a party has, by words or by conduct, made a representation to another leading him to believe in the existence of a particular fact or state of facts, and that other person has acted on the faith of such representation, then the party who made the representation shall not afterwards be heard to say that the facts were not as he represented them to be.

Apart altogether from the fact that Nichols gave no very clear evidence proving that, but for the statements in the rent book, he would have sought other premises, the court thought that the plea of estoppel must fail. A letter written to Nichols by the landlords' agents on Feb. 10, 1941, must have conveyed to his mind the fact that he could at any time be dispossessed on one week's notice, and representations, in order to operate as estoppels, must be free from ambiguity in their terms. Furthermore the plea of estoppel must fail on the ground that the statements in the rent book, if amounting to a representation at all, constituted a representation of law and not of fact.] In our judgment, both appeals fail and must be dismissed with costs.

Appeals dismissed with costs.

Solicitors : *Ralph J. Myers* (for the tenants); *Fladgate & Co.* (for the Association).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

BOYT v. BOYT.

[COURT OF APPEAL (Tucker and Somervell, L.JJ.), July 9, 1948.]

Divorce—Custody—Custody pending suit—Preservation of status quo until trial. Husband and Wife—Proceedings by wife—Injunction—Matrimonial home belonging to wife—Right to exclude husband.

A husband and a wife and their three children occupied as their matrimonial home a house belonging to the wife. On Dec. 16, 1947, the wife left the house, alleging the husband's cruelty as her reason for doing so, and she went to her brother's house, taking with her the two daughters, aged 16 and 12, but leaving behind the son, aged 3, in the care of his nurse. Her solicitors later informed the husband that she could not return to the house while he was there, and, accordingly, he left on Dec. 26, and the wife returned there with her younger daughter. On Mar. 30, 1948, the husband telephoned saying that he would be returning to the house on the following day, and the wife thereupon arranged to go back to her brother's house with the children. She sent the son and the younger daughter in the car with the nurse, but the husband stopped the car and took the daughter back with him to the wife's house. On Apr. 28, the wife filed a petition for divorce on the ground of the husband's cruelty. By his answer the husband denied the wife's allegations and asked for restitution of conjugal rights. On May 1, the husband took the son and the nurse back to the wife's house. The wife applied (a) for the custody of the younger daughter and the son pending suit, and (b) for an injunction to restrain the husband from entering her house:—

HELD: (i) in regard to the custody of children *pendente lite*, the status quo which it was desirable to preserve, bearing in mind that the interests of the children were the paramount consideration, was the state of affairs which existed on Mar. 29, 1948, and, therefore, the wife was entitled to the custody of the children until the suit was heard. Where there was no allegation against the husband or the wife in regard to his or her conduct as a parent, it was the duty of the court to decide what was best for the child irrespective of any preference which the child might express for one parent or the other.

(ii) where property belonged to the wife, the court had jurisdiction to grant an injunction to restrain the husband from entering the premises, but the jurisdiction was one which would be exercised with care, especially where it involved the breaking up of the matrimonial home. In the circumstances of the case, the wife was entitled to the injunction.

Shipman v. Shipman ([1924] 2 Ch. 140) and *Symonds v. Hallett* (1883) (24 Ch.D. 346), applied.

[AS TO INTERIM ORDERS WITH RESPECT TO CUSTODY OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 10, pp. 721-723, paras. 1102-1104; and FOR CASES, see DIGEST, Vol. 27, pp. 418, 419, Nos. 4232-4248.]

AS TO WIFE'S RIGHT TO INJUNCTION FOR PROTECTION OF HER PRIVATE PROPERTY, see HALSBURY, Hailsham Edn., Vol. 16, p. 739, para. 1209; and FOR CASES, see DIGEST, Vol. 27, pp. 258, 259, Nos. 2278-2282.]

Cases referred to:

- (1) *Shipman v. Shipman*, [1924] 2 Ch. 140; 93 L.J.Ch. 382; 131 L.T. 394; 27 Digest 259, 2282.
- (2) *Symonds v. Hallett*, (1883), 24 Ch.D. 346; 53 L.J.Ch. 60; 49 L.T. 380; 27 Digest 259, 2281.

INTERLOCUTORY APPEAL by the wife from an order of BARNARD, J., dated June 18, 1948, refusing her applications for (a) the custody of the children until the hearing of her divorce petition, and (b) an injunction to restrain the husband from entering on premises which had been the matrimonial home but were her property. The Court of Appeal allowed the appeal and granted to the wife the custody of the children *pendente lite* and the injunction. The facts appear in the judgment of TUCKER, L.J.

Holroyd Pearce, K.C., and *J. E. N. Russell* for the wife.
Raeburn, K.C., and *Ormrod* for the husband.

TUCKER, L.J. : This is an appeal from a decision of BARNARD, J., in a divorce suit whereby he refused the wife's application for custody pending suit of two children of the marriage, a son, aged 3 years and 10 months, and a daughter, Suzy, aged 12½. He also refused the application of the wife for an injunction to restrain her husband from entering on the premises known as Enford House, Enford, the property of the wife, the petitioner in the suit.

The husband had been serving in the army, and after leaving the army he returned to what had been the matrimonial home, namely, Enford House, Enford. During the war the wife had been with the children at Shrewsbury at the house of her brother. The petition by the wife is dated Apr. 20, 1948, and is based on allegations of cruelty. By his answer the husband denies these allegations and alleges that on Dec. 16, 1947, the wife withdrew from cohabitation with him and has refused, and continues to refuse, to return and render him conjugal rights, and he asks for an order that she should do so. On Dec. 16, 1947, the wife left Enford and went to her brother's house at Shrewsbury. She left the little boy, Henry, behind in the care of his nurse, but she took the girls with her. There was another girl, called Bula, who is not concerned in the present proceedings because she is over 16. A week or two later the wife's solicitors on her behalf informed the husband that she could not return to Enford while he was there. Accordingly, on Dec. 26 the husband left and the wife went back to Enford with the girl, Suzy. The husband stayed with his brother not far away. On Mar. 30 the husband telephoned saying that he was returning the next day, and, as the wife's attitude, rightly or wrongly, was that she could not be in the house with him because of the state of her health, which, she said, was due to his treatment, she arranged to go back to her brother's. She sent Suzy and Henry with the nurse in the car, but the husband stopped the car, and took Suzy back to Enford with him. On May 1, he also took Henry and the nurse to Enford. On May 28 this summons was issued. What appears to have led up to the telephone conversation of Mar. 30, was that the husband had been suggesting that he should approach the wife's father for financial assistance. The wife was the one who had the means, the house at Enford belonged to her, and, when she left, she paid £500 into her husband's account, but finance seems to have been a difficulty and the husband had been asking for £5,000 with a view to setting up in business, and he suggested approaching the wife's father. The wife resented that very much, and it would appear that, as the immediate result of that difference of opinion, the husband telephoned to say that he was coming back.

One of the matters which has to be taken into consideration is what was the *status quo* which in cases such as this it is desirable to preserve, always bearing in mind that the interests of the children are, of course, the paramount consideration. I think that really the *status quo*, or, at any rate, the reasonable state of affairs, which should be preserved until the trial is the state of affairs which existed on Mar. 29. At that time (and it is a matter not to be overlooked) the petition had not been filed. I think the position would have been stronger from the wife's point of view if it had, but it had not. However, with these unfortunate differences existing and with this matrimonial suit looming in the background as a possibility, I should have thought that, other things being equal, the proper and convenient arrangement until the divorce suit was heard would have been that which existed on Mar. 29, namely, the wife in her own house with her children and with a nurse and the husband living somewhere else. It was the husband who disturbed that state of affairs by taking action which was calculated—and, I think, intended—to bring pressure on the wife. The action he took was to announce his return, which he knew would involve his wife's departure, then the interception of Suzy, and the final taking away of Henry. I think those were all acts done with a view to putting pressure on the wife either to give up the divorce proceedings or to return to the matrimonial home.

It is clear from the authorities that this court has jurisdiction in a suitable case to grant an injunction such as is asked for in the present proceedings where the property belongs to the wife. It is a discretionary remedy which will be exercised with care, and especially so where it involves the breaking up of the matrimonial home. Dealing with a matter of this kind in *Shipman v. Shipman* (1) ATKIN, L.J., said ([1924] 2 Ch. 140, 145, 146) :

The rights given to a wife [under the Married Women's Property Act, 1882, s. 12] are much wider. She was intended to have all the rights and all the remedies that every owner of property was intended to have, including a right to exclusive possession, and the question is whether she has those rights in respect of the matrimonial home against her husband. That is a matter of public importance. It is the duty of husband and wife to live together, and if one or other wilfully absents himself, that is a matrimonial offence, and if a wife, without good cause, seeks to exclude her husband from the matrimonial home, she seeks to get the court to enable her to evade a duty. Therefore I should be reluctant to lay down a rule that a wife can treat her husband in the same way as a stranger.

That shows the care which must be taken where a remedy of this kind is being invoked. In *Symonds v. Hallett* (2) BOWEN, L.J., said (24 Ch.D. 346, 352, 353) :

I think the question we have to decide now resolves itself into this. Here is a husband seeking to enter a house settled to his wife's separate use, and his wife has instituted a suit at the hearing of which will be decided the question whether she has the right to say, "No, you shall not come here," and meanwhile, under the circumstances of the case and until that very important legal matter is decided, what is most convenient and most just to be done to preserve the *status quo* as far as possible without prejudicing the rights on either side? I think upon the whole that the most convenient, and most just, and most wise course is to let the wife enjoy what it is quite clear she has, the house, and to let the injunction stand which prevents the husband from coming there only until the hearing.

Therefore, it seems to me that this court clearly has jurisdiction, if it thinks right to exercise it in the particular circumstances, to grant an injunction to the wife.

Whether or not that injunction should be granted in this case is very closely connected with the question : To whom should be granted the interim custody of these children? It seems to me that the case really resolves itself into this : What in the circumstances is the best for the children, having regard to the fact that the wife is the owner of this house and *prima facie* entitled to occupy it and live there? It seems to me that what counsel for the wife said with regard to the little boy, Henry, is really unchallengeable, namely, that it would be wrong to deprive the wife of his custody. He clearly wants the care of a mother, and nothing whatever can be said against this wife as a mother—and nothing can be said against her as a wife unless it eventually turns out that her action in leaving on Dec. 16, 1947, was without reasonable cause. With regard to Suzy, the matter is not so clear. The learned judge saw her and I accept without question what he said as to the view he formed, that she, and her sister Bula too, passionately desired to have both their parents in the matrimonial home. Counsel for the husband has pressed us to see Suzy for ourselves. We did not think that that was desirable. I am quite prepared to accept what BARNARD, J., stated as the result of his interview. As regards a preference which she might express for one parent rather than the other, I think that is a matter as to which it would be very undesirable to question her. She has lately been with her father, and, in any event, it is our duty to decide in all the circumstances where it is best for her to be, irrespective of any preference she may have formed in a case where really nothing serious can be, or is, alleged against either of the parents in regard to their conduct as a father or as a mother. Therefore, I do not think it would really have been right for us to have interviewed Suzy. With regard to her, again, I think a child, especially a girl of 12½, requires the care and attention of a mother, although the case is not so strong as in the case of the little boy. As, however, I think that the little boy should go to the wife, so, I think, should Suzy. I think it is undesirable to break up this family. The proper place pending suit, for the wife to be with these two children is in the house that belongs to her, where she was on Mar. 30. For these reasons, I think that this appeal succeeds.

SOMERVELL, L.J. : I agree and I do not desire to add anything to what has been said by my Lord.

Appeal allowed.

Solicitors : *Collissons & Dawes*, agents for *Wragge & Co.*, Birmingham (for the wife) ; *Hodding, Jackson & Co.*, Salisbury (for the husband).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

LANGFORD PROPERTY CO., LTD. v. GOLDRICH.

[KING'S BENCH DIVISION (Birkett, J.), April 22, June 11, 1948.]

Rent Restriction—"Dwelling-house"—Two separated flats let together—Date for considering rateable value—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 16—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 7.

Estoppel—Landlords' assumption of applicability of Rent Acts—Denial four years later.

By an agreement, dated July 1, 1941, two flats, which up to that date had been let separately, were let, together with a garage, to one tenant on a quarterly tenancy commencing on Sept. 1, 1941. The flats were on the same floor, but were separated by other flats. In 1942, the landlords gave notice to the tenant to quit, but said that they would grant him a new tenancy at an increased rent. On Aug. 18, 1943, the landlords' agents wrote to the tenant enclosing a notice to quit on Dec. 1, 1943, and saying: "Your tenancy of this flat having been determined, we are writing to inform you as to the terms on which you are entitled to remain in occupation . . . under the provisions of the Rent and Mortgage Interest Restrictions Acts." On Sept. 3, 1943, the landlords gave the tenant formal notice of an increase in the rent "in respect of the rates," and there was further correspondence regarding the position under the Rent Acts. On May 27, 1947, the landlords gave the tenant a further notice to quit expiring on Sept. 1, 1947, later pointing out that they had been under a misapprehension with regard to the applicability of the Rent Acts, which they now said did not apply owing to the rateable value of the premises. On Apr. 1, 1939, the rateable value of one flat was £98 and of the other £92. On Mar. 24, 1941, there was an amendment to the valuation list reducing the rateable value to £54 and £52 respectively, taking effect from Apr. 1, 1939. On June 19, 1942, there was a further amendment of the rateable values to £48 and £46 respectively, with effect from Apr. 1, 1941. At no time were the two flats assessed together as one dwelling-house.

HELD: (i) the flats did not constitute a separate dwelling-house within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16, nor was each flat let as a separate dwelling, and, therefore, the Rent Acts did not apply.

Sheehan v. Cutler ([1946] K.B. 339) and *Selwyn v. Hamill* ([1948] 1 All E.R. 70), considered.

(ii) even if the premises were a "separate dwelling," having regard to the Rent and Mortgage Interest Restrictions Act, 1939, s. 7, the date for the consideration of their rateable value was Apr. 1, 1939, and on that day the rateable value exceeded £100.

(iii) the landlords were not estopped by their letters, in which they assumed the applicability of the Rent Acts, or by the notice of increase of rent which purported to have been given under those Acts, from pleading that the Acts did not apply.

Griffiths v. Davies ([1943] 2 All E.R. 209), applied.

[AS TO PREMISES WITHIN THE RENT RESTRICTIONS ACTS, see HALSBURY, Hails-ham Edn., Vol. 20, pp. 312-316, paras. 368-373; and FOR CASES, see DIGEST, Vol. 31, pp. 557-559, Nos. 7042-7067.]

Cases referred to:

- (1) *Sheehan v. Cutler*, [1946] K.B. 339; 115 L.J.K.B. 337; 174 L.T. 411; 2nd Digest Supp.
- (2) *Selwyn v. Hamill*, [1948] 1 All E.R. 70.
- (3) *Haldane v. Sinclair*, 1927 S.C. 562; Digest Supp.
- (4) *Griffiths v. Davies*, [1943] 2 All E.R. 209; [1943] K.B. 618; 112 L.J.K.B. 577; 169 L.T. 201; 87 Sol. Jo. 390, C.A.; 2nd Digest Supp.
- (5) *Bradshaw v. McMullan*, [1920] 2 I.R. 412, 490; 54 I.L.T. 109; 21 Digest 142 n.
- (6) *Maritime Electric Co., Ltd. v. General Dairies, Ltd.*, [1937] 1 All E.R. 748; [1937] A.C. 610; 106 L.J.P.C. 81; 156 L.T. 444; Digest Supp.

ACTION by the landlords for possession of two flats which, by an agreement dated July 1, 1941, had together been demised to the tenant on a quarterly

tenancy commencing on Sept. 1, 1941. The tenant, who counterclaimed for money paid in excess of the standard rent, contended that (1) the flats together comprised one dwelling-house within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16; (2) although the flats had previously been let separately, they had not before been let together as one dwelling, and, therefore, for the purposes of assessing the rateable value, the "appropriate day" was July 1, 1941; (3) alternatively, the demise amounted to the separate letting of each of two dwellings; and (4) in any event, the landlords were estopped, by a series of letters and a notice of increase of rent in which they had assumed the applicability of the Rent Acts, from now denying that those Acts were applicable to the demised premises. **BIRKETT, J.**, gave judgment for the landlords both on the claim and on the counterclaim.

Safford, K.C., and *Heathcote-Williams* (with him *L. A. Blundell*) for the landlords.

Scott Henderson, K.C., and *I. H. Jacob* for the tenant.

Cur. adv. vult.

June 11. **BIRKETT, J.**, stated the facts and continued: I now turn to the defences which were raised. Paragraph 3 of the defence said:

The two flats and garage referred to in the amended statement of claim were first let together on July 1, 1941, under and by virtue of the said tenancy agreement, and thereby constituted a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, at all material times applied and still apply.

By an amended defence the tenant denied that the rateable value of the premises exceeded the sum of £100 on the appropriate day as was alleged in the statement of claim. He further said:

Or in the alternative each of the two flats, *viz.*, Nos. 13 and 15, West Heath Court, North End Road, Golders Green, comprised in the said tenancy agreement was at all material times and still is a dwelling-house within the meaning and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and the defendant claims to be entitled to the protection of the said Acts in respect of his possession and occupation of the said flats.

The tenant also raised the defence that the landlords were estopped from alleging that the tenant was not entitled to the protection of the Rent Acts because the notice of the increase of rent by the landlords' agents showed that the landlords intended that the tenant should act on the basis that he was the tenant of the two flats subject to the provisions of the said Acts, and the tenant, induced thereby and not otherwise, did so act on the said date. Then the tenant went on to deny that the landlords were entitled to possession and it was not reasonable to give possession. He was still in possession and claimed he was entitled to be so. The counterclaim having repeated that defence, the tenant thereupon claims that he is entitled to recover the money overpaid beyond the standard rent, on the footing that he is entitled to the benefit of the Rent Acts. The counterclaim itself was for £400, but I was told that, if it succeeded, it should be, on a proper calculation, for £337 10s. 0d.

The Rent and Mortgage Interest Restrictions Act, 1939, s. 3, provides:

(1) Without prejudice to the operation of the two preceding sections in relation to any dwelling-house to which the principal Acts applied immediately before the commencement of this Act, the principal Acts, as amended by the last preceding section, shall, subject to the provisions of this section, apply to every other dwelling-house of which the rateable value on the appropriate day did not exceed (a) in the metropolitan police district or the city of London, £100.

In s. 7 (1), under "Interpretation," these words occur:

... "rateable value on the appropriate day," in relation to any dwelling-house, means (subject to the following provisions of this section) the value shown, with respect to that dwelling-house, on that day in the valuation list then in force, as the rateable value or, where the net annual value differs from the rateable value, as the net annual value.

That section makes it clear that when you are considering the rateable value on the appropriate day you have to look at the value shown in respect of the particular dwelling-house on that day in the valuation list then in force, and, further, s. 7 (1) provides: "'the appropriate day' means, as respects the administrative county of London, Apr. 6, 1939, or, as respects the remainder

of England, Apr. 1, 1939." Looking at the rateable value on the appropriate day, Apr. 1, 1939, that rateable value would appear, on the figures I have cited, to be in excess of £100. The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16, provides :

"Dwelling-house" has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let.

Counsel for the landlords contended that the premises (*i.e.*, the two flats) which were the subject of the agreement of July 1, 1941, could not possibly come within that definition, and were not a dwelling-house within the meaning of the statute. Counsel for the tenant, on the contrary, said : "I put it in two ways. First of all, the tenant was in occupation of two dwelling-houses, to which these Acts applied, namely, No. 13 and No. 15, and he was entitled to the protection of the Rent Acts because of that fact. Alternatively, if that is not acceptable, the tenant was in occupation of one dwelling-house, that is, two flats regarded as one, and July 1, 1941, is the date which you must look at to ascertain the status of that house," and he referred me to s. 7 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, which provides :

If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown.

The conclusion to which I have come is that these premises were not a dwelling-house within the meaning of the Rent Acts, and on that matter there are two cases which I think are rather helpful, although they are not exactly on the point in question. The first is *Sheehan v. Cutler* (1) which dealt with suitable alternative accommodation under the Act. The headnote reads ([1946] K.B. 339) :

"Suitable alternative accommodation available for the tenant" within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sub-s. 3 (*sic.*) contemplates accommodation in a single dwelling-house and is not satisfied by the offer of a house with the additional accommodation of one room in a separate house. MORTON, L.J., who dealt rather fully with the matter, said (*ibid.*, 342) :

What this court has to determine is whether accommodation in two separate houses, for which provision is made in the judge's order, is "suitable alternative accommodation" within the meaning of s. 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and that, in turn, depends on whether the proposed accommodation falls within the terms of s. 3 (3). That sub-section applies to the present case, and provides, by sub-cl. (a), that "accommodation shall be deemed to be suitable" if it consists of "a dwelling-house to which the principal Acts apply." It may be pointed out that under the Interpretation Act, 1889, the words "a dwelling-house" would include the plural unless a contrary intention appears. In my opinion, for reasons which I shall mention later, a contrary intention does appear in the present instance. The sub-section goes on to provide by sub-cl. (b) as an alternative, that accommodation shall also be deemed to be suitable if it consists of "premises to be let as a separate dwelling" on terms which will afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of "a dwelling-house to which these Acts apply." The repeated use of the singular is to be noted. So far, two alternatives have been stated, but there follows a further qualification which the accommodation offered must possess if it is to be deemed to be suitable. It must be "reasonably suitable to the needs of the tenant and his family as regards proximity to place of work." It seems to me that in this sub-section the legislature is regarding the tenant and his family as one unit and is providing that that unit is to be accommodated in one dwelling-house under sub-cl. (a) or in premises to be let as one separate dwelling on terms which answer the description given in sub-cl. (b). The provisions which follow, and in particular the provisions of sub-cl. (ii) in reference to "the needs of the tenant and his family" in regard to the extent and character of the accommodation, point in the same direction. We were referred to the definition of "dwelling-house" in s. 16 of the Act where it is said that "dwelling-house has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let." That perhaps, does not carry the matter much further.

The learned LORD JUSTICE goes on to deal further with those matters and comes to the conclusion, with which the other members of the court agree, that the question of suitable alternative accommodation is not satisfied by the offer

of a house with the additional offer of a single room in another house but contemplates similar accommodation to that which he originally had.

In *Selwyn v. Hamill* (2) the headnote reads ([1948] 1 All E.R. 70):

A landlord, who had become landlord by purchase in 1945, claimed possession of a controlled dwelling-house, offering the tenant alternative accommodation consisting of a living-room, kitchen and bathroom in one dwelling-house and a bedroom in a separate dwelling-house, the two premises, although under the same roof, being divided by a third dwelling-house. HELD: (i) the accommodation offered did not consist "of premises to be let as a separate dwelling" as required by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (3) (b), and was not, therefore, "suitable" within the meaning of the section. *Sheehan v. Cutler* (1) applied.

TUCKER, L.J., in the course of that case—*Selwyn v. Hamill* (2)—said (*ibid.*, 71):

It is said by counsel for the landlord that, this point not having been taken in the court below and the judge's attention not having been drawn to *Sheehan v. Cutler* (1), we ought to send the case back for a new trial to give the judge an opportunity of considering whether No. 4A alone might not constitute reasonably suitable accommodation. As it appears clear from the judge's note that this point, which is a pure point of law, was never taken in the court below, if there were any possibility that, on a further investigation of the facts, the judge might come to the conclusion that No. 4A was reasonably suitable accommodation, I should certainly have been disposed to send the case back for a new trial because it is most unsatisfactory that cases should be dealt with without the tribunal to which jurisdiction is given under these Acts having had an opportunity of investigating the facts fully and properly. On the facts of this case, however, I am driven to the conclusion that it would be impossible as a matter of law for the judge to find that No. 4A by itself was reasonably suitable accommodation for this family which consists of an elderly invalid lady and two grown-up daughters who are working. The living-room which would have to be used as a bed-sitting room and kitchen could not possibly be said to be accommodation which was reasonably suitable for these ladies. I, therefore, think that it would not be right to order a new trial and we are bound to allow this appeal.

That was a case where the alternative accommodation consisted of premises, which although under the same roof were separate, 4A and 2A being separated by 3A, and it was held that that could not be regarded as a separate dwelling-house. The matter, therefore, on this first point, in my opinion, must be decided in favour of the landlords. The letting in the agreement of July 1, 1941, is not of a dwelling-house within the meaning of the Act.

With regard to the second point which was raised by the landlords' counsel, namely, if these two flats can be regarded as a dwelling-house within the meaning of the Act of Parliament, then, on the appropriate day, Apr. 1, 1939, the rateable value was clearly over £100. There, again, the landlords would be entitled to succeed. Counsel for the tenant said: "I am not disposed to agree that that is the date which has to be taken into account. The rateable value is to be ascertained with regard to July 1, 1941. If one tenant is in No. 13 and another in No. 15 these Acts apply. They are two separate dwellings. The fact that there is one demise makes no difference, the fact that there is one rent for both makes no difference." He referred me to the provision in the Act of 1920, s. 12 (6), that the Act once effective is always effective. That was countered by counsel for the landlords, who referred me to *Haldane v. Sinclair* (3), and argued that, as the two flats had been let as one demise, the landlords were entitled to rely on that case. Counsel for the tenant further said: "If this is a separate dwelling-house, as I contend it is, it became so for the first time on July 1, 1941, and you must look at s. 7 (2) and (3) of the Act of 1939." There was, he said, no separate assessment of the two flats as a separate dwelling at any time. Of course, that is quite right. The only assessment before me was the assessment on the valuation list of the two flats singly and individually, and "the appropriate day" he, therefore, submitted, could not be before July, 1941, because before then it was not a separate dwelling. There never having been any new assessment, the onus was on the landlords to show that the rateable value was over £100, and he said it was impossible for them to do that because there never was a separate rateable value for those two flats treated as one. The view I take of the facts of this case, having regard to the provisions of s. 7 of the Act of 1939, is that I must look at the rateable value as shown in the valuation list as on Apr. 1, 1939, and if it is conceded

that that is the appropriate day, then the rateable value is over £100. I am of the opinion that that is the date to which I ought to look.

The only other point, therefore, with which I ought to deal, is the point raised by counsel for the tenant with regard to estoppel. He cited *Griffiths v. Davies* (4), which was a case in the Court of Appeal the headnote of which is ([1943] K.B. 618):

In an action by the landlord of a dwelling-house to which the Rent Restrictions Acts applied, in which he claimed possession for non-payment of rent, the tenant did not take the point that the rent was in excess of the standard rent plus the permitted increases and judgment was given for possession, but suspended so long as the current rent and 2s. 6d. a month off the arrears was paid. The tenant paid the current rent and instalments of the arrears, but later he applied to the county court under s. 11 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, to determine the standard rent and the current lawful rent:—HELD, that the tenant was not estopped from pursuing his application by the judgment in the possession action, since the doctrine of estoppel by judgment did not apply where the result would be to compel the court to give a judgment which it was by statute prohibited from giving, namely, in the present case, to determine the standard rent otherwise than in accordance with the provisions of the Rent Restrictions Acts.

LORD GREENE, M.R., in dealing with the point, said (*ibid.*, 619):

It is said that, having regard to the language of the Rent Restrictions Acts, the judgment in the proceedings in 1933, which might, in cases not governed by those Acts, have precluded the tenant from alleging now that the rent was other than £26, do not prevent her from doing so. It is argued that the principles of estoppel or of *res judicata* do not apply where to give effect to them would be to go counter to some statutory direction or prohibition, and that s. 1 of the Act of 1920 is a statutory direction to the court to abstain from giving a judgment for recovery of rent which is shown to the court to be excessive. It appears to me beyond all question that, if, in proceedings where the point is not taken, judgment for an amount of conventional rent which is excessive is given against a tenant, and, later, an action is brought against the tenant for the conventional rent at the same rate, in which later proceedings it is shown that that rent is excessive, the earlier judgment cannot give to the court a jurisdiction which s. 1 of the Act of 1920 has denied to it. In other words, if two actions are brought in respect of two different rent periods, and in the first action judgment is given for the conventional rent and in the second it is shown that the conventional rent is too high, the court is bound in the second action to give effect to the provisions of s. 1 and to refuse to give judgment for the recovery of the excess rent. Otherwise the court would be doing something which the statute says it is not to do . . . I do not think I need refer at length to authority for the proposition that a statutory prohibition or direction cannot be overridden or defeated by a previous judgment between the parties. If authority for that proposition were required, it is to be found in LORD SHAW's speech in the House of Lords in *Bradshaw v. McMullan* (5), a statement of the law which is again referred to in the judgment of the Privy Council in *Maritime Electric Co., Ltd. v. General Dairies, Ltd.* (6). It is a principle which manifestly is right, quite apart from authority.

MACKINNON, L.J., and DU PARCQ, L.J., both agreed. I think, in view of the reasoning in that case, it is not possible for me to accept the point taken here by counsel for the tenant. It is true at one time that the agents for the landlords were under the impression that the premises did come within the scope of the Rent Acts. That matter was put right by them in the correspondence, and I cannot think that this action fails because the landlords are estopped by those facts from proceeding in the manner they have done.

In these circumstances, I must give judgment for the landlords. I hold that this letting of the separated flats with the garage was not the letting of a dwelling-house as a separate dwelling to which the Act of Parliament applies. I further hold that, if the dwelling is to be regarded as a separate entity at the appropriate day, Apr. 1, 1939, the rateable value exceeded the sum of £100. I am further of opinion that the point of estoppel fails. There must be judgment for the landlords on the claim and counterclaim.

Judgment for the landlords with costs.

Solicitors: *Stikeman & Co.* (for the landlords); *Franks, Charlesly & Leighton* (for the tenant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.

Re ST. LUKE'S HOSPITAL, CHELSEA. LONDON COUNTY COUNCIL *v.* WAR DAMAGE COMMISSIONERS.

[CHANCERY DIVISION (Vaisey, J.), July 5, 9, 1948.]

War Damage—Temporary works payment—“Works reasonably executed for temporarily meeting the circumstances created by the damage”—Provision of alternative accommodation away from site of damage—Permanent structures—War Damage Act, 1943 (c. 21), s. 6 (2).

In 1941 the S. hospital suffered severe damage by bombing. In 1942 the hospital authorities effected certain works which involved the construction on the site of a former store room, in place of a kitchen and scullery which had been rendered unusable, of a new main kitchen and scullery in the course of which construction it was necessary to take up a timber floor, fill in the cavity with rubble and lay down a thick concrete floor, and the dividing of a former ward on the ground floor into several parts which were converted into a new operating theatre, with a surgeon's dressing room, sterilising room, anaesthetising room, X-ray room, dark room and office, to replace those on the first floor which had virtually been destroyed. Wiring for electricity, the tapping of the electric main in the street, and the laying of heavy cables to the X-ray room had also been effected.

HELD: the works were neither works of temporary repair nor of temporary precaution, but were carried out to provide alternative accommodation at a distance from the area of the damage, and were not “works reasonably executed for temporarily meeting the circumstances created by the damage” within the War Damage Act, 1943, s. 6 (2).

Per VAISEY, J.: The statement of the case by the War Damage Commission seems to place some emphasis on the physical life of the works in question. It is alleged that some of them would last for twenty-five years and others for forty to fifty years. I do not think that that is the test. I do not think that the works have to be “temporary” in the sense that they are likely to decay at an early date. I think that the reference to “temporary works” in ss. 16 and 20 of the Act is somewhat misleading. The works in themselves may be as permanent as possible. The point is: Were they executed for temporarily meeting the circumstances created by the damage?

[FOR THE WAR DAMAGE ACT, 1943, s. 6 (2), see HALSBURY'S STATUTES, Vol. 36, p. 342.]

ORIGINATING NOTICE OF MOTION.

Appeal by the London County Council, owners of St. Luke's Hospital, Chelsea, from a determination of the War Damage Commission that certain works completed by the council were not “works reasonably executed for temporarily meeting the circumstances created by [war] damage.” The respondents, the War Damage Commission, contended that the repairs were adaptations, for the convenience of the council, of the undamaged, or comparatively undamaged, portions of the hospital. VAISEY, J., dismissed the appeal. The facts appear in the judgment.

R. M. Hughes, K.C., and *Squibb* for the appellants, the London County Council, the owners of St. Luke's Hospital.

Rowe, K.C., and *Danckwerts* for the respondents, the War Damage Commission.

Cur. adv. vult.

July 9. VAISEY, J., read the following judgment. This is an appeal from a determination by the respondents, the War Damage Commission, of a question as to the making of a temporary works payment in respect of St. Luke's Hospital, Chelsea. The appellants, the London County Council, are the owners of the said property. They say that certain works, which I must presently describe, were (to quote the words of the War Damage Act, 1943, s 6 (2)) “works reasonably executed for temporarily meeting the circumstances created by the damage,” which means, in the context in which it appears, war damage to a hereditament.

The facts of the case are as follows. On May 11, 1941, the hospital was severely damaged by enemy action owing to the effect of a high-explosive bomb which fell in the centre of the building. Parts of the hospital were so seriously damaged

as to be totally unusable unless completely rebuilt and re-equipped, including : in the basement of the building, the main kitchen, the scullery and servery, the butcher's shop, the cold stores, and various ancillary offices, including, in particular, the heating-boiler room ; on the ground floor, two receiving wards, with the assistant medical officer's quarters and other ancillary accommodation, and on the first floor the operating theatre, with the sterilising rooms, X-ray room, bath rooms, and the main corridor. The parts of the building which were either not damaged, or damaged to only a slight extent, included twelve wards and other accommodation. After the explosion, the condition of the hospital, as I understand it, was comparable with that of an ocean going liner, of which the decks, the cabins and the state rooms were intact, but which had lost the whole of its engines and operating machinery.

Obviously this was not a case of total loss, as defined in s. 7 (2) of the Act, and in due time a payment on the basis of cost of works would fall to be made under the provisions of the Act in so far as the damage had been or would be made good. The hospital was completely put out of action and had to be evacuated, but the need for hospitals in 1941 and the succeeding years was such that it was obviously desirable once more to put it into use, and that at the earliest possible moment. There were carried out, with the necessary permits and licences, works which were finally completed in August, 1942, some fifteen months after the occurrence of the calamity. Those works included, first, certain works of permanent reinstatement, as to which no question arises ; secondly, certain temporary works, as to which again no question arises ; and, thirdly, the works which have given rise to the present appeal, with which I must now deal.

Those works consisted of the following items : first, in a space in the basement of the building which had formerly been used as a store room, a new main kitchen and scullery were constructed to take the place of the former kitchen and scullery which had been either completely destroyed, or, at any rate, put completely out of action, by the explosion. This operation involved the removal of certain partitions, the taking up of a timber floor, the filling of the cavity with brick rubble, and the laying down of a thick concrete floor, with such incidental matters as the installing of sinks, and of gas, electric and general engineering services. Secondly, in what had previously been known as ward No. 8, which was on the ground floor of the building, a new operating theatre was constructed, with surgeon's dressing room, sterilising room, anaesthetising room, X-ray room, dark room and office, which, as I have said, had previously been on the first floor. That work involved the division of ward 8 by the erection of a number of partitions, constructed of timber covered with wallboard, thus forming separate rooms. Those partitions and the doors thereof had to be painted. The electric light had to be brought into what had previously been ward 8. The electric main in the street had to be tapped for intake, and heavy electric cables had to be laid to the X-ray room.

Now, it is said by the county council that these works, to which I have just been referring, were, within the meaning of the Act, " works reasonably executed for temporarily meeting the circumstances created by the damage " to the hospital. The War Damage Commission, on the other hand, say that these works, having been effected for the purpose of providing alternative accommodation elsewhere than on or in the damaged portions of the hospital, were not " works reasonably executed for temporarily meeting the circumstances created by the damage," but were adaptations, for the convenience of the council, of the undamaged portions, or portions comparatively undamaged, of the hospital.

I now turn to the Act. Section 1 provides for payments being made in respect of war damage to land and to goods. Section 2 defines " war damage." Nothing arises on those definitions. Section 5 may be sufficiently stated by reference to its marginal note which says : " Hereditaments that are to be units for payments in respect of damage to land." There is, I think, no question but that the hospital is a hereditament within the meaning of that section, and, further, that it is what the section defines as a " developed hereditament." I now come to s. 6, which prescribes the nature of the payment which falls to be made in respect of damage to land. It divides those payments into two heads, that is to say :

(a) a payment of cost of works, being a payment of an amount determined by reference to the cost of works executed for making good the damage . . . ; or (b) a value payment . . .

This is what is called by the convenient short description of a cost of works case. Sub-section (2) of s. 6 is the one which is directly relevant to the question now before me, and it reads thus :

Where either a payment of cost of works or a value payment is made in respect of war damage to a hereditament, there shall be made, in addition to that payment, a payment (in this Act referred to as a "temporary works payment") of an amount equal to the proper cost of any works reasonably executed for temporarily meeting the circumstances created by the damage, being—(a) where a payment of cost of works is made, works, other than those taken into account in computing the amount of that payment, executed between the occurrence of the damage and the time when it is made good ; (b) where a value payment is made, works executed between the occurrence of the damage and the time when the Commission's determination to make that payment, and not a payment of cost of works, has been notified to all persons having an interest in the hereditament who have made a request in writing to the Commission to be notified thereof, or, if no such request has been made, the time of the Commission's determination.

Section 8 of the Act defines the amount of the payment of cost of works, and sub-s. (2) is :

If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof.

There are two references, or apparent references, to this matter in later sections of the Act. First of all, s. 16 (1) (a) relates to such temporary works as are mentioned in s. 6 (2). I pause here to observe that I do not find in s. 6 (2) any mention of temporary works at all. In s. 20 of the Act there is another reference to temporary works as to which the same observation applies.

The War Damage Commission have issued some explanatory pamphlets as to their practice, which, of course, possess no statutory or other force, but which are extremely useful publications and are in the nature of commentaries on the words of the Act. In the first of those pamphlets, which is entitled "Practice Notes—First Series" and has the Stationery Office code number 70,392, there is given, no doubt by way of guidance, the reference to the corresponding section of the earlier Act, and what is suggested is : "In all cases the works must be 'reasonably' executed for temporarily meeting the circumstances created by the damage'." It is further pointed out : "The Commission has to decide whether the works are both 'reasonably executed' and 'for temporarily meeting the circumstances'." Then it is said that in normal cases the War Damage Commission will be prepared to act in accordance with certain principles which are there enumerated :

(a) The works must be executed only to or on the damaged hereditament itself.
(b) In the case of a developed hereditament the works should normally be for the purpose either of temporarily making the damaged building (or buildings) usable for the purpose for which it was used before the damage or for preserving the building (or buildings) from further depreciation or to prevent injury to the public or to other buildings arising from the damaged hereditament.

It is suggested that the fencing of a hole would be allowed. It is emphasised that the works must be of a temporary character, and the reader is reminded that it is not reasonable to use expensive materials where less expensive materials will serve the temporary purpose and are available. There is a final reminder—which is very helpful, perhaps—that the rules to apply are largely common-sense, and the problem to be solved is : "On consideration of all the facts, ought temporary repairs to be executed or permanent repairs ? Are the works, in their nature, both 'temporary' and 'reasonable' ?"

A second edition of the Practice Notes was issued three years later than the first edition. The Stationery Office code number is 70,392,045. There—no doubt with the added experience of the years which had passed—a revised edition of hints is given as to how the words should be construed and how they should be applied in practice. We now find that there is a suggestion that the works must, normally, at any rate, be executed only to the damaged part of the

hereditament, and that they should normally be for the purpose either of temporarily making the damaged building (or buildings) usable, and so on, or—following the words of the earlier edition. A somewhat notable point, perhaps, is that there is in the later edition of the pamphlet no reference to common-sense. Admittedly, the words in question are very general indeed, and quite incapable of any definition that is more precise than the words themselves afford. They must obviously be construed in their context and having regard to the scheme and purpose of the whole Act. The form in which they are enacted is rather puzzling. The word “reasonably” is, I think, always rather an alarming word. What standard of reason must be applied? Whose reason has to be interrogated? It is somewhat strange that by re-arranging these words—as, for instance, substituting for “works executed for making good the damage” “works reasonably executed for temporarily meeting the circumstances created by the damage”—much the same result would appear to have been intended. Clearly, reason must be brought into the picture, and so far I do not think that there is any very serious difficulty. The Commission have to apply their standards of reason to the facts of the case, and I have to apply mine to the meaning of the Act.

Next, the works must be intended to meet the circumstances created by the damage. Quite obviously that might include a very large number of arrangements and re-arrangements necessitated by the damage in question. Then such circumstances must be met temporarily, that is to say, they must be met in a make-shift manner, and not in a manner which is going to afford permanent, continuous relief. It is obvious that persons dealing with institutions finding themselves in trouble over war damage have to resort to many shifts and devices to meet the circumstances created thereby, and normally, I should have supposed, the works in question would tend to be works of temporary repair or works of temporary precaution. By “works of temporary repair” I mean works which were intended to be temporary in the sense that they were meant to be superseded by works intended to be permanent, and I may instance such things as the insertion of fabric material in windows to be glazed later on, or the patching up of shrapnel holes in a roof which would ultimately be properly re-slatted. Among works of precaution I would include the shoring up of a dangerous wall, the fencing of a bomb crater (later to be filled in), or the provision of an outside staircase to take the place of an interior one which had become insecure. I ought not, I think, to endeavour to expound the relevant words further than I have already attempted to do.

It is very easy indeed to imagine border-line cases in which it may be very difficult to say whether they are covered by these words or not, but in the present case I feel compelled—though not without hesitation—to hold that the works in question were neither works of temporary repair nor works of temporary precaution. I think that they were works carried out to provide alternative accommodation at a distance from the area of the damage, and I can see no distinction in principle between the present case, where the works in question were done within the walls of the hospital, and a case where they might have been done in some near-by building acquired for the purpose. The Act does not deal with damage to a man's pocket or to his convenience, but only with damage to his tangible property—in this case damage to his buildings. I do not think that these works which have been carried out were temporary in the sense that they were intended to be superseded by permanent works, nor do I think that they can be regarded as works of temporary precaution.

I think that the case is near the line, but I have come to the conclusion that it is on the wrong side of the line from the point of view of the council. I think that the letter from the Commission dated Jan. 27, 1943, sets out—though, perhaps, in rather too narrow a form—the conclusions at which I have arrived in the present case. That letter says that the Commission consider:

... that temporary works are only those executed to or on the damaged building itself and carried out for the purpose either of temporarily making it usable for the purpose for which it was used before the damage, or for preserving it from further depreciation, or to prevent injury to the public or to other buildings. On this basis I am to explain that, although the information given in your typical cases is not necessarily complete, it is not considered likely that a temporary works payment could be made in any of the cases.

The statement of the case by the War Damage Commission seems to place some emphasis on the physical life of the works in question. It is alleged that some of them would last for twenty-five years and others for forty to fifty years. I do not think that that is the test. I do not think that the works have to be "temporary" in the sense that they are likely to decay at an early date. I think that the reference to "temporary works" in ss. 16 and 20 of the Act is somewhat misleading. The works in themselves may be as permanent as possible. The point is: Were they executed for temporarily meeting the circumstances created by the damage? In my judgment, these works represent arrangements made for temporarily meeting the circumstances created by the damage, but not works executed for that purpose. Although I have found the matter very puzzling, I have in this case come to the conclusion which I have already indicated. I think that the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor to the London County Council* (for the appellants); *The Treasury Solicitor* (for the respondents.)

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

MARTINS BANK, LTD. v. KAVANAGH.

[CHANCERY DIVISION (Roxburgh, J.), June 29, July 6, 14, 1948.]

Mortgage—Possession by mortgagee—Originating summons—Parties—Trustee in bankruptcy—R.S.C., Ord. 55, rr. 5A, 5B.

In 1944, the defendant charged her farm by way of legal mortgage with payment of certain moneys to the plaintiffs. In 1947 she was adjudicated bankrupt, but remained in occupation of the farm. The plaintiffs issued an originating summons claiming possession of the farm, and elected before the master not to add as a defendant the trustee in bankruptcy in whom the equity of redemption was vested.

HELD: the application was properly made by originating summons under R.S.C., Ord. 55, r. 5A, but, as it involved a step in the enforcement of the security which might prejudice the person entitled to the equity of redemption, the trustee in bankruptcy should have been joined under Ord. 55, r. 5B, and, therefore, the summons was defective.

[AS TO WHEN ORIGINATING SUMMONS APPLICABLE, see HALSBURY, Hailsham Edn., Vol. 26, pp. 106, 107, para. 209.]

Case referred to:

- (1) *Temperance Permanent Benefit Building Society v. Nevitt*, [1940] 3 All E.R. 237; 163 L.T. 234; Digest Supp.

PROCEDURE SUMMONS.

By an originating summons a mortgagee, Martins Bank, Ltd., sought possession of the farm on which the mortgage was secured from the mortgagor who had been adjudicated bankrupt. The bank did not join the trustee in bankruptcy, and it was objected that the procedure was inappropriate and that the originating summons was defective. The facts appear in the judgment.

Hewins for the plaintiff bank, the mortgagees.

Baden Fuller for the defendant, the mortgagor.

Cur. adv. vult.

July 14. **ROXBURGH, J.**, read the following judgment. By a mortgage dated Feb. 29, 1944, the defendant charged, by way of legal mortgage, Cross Keld Farm, Fylingdales, Yorkshire, with payment of certain moneys to the plaintiff bank. On Dec. 5, 1947, the defendant was adjudicated bankrupt, but she remained in occupation of the farm. By this originating summons, the plaintiff bank claims delivery of possession of the farm by the defendant, having elected before the master not to add as a defendant to the application the trustee in bankruptcy in whom the equity of redemption is vested.

Two points were taken on behalf of the defendant. The first is that such an application as this cannot be made on an originating summons. The second is that it ought not to proceed in the absence of the trustee in bankruptcy. Order 55, r. 5A, is in the following terms :

Any mortgagee or mortgagor, whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require ; that is to say,—Payment of monies secured by the mortgage or charge ; Sale ; Foreclosure ; Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property ; Redemption ; Reconveyance ; Delivery of possession by the mortgagee.

There is no appearance of ambiguity in the words " delivery of possession . . . by the mortgagor . . . or by any other person in, or alleged to be in possession of the property." They appear to warrant just such an application as this, but counsel for the defendant would have me imply the further words " being a person entitled to redeem," and he surveyed the evolution of the present rules with a view to persuading me that those words must necessarily be implied. Counsel for the plaintiffs, on the other hand, drew my attention to the decision of a full Court of Appeal in *Temperance Permanent Benefit Building Society v. Nevitt* (1) and argued that the words which I have quoted with regard to delivery of possession to the mortgagee (which were introduced into the rule in the same month as that case was heard) were introduced to take just such a case as the present outside the scope of Ord. 13, r. 8 (which deals with judgment for the recovery of land in default of appearance in cases to which r. 17 does not apply), and bring it within the ambit of Ord. 13, r. 17 (which deals with judgment in default of appearance in cases to which Ord. 55, r. 5A, applies). This, he says, was done for the greater protection of mortgagors, though it confers an incidental advantage on mortgagees. I am satisfied that counsel for the plaintiffs is right and that the present application is within the rule, and, indeed, that it was intended to be brought within it.

On the other hand, Ord. 55, r. 5B, provides :

The persons to be served with the summons under the last preceding rule shall be such persons as under the existing practice of the Chancery Division would be the proper defendants to an action for the like relief as that specified by the summons.

The Court of Appeal, in the case to which I have already referred, held that there the mortgagor was a necessary party. The form of order prescribed by Ord. 55, r. 8A, contemplates that the mortgagor will be a party, but, furthermore, the application involves a step in the enforcement of the security which may prejudice the person entitled to the equity of redemption. I am satisfied, therefore, that he ought to be a defendant under the existing practice of the Chancery Division. This is so whether " existing " refers (as I think it does) to the practice at the date of the application or to the practice at the date when applications like the present were first allowed to be made by originating summons, namely, June, 1940. I cannot accept the contention of counsel for the plaintiffs that the word " existing " could refer to a time earlier than that date.

Accordingly, in my judgment, the originating summons is defective for want of a party, and I refer the originating summons back to chambers for amendment and for further evidence on the question of costs.

Order accordingly.

Solicitors : *Stocken, May, Sykes & Dearman* (for the plaintiffs) ; *Gibson & Weldon* (for the defendant).

[*Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.*]

IRELAND v. TAYLOR.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), June 14, 16, 17, 18, July 13, 1948.]

Landlord and Tenant—Goodwill—Letting of premises at higher rent—Compensation—New lease—Premises used for purpose prohibited by head lease—Premises “required” for occupation by landlord—Landlord and Tenant Act, 1927 (c. 36), ss. 4 (1), 5 (1) (2) and (3) (b) (i).

On July 21, 1941, premises were sub-let by A. to the tenant for 3 years, with an option to renew (which was exercised) for a further 3 years, the tenant covenanting to use the premises as a private nursing home and/or guest house only. In fact, the premises were used by the tenant for the business of a home or guest house for old and infirm ladies from the neighbourhood and the home was recommended by local doctors. On Aug. 7, 1945, A. assigned her lease to Mr. and Mrs. T., who intended to reside on the premises when the tenant's lease ran out. On June 14, 1946, the tenant served a notice on Mr. and Mrs. T. claiming compensation for goodwill under s. 4 of the Landlord and Tenant Act, 1927, or, alternatively, a new lease under s. 5. In answer to a summons in respect of this claim Mr. and Mrs. T. alleged, *inter alia*, under s. 5 (3) (b) (i) of the Act, that they required the premises for their own occupation, Mr. T., then 70 years old and once a portrait painter, requiring the house for the purpose of using the large lounge as a studio for portrait painting, a profession which he intended resuming. Notice of the tenant's application was given by Mr. and Mrs. T. to the freeholders, who drew the attention of Mr. and Mrs. T. to the fact that the tenant had committed a breach of a covenant in the head lease not to use the premises for any purpose other than as a private dwelling house and demanded immediate steps be taken to see that the breach was remedied. No steps were, in fact, taken, and the tenant continued to carry on her business. The referee in his report found that goodwill within the meaning of s. 4 of the Act had been established and assessed a figure, but, as regards the application for a new lease, he construed the word “required” in s. 5 (3) (b) (i) as “needs” or “reasonably requires” and came to the conclusion that Mr. and Mrs. T. did not reasonably require or need the house. The county court judge agreed on the question of adherent goodwill, rejected the referee's construction of “requires,” but construed it as not including a mere whim or fancy and found that in that sense Mr. and Mrs. T. did not require the premises, and, there being nothing in the evidence otherwise to render the grant unreasonable, granted the tenant a new lease. On Appeal:

HELD: (i) on the question of adherent goodwill, the only part of the tenant's goodwill which could be the subject of compensation was the net rental value of what adhered to the premises in the sense of enuring to the benefit of the landlord in the form of increased rental value after the premises had returned into his possession, and, as the referee and the judge had correctly appreciated this, the court would not interfere on that question.

Whiteman Smith Motor Co., Ltd. v. Chaplin ([1934] 2 K.B. 35) and *Clift v. Taylor* ([1948] 2 All E.R. 113), followed.

(ii) the words in s. 4 (1) “the premises could be let” included letting by all such persons as might be in a position to let at the determination of the tenancy and were apt to cover the case where the letting which was contemplated might require the consent of some person other than the mesne landlord, the only question to be considered being, not whether the landlord could let the premises, but whether the premises could be let.

Per SOMERVELL, L.J.: I should myself hesitate to come to the conclusion that a landlord, apart from any question of estoppel, should have to pay compensation in respect of an increased rental value which he was going to be prevented from realising owing to the existence in a head lease of an enforceable covenant preventing further user of the premises for the trade or business in question. The compensation, as was stated in *Whiteman Smith Motor Co., Ltd. v. Chaplin* (*supra*), is limited

to the addition to the value of the premises in the hands of the landlord at the end of the tenancy. In the case put the addition would appear to be nil.

(iii) both the referee and the judge had come to an erroneous decision with regard to s. 5 (3) (b) (i); under that paragraph the landlord must be the sole arbiter of his requirements provided he proves that he, in fact, desires possession of the premises and genuinely intends to occupy them; and, therefore, the judge's order should be varied by substituting for the new lease an award of the compensation fixed by the referee.

Dictum of HALLETT, J., in Nuthall (G. C. & E.) (1917), Ltd. v. Entertainments & General Investment Corp'n., Ltd. ([1947] 2 All E.R. 384, 392), approved.

[AS TO COMPENSATION FOR GOODWILL AND GRANT OF NEW LEASE, see HALSBURY, Halsham Edn., Vol. 20, pp. 294-301, paras. 333-345; and FOR CASES, see DIGEST Supp.]

Cases referred to :

- (1) *Clift v. Taylor*, [1948] 2 All E.R. 113.
- (2) *Whiteman Smith Motor Co. Ltd. v. Chaplin*, [1934] 2 K.B. 35; 103 L.J.K.B. 328; 150 L.T. 354; Digest Supp.
- (3) *Nuthall (G. C. & E.) (1917), Ltd. v. Entertainments & General Investment Corp'n., Ltd.*, [1947] 2 All E.R. 384.
- (4) *Hudd v. Matthews*, [1930] 2 K.B. 197; 99 L.J.K.B. 621; 143 L.T. 383; 94 J.P. 204; Digest Supp.
- (5) *Bullin's v. Fytche and Another*, [1948] 1 All E.R. 737.

APPEAL by the landlords from an order of His Honour JUDGE HANCOCK, made at Wandsworth County Court and dated Dec. 11, 1947, granting to the tenant a new lease under the Landlord and Tenant Act, 1927, s. 5. The appeal was allowed, and the judge's order varied by substituting for the new lease an award of compensation fixed by the referee. The facts appear in the judgment of TUCKER, L.J.

Havers, K.C., and *Hawser* for the landlords.
Avgherinos for the tenant.

Cur. adv. vult.

July 13. The following judgments were read.

TUCKER, L.J. : This is an appeal by the landlords from the decision of the county court judge granting a new lease to the tenant under s. 5 of the Landlord and Tenant Act, 1927. In 1883 a lease of the premises in question was granted for 97 years containing a covenant against any user of the premises for any trade or business or for any other purpose than as a private dwelling-house. On July 21, 1941, the then lessee under the head lease, a Mrs. Abney, granted a sub-lease to the tenant for a term of three years with an option, which was exercised, to renew for three years. The lease contained the following covenant by the tenant :

To use the premises as a private nursing home and/or guest house only but with no outside indication of such usage without the consent of the superior landlord.

The premises were, in fact, used by the tenant for the business of a home or guest house for old and infirm ladies. Most of the old ladies came from the neighbourhood, and the home was recommended by local doctors. The house is in Kew Road facing Kew Gardens, and is known as "Heathlands." On Aug. 7, 1945, Mrs. Abney assigned the head lease to the landlords, and there was evidence that the landlords bought the lease in order to be able to live in the house when the tenant's lease expired. On June 14, 1946, the tenant served a notice on the landlords under the Act of 1927 claiming compensation under s. 4 of the Act, and, alternatively, a new lease under s. 5.

Section 4, so far as material, reads as follows :

(1) The tenant of a holding to which this part of this Act applies shall, if a claim for the purpose is made in the prescribed manner—(i) in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant; and (ii) in any other case, not more than thirty-six nor less than twelve months before the termination of the tenancy; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he

proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto. Provided that . . . (d) the tribunal shall, in determining the amount of compensation for goodwill—(i) have regard to the intentions of the tenant as to carrying on the trade or business elsewhere, and may make it a condition of its award that the tenant shall undertake not to carry on the trade or business within such distance of the premises as may be specified in the award; and (ii) disregard any value which is attributable exclusively to the situation of the premises . . .

Section 5 provides :

(1) Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him, (2) Where such a notice is so served, the tribunal . . . may, if it considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy for such period (being a term of years absolute) not exceeding fourteen years and on such terms as the tribunal may determine to be proper, but if the tribunal is precluded on any of the grounds mentioned in paragraph (b) of the following subsection from making such an order the tribunal may award such compensation as is provided under the last foregoing section . . . (3) Where the tenant is the applicant, the grant of a new lease under this section shall not be deemed to be reasonable (a) unless the tenant proves . . . or (b) if the landlord proves (i) that the premises are required for occupation by himself, or, where the landlord is an individual, for occupation by a son or daughter of his over eighteen years of age . . . (iv) that for any other reason the grant of such a lease of the premises would not be consistent with good estate management, and for this purpose regard shall be had to the development of any other property of the same landlord: Provided that, if the grant of a new lease is refused by the tribunal on any such ground as is mentioned in paragraph (b), the tribunal may make it a condition of refusal that if the landlord fails to carry out his intention within such period as may be allowed by the tribunal, the landlord shall pay to the tenant such compensation as the tribunal may fix not exceeding the amount of the loss which the tenant has suffered by reason of having been deprived of his right to the grant of a new lease under this section . . .

The originating summons in respect of the claim was filed on Oct. 4, 1946, in the Wandsworth County Court. Paragraphs (j) and (k) of the particulars in the summons read as follows :

(j) The applicant claims compensation in the sum of £2,000 for goodwill which has accrued to the premises by reason of the applicant having attracted thereto a permanent clientele of good standing which (*sic*) has become popular and widely known in the district. (k) Alternatively, the applicant claims a new lease of the premises.

On Dec. 21 the landlords filed their answer. They denied that any goodwill had become attached to the premises. They denied that it would be reasonable to grant a new lease, alleging some matters which are not now material, and relying on the covenant in the head lease. They also alleged that they required the house for their own occupation. On the same day the landlords gave notice of the proceedings to Queen Anne's Bounty, the head lessor. The letter, after setting out the course of events, said :

We shall be obliged if you will inform us whether you will appear before the tribunal or whether you have any suggestions to make with regard to the matter. If you wish to join us in the matter we shall let you know when the hearing before the referee will take place.

On Jan. 8 Queen Anne's Bounty wrote to the landlords as follows :

It has been brought to my notice that a breach of covenant of the lease dated Oct. 30, 1883, has been committed in that the above-mentioned property is being used as a guest house and not as a private dwelling-house as prescribed by the said lease. The governors of Queen Anne's Bounty as freeholders are not prepared to consent to the user of this property for a business and I must ask you to take immediate steps to see that such breach of covenant is remedied.

The business carried on by the tenant continued and Queen Anne's Bounty took no steps to re-enter or obtain an injunction. In accordance with the

procedure as laid down the matter was referred to a referee for report. The landlords and the tenant appeared and called evidence. Queen Anne's Bounty, though entitled to, did not appear. The referee, though he heard the matter fully and reported on all issues, expressed the view that a tenant, in order to claim, must have been holding the premises for the five years required by s. 4 under a single title. Here there were two tenancies, the original three years and the further three years by reason of the exercise of the option. This was a point open to the landlords before the county court judge. Counsel for the landlords was invited by the learned judge to address him on the point, but he declined to do so, though, according to the judgment, he said he would like a decision on the point. The county court judge, accordingly, did not deal with the question, and we decided that the point had not been taken below and could not be relied on in this court.

The first question raised by the landlords is that there was no evidence of adherent goodwill. I have come to the conclusion that this contention fails. Both the referee in his report and the learned judge in his judgment seem to me properly to have appreciated the nature of what a tenant is required to establish, namely, that the only part of the tenant's goodwill which can be the subject of compensation is the net rental value of what adheres to the premises in the sense of enuring to the benefit of the landlord in the form of increased rental value after the premises have returned into his possession : see *Clift v. Taylor* (1). This value can usually only be ascertained as stated by MAUGHAM, L.J., in *Whiteman Smith Motor Co. v. Chaplin* (2) ([1934] 2 K.B. 35, 51) by an intelligent guess. If the guess is made by a witness considered by the tribunal to be honest and competent and accepted as accurate it is not for this court to disturb the finding even if, as is the fact in this case, some of the evidence appears to have been obtained as a result of questions put by counsel and by the referee which tended by their leading nature somewhat to discount the value of the answers so obtained.

I pass, therefore, to consider what is, in my view, one of the two principal issues in this case, namely, whether the premises "could be let" within the meaning of those words in sub-s. (1) of s. 4. It is to be observed that this question falls to be decided under a section which deals only with compensation. Whether or not the existence of a covenant as to user in a head lease is a matter which should be taken into consideration in determining whether to grant a new lease under s. 5 is an entirely different matter. As was pointed out by the county court judge, the words are not "the landlord could let" but simply "could be let." Section 4 contains no sub-section equivalent to sub-s. (9) of s. 5, which extends the meaning of the word "landlord" in that section to include a superior landlord. Consequently, in s. 4 the word "landlord" has the limited meaning assigned to it by s. 25, namely, the person who under a lease is as between himself and the tenant for the time being entitled to the rents and profits of the demised premises payable under the lease. The use of the word "landlord," with this limited meaning, is, it seems, purposely avoided at the end of sub-s. (1), leaving the words "could be let" to cover and include all such persons as may in fact be in a position to let at the determination of the tenancy, e.g., the head landlord where there is only one day left of the mesne landlord's term at the end of the tenant's lease. If this is so, the words seem to me apt to cover the case where the letting which is contemplated may require the consent of some person other than the mesne landlord. I can see no reason why the tenant should be deprived of compensation for adherent goodwill merely by reason of the fact that the head landlord might not desire to appropriate the goodwill or might prevent the mesne landlord by forfeiture from enjoying it. None of these contingencies appears to me to require consideration under s. 4, which contemplates a letting for the same purpose as that for which the expiring lease has been used. I am not, of course, dealing with cases where the user is "unlawful" in the sense of being in contravention of the law.

A case for compensation under s. 4 was, in my opinion, established, but as the tenant alleged, and as was not disputed, the amount of compensation which could be awarded to her under s. 4 would not compensate her for the loss of her goodwill. She claimed the grant of a new lease under s. 5, which empowers the tribunal, subject to the provisions of that section, to order the grant of a

new lease. The first requirement is that the tribunal should consider the grant of a new tenancy in all the circumstances reasonable. If the tribunal, for reasons other than those stated in para. (b) of s. 5 (3), does not consider the grant reasonable, then there is an end to the matter.

It is, I think, at this stage that it may be relevant for the tribunal to consider the attitude and intentions of the head landlord with regard to possible grounds for forfeiture arising out of a grant of a new tenancy. Similar considerations may also arise in connection with estate management under cl. (iv) of para. (b) of sub-s. (3) of s. 5. In the present case the learned judge has found nothing in the evidence to render the grant unreasonable, apart from para. (b) of sub-s. (3) and I think the evidence before him as to the attitude and intentions of Queen Anne's Bounty with regard to the breach of covenant was such that the judge may well have been unimpressed by it. With regard, however, to para. (b) of sub-s. (3), I think the learned judge came to an erroneous decision. The evidence of Mr. Taylor, one of the landlords, was that he required possession of the house so that he might use the large lounge as a studio for portrait painting, for which purpose it was suitable by reason of its size and lighting. He was 70 years of age and desirous of resuming his profession as a portrait painter. No attack appears to have been made on the veracity of Mr. Taylor, but the learned judge described this as a "mere whim." If Mr. Taylor, in fact, desires to get possession of this house and genuinely intends to use it for this purpose I can see no ground for saying that he does not "require" it within the meaning of sub-para. (i) of para. (b) of sub-s. (3) of s. 5, which contains the words "the premises are required for occupation by himself." If he required it for this purpose, then his wife who was living with him clearly also required it apart altogether from the other reasons which she gave in evidence some of which clearly could not be substantiated. The referee had interpreted the word "required" as if it meant "needed," somewhat on the lines of the words "reasonably required" in the Rent Restrictions Acts. The county court judge rightly rejected this construction, but appears to have interposed his own judgment as to the landlord's "requirements," whereas, in my opinion, in this part of the section the landlord must be the sole arbiter of his own requirements, provided he proves that he, in fact, desires possession and genuinely intends to occupy. I think this construction is strongly supported by the use of the word "intention" in the proviso to sub-s. (3), which, it may be observed, provides a means whereby a landlord who goes back on his expressed intention can be penalised. It is also the construction accepted by HALLETT, J., in *Nuthall, Ltd. v. Entertainments & General Investment Corp., Ltd.* (3) ([1947] 2 All E.R. 384, 392). For this reason I think the learned judge's order should be varied by substituting for the new lease an award of the compensation fixed by the referee.

SOMERVELL, L.J. : It is unnecessary to re-state the sequence of events and the relevant provisions of the statute as these have already been set out in TUCKER, L.J.'s judgment. The case came on before the learned county court judge in November, 1947. We have the advantage of a full judgment in which the learned judge sets out his reasons for his conclusions. Queen Anne's Bounty, who did not appear and argue before the referee, had intervened formally, in order, we were told, to obtain a copy of the report. Counsel on behalf of Queen Anne's Bounty appeared before the learned county court judge, and I deal later in this judgment with the course which Queen Anne's Bounty have taken. The learned judge found that goodwill had attached to the premises within the meaning of s. 4 of the Act. The first issue raised is whether there was any evidence on which he could so find, considering the point irrespective of any argument based on the restrictive covenant in the head lease.

The conception of goodwill under the Act is not an easy one. It was fully dealt with in *Whiteman Smith Motor Co., Ltd. v. Chaplin* (2) in judgments given by SCRUTTON, L.J., and MAUGHAM, L.J., sitting as a Divisional Court. The matter has been recently considered by this court in *Clift v. Taylor* (1), in which the judgment of the court was delivered by SCOTT, L.J. I will cite one sentence from the judgment of this court in the latter case approving and summarising what had been said in *Whiteman's* case (2) ([1948] 2 All E.R. 113, 115):

Those learned judges made it quite clear that the only part of the tenant's goodwill which is the subject of compensation is the net rental value of what "adheres" to

the premises in the sense of enuring to the benefit of the landlord in the form of increased rental value after the premises have returned into his possession.

A Mr. Warner, who had practised as a surveyor and estate agent for 20 years, gave evidence that, on the evidence given as to the tenant's building up and carrying on the business, goodwill had attached to the premises, with the result that, in his opinion, a person desiring to carry on the same business would give £220 a year, whereas other persons would give £180 a year. On this the learned

A judge said :

That evidence was in fact the witness's expert opinion on the very question which the court has got to decide, and I can only wish that I personally found the approach to it so simple.

I think that expert evidence of this kind is admissible. It does not, of course, bind the court, and there will often, as there was here, be conflicting evidence.

B It must be carefully scrutinised so as to see whether the expert is directing his mind to the goodwill with which the Act is concerned. Having read Mr. Warner's evidence, I think it constituted some evidence of adherent goodwill. The learned judge then considered the matter on general grounds, and in the light of the tenant's evidence. He said this :

C On this point I was very impressed by the argument of Mr. *Hawser*, that this being a business carried on with considerable privacy and dependent to a large extent on the personality of Mrs. Ireland could not, by its very nature, be adherent to the premises. In his cross-examination of Mrs. Ireland, Mr. *Hawser* extracted from her a number of answers which laid emphasis on the site value of the premises, and on the personal connection between herself and her clientele, but in re-examination she said that "Heathlands" as such, as a name, had acquired a reputation. This, it seems to me, is quite consistent with probabilities and ought to be accepted. It does not require any stretch of imagination to visualise someone in search of a home for an elderly and infirm relation being told by a friend or relation of a guest that there is such a home at "Heathlands." There is the introduction, and whether the enquirer knows the name of Mrs. Ireland or not he or she is not likely to ignore the recommendation so long as the home is well run by its new proprietor. It is probably true that recommendations from doctors would be largely personal to Mrs. Ireland, but I see no reason why recommendations from friends and relatives of guests should not be very largely in the name of the house rather than, or at least as well as, in the name of Mrs. Ireland.

E In my opinion, the landlords fail in their submission that there was no evidence to support this finding.

The next point raised was that based on the covenant in the head lease, and is formulated by the judge as follows :

F The landlords say that [the premises] could not be let at a higher rent because by the terms of the head lease the carrying on of this business was a breach of covenant as between the mesne landlords and the head landlord, and now that the head landlord knows of the breach he would not permit it to be perpetuated with a new tenant.

G The learned judge's first reason for not accepting this submission was that the premises having been let by the landlords' predecessors in title with permission to carry on this particular business the landlords were estopped from denying that it was a lawful purpose. In the view I take on this part of the case it is unnecessary to decide it on this basis. The learned judge went on to hold that, apart from the doctrine of estoppel, the argument was not a sound one, and he said this :

H The operative words are "the premises could be let at a higher rent." It seems to me to be quite immaterial that they cannot be so let without the consent of the superior landlord. Apart from that limitation they could be so let, and the mesne landlords might obtain the advantage by getting a consent from their head landlord, or they might surrender the lease to their head landlord who would pay a higher price for the premises with an enhanced value, or they might, and in these days very likely could, get the covenant modified under s. 84 of the Law of Property Act, 1925. These are possibilities to which I refer because the words of the section are "premises could be let" and not "the landlord could let the premises," and I do not think there is anything in the decision of *Hudd v. Matthews* (4) which is contrary to this interpretation of the section.

I am not sure what the learned judge's view would have been if he had been satisfied on evidence that there was no possibility of the landlord giving his

consent, or that the covenant was of a kind which was unlikely to be modified under s. 84 of the Law of Property Act, 1925.

I arrive at the same conclusion as my brethren and the learned judge, but by a somewhat different route. In cases where a new lease is claimed the proceedings under the Act are started before the termination of the lease. The mesne landlord has, under s. 5 (9), to give notice of the claim to his immediate landlord. If that landlord is a mesne landlord he has to notify his immediate landlord, and so on. If no new lease is claimed a mesne landlord who desires at the end of his lease to claim compensation from his landlord under s. 8 must notify that landlord of the claim. In a case, therefore, like the present where a trade has been carried on in breach of a covenant in a head lease unknown to the head lessor, the head lessor will normally receive notice, as happened in the present case. Now, the mere fact that the trade or business is contrary to a covenant in a head lease is consistent with there having been an express or implied consent or a willingness to abstain from enforcing the covenant *in futuro*. Indeed, the argument as set out by the learned judge was based on the submission that the head landlord would not permit the breach to be perpetuated with a new tenant. It would, of course, on any view be wrong if compensation was refused on the ground of the existence of such a covenant, there being no intention to enforce it now or *in futuro*.

In the present case no steps were taken by Queen Anne's Bounty when their demand in the letter of Jan. 8, 1947, that the business should be discontinued was disregarded. They could, by taking the appropriate steps, have enforced, or, at any rate, sought to enforce, their covenant. If they had obtained an injunction no goodwill enabling the premises to be let at a higher rent on the termination of the tenancy could, as it seems to me, have attached. At the material date the business would have ceased. If there had been a forfeiture it is, I think, clear that the wording of s. 4 (1) (i) and (ii) excludes the case of a lease terminated by a forfeiture. In the present case the matter does not rest on the mere absence of proceedings. Queen Anne's Bounty did not, as I have stated, appear and argue or call evidence before the referee. A witness, a Mr. Godbold, from their estates management department, was called by the landlords. He gave evidence that it was the general policy of Queen Anne's Bounty not to allow a trade or business to be carried on in Kew Road. The following two questions and answers are, I think, important: Counsel for the landlords asked this question:

To make it quite specific, are Queen Anne's Bounty prepared to allow the premises to be used as a guest house for elderly ladies? (A) I should very much doubt it, if it is to be run on the lines of a business for profit.

Again there is a question by counsel for the tenant:

If they were approached by Mrs. Ireland saying: "I am carrying on this business without any indication outside so that it does not upset the appearance of your estate. I have these old ladies who would otherwise be driven to an infirmary, and I have been carrying on for six years," would your governors say "No"? (A) I cannot answer that.

This was some six months after they had received the notice. On the evidence, therefore, it was not clear whether Queen Anne's Bounty were or were not prepared to allow this very limited breach of the covenant. It is, to my mind, plain that if a covenant like this, not having been enforced or sought to be enforced by legal process after knowledge of the breach, is to be relied on as defeating a claim for compensation the tribunal must be satisfied beyond all reasonable doubt that it is the intention of those entitled to enforce it to take all steps open to them to do so. At this stage, therefore, in my opinion, the landlords had failed to discharge that burden. Before the learned county court judge Queen Anne's Bounty appeared, as I have said, by counsel. It appears from the judgment that they sought to call evidence to show that the grant of a new lease allowing the business to continue would not be consistent with good estate management. The learned judge refused to allow this to be done as Queen Anne's Bounty had neglected to appear before the referee. Queen Anne's Bounty have not appealed either from the learned judge's refusal to allow this evidence or from his order granting a new lease overriding the covenant. This issue, therefore, remains on the evidence as it was before the

referee, and on that evidence, for the reasons already given, the point, in my opinion, fails. I am not in any way criticising the line taken by Queen Anne's Bounty. They appear to have been content to leave the matter in the hands of the court and have accepted the decision. They may well feel that in present circumstances it would be undesirable to insist on the letter of their bond against this minor and inconspicuous breach.

A It is, therefore, unnecessary to decide the question whether, in considering the application of the words "could be let," the existence of an enforceable covenant preventing further user for the trade or business in question is wholly immaterial. I should myself hesitate to come to the conclusion that a landlord, apart from any question of estoppel, should have to pay compensation in respect of an increased rental value which he was going to be prevented from realising. The compensation, as was stated in *Whiteman Smith Motor Co., Ltd. v. Chaplin* (2), is limited to the addition to the value of the premises in the hands of the landlord at the end of the tenancy. In the case put the addition would appear to be nil.

B The next question is whether the learned judge was right in ordering a new lease. On this point I think the appeal succeeds on the ground that the landlords required the premises for occupation by themselves. The referee in his report construed "requires" as meaning "needs," and came to the conclusion that the landlords did not need this large house. It is unnecessary to refer to the evidence in detail, but neither in the referee's findings nor, as far as I can see, in cross-examination was any doubt thrown on the intention of the landlords to go and live in the house if they got the chance. The learned judge did not regard "requires" as meaning "reasonably requires" or "needs," but as a somewhat stronger word than "intends." He again, as I read the judgment, threw no doubt on the landlord's intention. He regarded their desire for this large house, and in particular Mr. Taylor's desire for the large lounge for use as a studio, as a whim or fancy. In *Clift v. Taylor* (1) it is said that any real ambiguity of language ought to be resolved in favour of maintaining common law rights. I doubt if there is any real ambiguity. "Requires" may, of course, have different senses in different contexts. In its present context it is, I think, satisfied if a landlord establishes, as these landlords did, that he wants and intends to occupy the premises. Apart from the Act that is his common law right. If the legislature had intended to place some burden on him of establishing that he was reasonable or not unreasonable in requiring what was his own, plain words would have been used. Of course, if a court came to the conclusion that the evidence of intention was false and that the landlord did not genuinely intend to occupy the premises, the claim would fail. There is, however, no trace of any finding to this effect. On this view it is unnecessary to consider F the question of "reasonableness." In the result, in my opinion, the appeal must be allowed as to the new lease.

E There then arises the question of compensation. Where a new lease has been applied for the court dealing with that application can under s. 5 (2) only grant compensation if it is precluded from granting a new lease on any of the grounds mentioned in s. 5 (3) (b). I referred to the difficulties that may arise from this provision in *Bullins v. Fytche and Another* (5) ([1948] 1 All E.R. 737, 740, 741). G They do not arise in the present case as on the view I take the application for a new lease fails under s. 5 (3) (b) (i). The referee fixed the figure for compensation, if awardable, at £371 9s. 4d. and this figure was not challenged before us.

H **COHEN, L.J. :** The facts have been fully stated by TUCKER, L.J., and I need not repeat them. He has also read all the provisions of the Act to which I desire to refer with the exception of s. 17 (1), which defines the holding to which pt. I of the Act refers. That sub-section reads as follows :

The holdings to which this part of this Act applies are any premises held under a lease, other than a mining lease, made whether before or after the commencement of this Act, and used wholly or partly for carrying on thereat any trade or business, and not being agricultural holdings within the meaning of the Agricultural Holdings Act, 1923.

The first ground of the landlord's appeal is the contention that the court had no jurisdiction to award compensation or grant a new lease because the tenant had not been tenant of the premises under one lease for a period of 5

years. I agree with my brethren that this point is not open to the landlords in this court.

The next question that arises is whether the tenant can establish the existence of adherent goodwill in the premises arising by reason of the business carried on by her thereon, and thus entitling her to compensation under s. 4. This is a mixed question of fact and law. The learned county court judge answered it in favour of the tenant, and the landlords cannot displace that finding unless they can show, either that the learned county court judge went wrong in principle, or that there was no evidence to support the conclusion which he reached. Counsel for the landlords contends that the learned judge went wrong in principle, in that, in considering whether the premises could be let at a higher rent than they would have realised had no adherent goodwill attached thereto, he ignored the fact that in the head lease there was a provision restricting user to user as a private dwelling-house. Counsel for the tenant, however, said that this was irrelevant and that the only question was whether the premises, *i.e.*, the physical premises, could be let at a higher rent, and that to that question the provision in the head lease was irrelevant. In my opinion, the argument of counsel for the tenant is well founded. What has to be considered is not whether the landlord could let the premises, but whether the premises could be let. The definition of "holdings" in s. 17 of the Act seems to me to support the view that the expression "premises" in s. 4 means the premises in their physical condition, and that there is no reason for importing any restrictive provision in the head lease into the consideration of the question whether the premises "could be let at a higher rent." It was suggested that this conclusion involved a hardship on the mesne landlord. I am unable to agree. The case must be rare in which a trade could be carried on for five years on premises without the mesne landlord being aware of that fact, and, in any event, if it is open to the landlords, mesne and head landlords together, to appropriate the value of the goodwill, I see no reason why the tenant should be deprived of that value, because as between the head landlord and the mesne landlord the head landlord may be in a position to prevent the mesne landlord enjoying that for which he has paid.

I turn now to the question whether there was evidence on which the learned county court judge could properly find that adherent goodwill had attached to the premises. The expert evidence of Mr. Warner, who was called for the tenant, was, as I read it, clearly to the effect that this question must be answered in the affirmative. The learned county court judge so read his evidence, but, as expert evidence must necessarily be based on the facts proved by the other witnesses, he was not prepared to act on the expert evidence without careful scrutiny of the other evidence. In this case the only other relevant evidence was that of the tenant herself. The learned judge deals with her evidence on this point in the passage in his judgment beginning "on this point I was very much impressed," which has already been read by SOMERVELL, L.J. The learned judge concludes his observations on this point by saying:

I have therefore not without difficulty come to the conclusion that the referee's decision that there is an adherent goodwill is the correct one in this case.

It is not for us to say whether we should have arrived at the same conclusion; it is enough to say that it seems to me quite impossible to say that there was no evidence on which this conclusion could be reached.

The tenant had, therefore, laid the foundation for an application under s. 5 for the grant of a new lease, provided she could prove that the compensation which could be awarded to her would not compensate her for the loss of goodwill she would suffer if she removed to or carried on her trade or business in other premises. It was not disputed that the tenant was in a position to prove this fact, but it was argued (i) that the court had not power to grant a new lease since the head landlord could enforce the restrictive provision in the head lease and thus render the new lease nugatory. The learned judge, however, held that any lease granted by him would bind the head landlord, and would be an answer to any action for forfeiture which the head landlord might bring. From this finding the head landlord has not appealed, and I do not think it lies in the mouth of the landlords to raise this objection. (ii) The landlords contended that it was not reasonable, in view of the existence of this restrictive

covenant, to grant a lease. I think this is really the same objection in another form, and in any event I do not think that the landlords, having let the premises to the tenant for the specific purpose of carrying on on the premises a private nursing home and/or guest house, can now be heard to say that it is not reasonable for the court to grant a new lease for the same purposes. (iii) A more formidable objection for the grant of a new lease is based on the provision in s. 5 (3) which provides that it shall not be deemed to be reasonable to grant a new lease if the premises are required by the landlord for his own occupation. A The landlords, by para. (7) (d) of their answer, contended that they would require the premises for occupation for themselves and for their son and daughter-in-law. Before turning to the evidence on this point it is necessary to decide what is meant by the word "required." The referee came to the conclusion that this word meant "needed," and that as (a) the landlords' allegation, so far as the son and daughter-in-law was concerned, was unsupported by evidence, and (b), so far as the landlords themselves were concerned, they had another house which they could retain under the provisions of the Rent Restrictions Act, it could not be said that they needed the premises for their own occupation.

Before the learned county court judge counsel for the landlords contended that the referee had wrongly construed the word "required," and he relied on the decision of HALLETT, J., in *Nuthall, Ltd. v. Entertainments & General Investment Corporation, Ltd.* (3), where the learned judge, referring to s. 5 (3) C (b) of the Act, said ([1947] 2 All E.R. 384, 392):

I . . . think that what the landlord has to prove under (i) is that he intends to use the premises for occupation by himself, just as under (iii) he has to prove that he intends to use the premises to carry out a scheme of re-development.

I respectfully agree with this construction of the sub-section. The learned county court judge purported to accept it, but qualified his acceptance in the D following words:

I do not think I am doing any injustice to that *dictum* if I say that there is always a danger in interpreting a word in a statute by the ample substitution of another, and I feel that although it is wrong to say that "requires" is the same as "reasonably requires" or "needs," yet it is a somewhat stronger word than "intends" and does not include a mere whim or fancy.

E If by these observations the learned county court judge merely meant that the intention must be a genuine intention, I should not quarrel with him, but if he meant that, although the intention was genuine, the court must consider whether it was reasonable, then I am unable to agree. From the way the learned county court judge dealt with the evidence, I have come to the conclusion that the second interpretation of his language is correct, and that he thought it was open to him to consider the reasonableness of the landlords' contention.

F After referring to the referee's summary of the evidence of the landlords, he says that he had the advantage of reading a shorthand note of Mrs. Taylor's evidence, and was not at all satisfied that she genuinely required the house for her own occupation. He deals with Mr. Taylor's evidence in the following language:

G Mr. Taylor, whose evidence was more frank, is apparently wishful of having the big lounge in the house for resuming, at the age of 70, his profession as a portrait painter, but having regard to all the circumstances, I cannot regard that as more than a whim, when it involves the requirement of an unsuitably large house for the sake of the size and lighting of one room in it.

As I read that observation he is saying that Mr. Taylor's evidence is genuine, but that he does not regard it as reasonable, having regard to the rest of his evidence, that at the age of 70 Mr. Taylor should want the big lounge in the H premises for his professional work.

Now, I think that it was not for the learned county court judge to decide as to the reasonableness of Mr. Taylor's intention. In my opinion, provided that intention was genuine, the landlords were entitled to rely on the proviso to the sub-section. The learned judge did not himself see the witnesses, but the referee did, and the referee seems to have felt no doubt as to the genuineness of Mr. Taylor's evidence. He concludes his observations on this part of the case by saying that he quite realised that the landlords would like to oblige their landlord (*i.e.*, the landlord of the house they were then living in) and that that

landlord desired, if they left, to sell the premises. In other words, the landlords' intention was genuine, and it was inspired in part by their desire to oblige their present landlord.

For these reasons, I would allow the appeal on the ground that the landlords have established that the premises are required for occupation by themselves. It is to be observed that, if the tribunal is precluded on the ground I have indicated from making an order for a new lease, it is empowered under sub-s. (2) of s. 5 to award such compensation as is provided under s. 4. The referee assessed compensation that would be payable under that section at £371 9s. 4d. and that figure was adopted by the learned county court judge who stated that it had not been disputed by any party to the application. Accordingly, in allowing this appeal I would direct the payment of £371 9s. 4d. compensation under s. 4.

Appeal allowed. Order of county court judge varied by substituting for the order for a new lease an order for payment of £371 9s. 4d., being compensation assessed by referee. Compensation to be paid on quitting the holding. Tenant to have costs of hearing before the referee and county court judge, on Scale C; landlords to have three-quarters of costs of appeal, to be set off.

Solicitors: *Dixon, Ward, Umney & Burdon* (for the landlords); *N. A. Woodiwiss & Co.* (for the tenant).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

Reversed. H.L. [1950] 1 All E.R. 392.

BARKWAY v. SOUTH WALES TRANSPORT CO., LTD.

[COURT OF APPEAL (Scott, Bucknill and Asquith, L.JJ.), May 25, 26, 28, 31, June 1, 2, 3, 4, July 9, 1948.]

Negligence—Presumption of negligence—Highway—Skid—Omnibus mounting pavement and falling down embankment—Accident due to tyre-burst—Impact fracture of tyre—No evidence when or how caused—Reasonable system of tyre maintenance by defendants.

At about 6.30 a.m. on Feb. 27, 1943, a motor omnibus belonging to the defendants, and carrying 53 passengers among whom was the plaintiff's husband, was passing through a village when the off-side front tyre burst, the omnibus went over to the off-side of the road, mounted the pavement, crashed into some railings, and fell down an embankment, killing four of the passengers, including the plaintiff's husband, and injuring others. The tyre-burst was caused by an impact fracture of the cord of the outer tyre, but there was no evidence when the fracture occurred. Evidence was given that an impact fracture was caused by a severe blow which could happen without leaving any visible mark on the outer surface of the tyre and might not be visible even if the tyre were removed from the rim and examined. The tyre, while fixed on the rim, had been examined periodically by an expert tyre fitter employed by the defendants, the last examination being 3 days before the accident, and it was the practice of the defendants to have tyres examined internally after every 25,000 miles when they had been running on fairly bad roads. The tyre in question had run about 23,545 miles, and about 21,750 miles since it was last taken off for examination. Before the accident occurred the driver of the omnibus had been driving at an average speed of 32 miles an hour, and was, therefore, guilty of a breach of statutory duty as the maximum speed for an omnibus of that type in the "black-out" (which then existed) was 20 miles an hour. He was, however, not driving at an excessive speed just before the accident occurred and the tyre-burst was not caused by his driving too fast. The plaintiff claimed damages from the defendants on the ground that her husband's death was caused by the negligence of the defendants or their servants.

HELD: (i) the fact that the omnibus left the road and fell down the embankment raised a presumption of negligence against the defendants, requiring them to prove affirmatively that they had exercised all reasonable care; to displace the presumption it was not sufficient for the defendants to show that the immediate cause of the accident was a tyre-burst, since

a tyre-burst *per se* was equally consistent with negligence or due diligence on their part; but it was necessary for the defendants to prove either that the burst itself was due to a specific cause which did not connote negligence, or, if they could point to no such specific cause, that they had used all reasonable care in the management of their tyres.

Laurie v. Raglan Building Co., Ltd. ([1941] 3 All E.R. 332); *principle in Scott v. London Dock Co.* (1865) (3 H. & C. 596); and *Woods v. Duncan, Duncan v. Hambrook, Duncan v. Cammell Laird & Co., Ltd.* ([1946] A.C. 401), *applied*.

(ii) [BUCKNILL, L.J., *dissenting*] on the facts, the defendants had discharged the burden on them by proving that they had maintained a reasonable system of inspection in regard to their tyres and that they were not guilty of negligence with regard to the maintenance of the tyre in question.

(iii) [BUCKNILL, L.J., *dissenting*] since the driver of the omnibus was unaware of the defect in the tyre and the burst was not caused by fast driving, the defendants had not failed to discharge the presumption of negligence arising from the fact that the driver of the omnibus exceeded the legal speed limit on the journey before the accident occurred.

Evidence—Admissibility—Document—"Information supplied" to person making statement—"Person interested"—*Transcript of evidence given in earlier action brought on same facts, but by different plaintiff—Death of witness before trial in present proceedings—Evidence Act, 1938 (c. 28), s. 1 (1) (i) (b), (3), (4).*

Proceedings arising out of the same accident, but brought by a different plaintiff, came to trial in 1943, although instituted after the present proceedings. In the 1943 action and before the trial of the present action evidence was given by J., the defendants' expert tyre fitter, who died in 1945. The defendants sought to give in evidence in the present proceedings the transcript of the evidence given by J. in the 1943 action, on the ground that it was a "statement made by a person in a document," which formed part of a record within the meaning of the Evidence Act, 1938, s. 1 (1) (b), the "person" making the document being either J., or the maker of the typed transcript of the evidence (*i.e.*, the "reporter"). The Evidence Act, 1938, s. 1, provides: "(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible . . . (i) if the maker of the statement . . . (b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had . . . personal knowledge of those matters . . . (3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish. (4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible."

HELD: (i) the transcript of the evidence given by J. in the former proceedings was not admissible in the present case under the Evidence Act, 1938, s. 1 (1), as a document made by J., because it had not been signed or initialled by him, or recognised by him in writing, as required by s. 1 (4) of the Act.

(ii) the transcript was not admissible as a document made by the reporter, because J.'s evidence was not "information supplied" to the reporter, within the meaning of s. 1 (1) (i) (b).

Edmonds v. Edmonds ([1947] P. 67), *distinguished*.

Bullock v. Borrett ([1939] 1 All E.R. 505), *considered*.

(iii) the transcript was inadmissible under s. 1 (3) of the Act, since J. was a "person interested" in the result of the 1943 action and, had he lived, he would have been interested in the result of the present proceedings

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inter which were instituted before those which came to trial in 1943. A "person" pres in the phrase, "any statement made by a person," in s. 1 (3), meant any person whatsoever, provided he was interested, and not merely the person reporting the statement.

Plomien Fuel Economiser Co., Ltd. v. National Marketing Co. ([1941] 1 All E.R. 311), approved.

[AS TO PRESUMPTION OF NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 671-675, paras. 956-958; and FOR CASES, see DIGEST, Vol. 36, pp. 88-92, Nos. 589-607.]

FOR THE EVIDENCE ACT, 1938, s. 1, see HALSBURY'S STATUTES, Vol. 31, pp. 145, 146.]

Cases referred to:

- (1) *Laurie v. Raglan Building Co., Ltd.*, [1941] 3 All E.R. 332; [1942] 1 K.B. 152; 111 L.J.K.B. 292; 166 L.T. 63; 2nd Digest Supp.
- (2) *Scott v. London Dock Co.*, (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.J.Ex. 220; 13 L.T. 148; 36 Digest 91, 601.
- (3) *Woods v. Duncan, Duncan v. Hambrook, Duncan v. Cammell Laird & Co., Ltd.*, [1946] 1 All E.R. 420, n.; [1946] A.C. 401; 174 L.T. 286; 2nd Digest Supp.
- (4) *Readhead v. Midland Ry. Co.*, (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; *sub nom.*, *Redhead v. Midland Ry. Co.*, 9 B. & S. 519; 20 L.T. 628; 8 Digest 71, 480.
- (5) *Edmonds v. Edmonds*, [1947] P. 67; [1947] L.J.R. 936; 176 L.T. 545.
- (6) *Bullock v. Borrett*, [1939] 1 All E.R. 505; Digest Supp.
- (7) *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.*, [1941] 1 All E.R. 311; [1941] Ch. 248; 110 L.J.Ch. 180; 165 L.T. 119; 2nd Digest Supp.

APPEAL by the defendants from a judgment of SELLERS, J., at Swansea, dated July 30, 1947.

The plaintiff's husband was killed in an accident while a passenger in a motor omnibus belonging to the defendants, and she sought to recover damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. Owing to a burst tyre, the omnibus skidded across the road, mounted the opposite pavement and fell down an embankment. SELLERS, J., held that the defendants were guilty of negligence in their system of tyre maintenance and gave judgment for the plaintiff. From this decision the defendants appealed to the Court of Appeal. The defendants' expert tyre fitter at the time of the accident had died in 1945, before the trial of the action, and the defendants applied to the Court of Appeal to admit as additional evidence the transcript of evidence given by him in an action heard in 1943 which arose from the same accident but was brought by a different plaintiff. This application was refused on the ground that the transcript was not admissible as evidence under the Evidence Act, 1938, s. 1. The Court of Appeal held (BUCKNILL, L.J., *dissenting*) that the defendants had displaced the presumption of negligence raised by the fact of the omnibus mounting the pavement and falling down the embankment by proving that they had exercised all reasonable care in the maintenance of the tyre which had burst and caused the accident. The facts appear in the judgment of BUCKNILL, L.J.

Fox-Andrews, K.C., *Gerwyn P. Thomas* (with him *Sheen*) for the defendants.
Edmund Davies, K.C., and *Platts Mills* for the plaintiff.

Cur. adv. vult.

July 9. The following judgments were read.

SCOTT, L.J.: I will ask BUCKNILL, L.J., to read the first judgment.

BUCKNILL, L.J.: This is an appeal from a judgment of SELLERS, J., awarding £2,000 damages to the plaintiff for the death of her husband on the ground that his death had been caused by the negligence of the defendants or their servants. The appeal before us was concerned solely with the question whether the judge was wrong in finding negligence. On Feb. 27, 1943, the defendants' double deck omnibus, 26ft. long and 7ft. 6ins. wide and weighing 10 tons, with 53 passengers including the plaintiff's husband, was going through the village of Pwll when the off-front tyre burst. The omnibus then went over to the off-side of the road, mounted the pavement, crashed into some railings and fell on its side down an embankment on to some railway trucks, killing four of the passengers and injuring others. *Prima facie*, the fact of the omnibus leaving the road and mounting the pavement raises a presumption of negligence

against the defendants. *Laurie v. Raglan Building Co., Ltd.* (1) illustrates this proposition. In that case the plaintiff's husband, whilst standing on the public pavement, was killed by a passing lorry which skidded so that part of it swept across the pavement. LORD GREENE, M.R., in his judgment pointed out that the accident raised a *prima facie* case of negligence against the driver of the lorry and continued ([1941] 3 All E.R. 332, 336) :

A That being the position, the plaintiff gave evidence which showed . . . that the position of the lorry over the pavement was due to a skid, and it is contended on behalf of the respondents that, assuming that a *prima facie* case of negligence arose, the circumstance establishing that the accident was due to a skid is sufficient to displace that *prima facie* case. In my opinion, that is not a sound proposition. The skid by itself is neutral. It may or may not be due to negligence. If, in a case where a *prima facie* case of negligence arises . . . it is shown that the accident is due to a skid, and that the skid happened without fault on the part of the driver, then the *prima facie* case is clearly displaced, but merely establishing the skid does not appear to me to be sufficient for that purpose.

The accident to this omnibus comes within the rule of evidence stated by ERLE, C.J., in *Scott v. London Dock Co.* (2) as follows (3 H. & C. 596, 601) :

C . . . where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

D This rule of evidence was considered recently by the House of Lords in *Woods v. Duncan* (3), better known perhaps as the *Thetis* case. It is clear from the speeches there delivered that the defendant, in a case where the rule applies, is not liable although he is unable to explain how the accident happened, provided he establishes that he himself was not negligent. Thus LORD SIMONDS said ([1946] A.C. 401, 439) :

The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered : yet, if the court is satisfied by his evidence that he was not negligent, the plaintiff's case must fail.

E The crucial question, therefore, seems to me to be whether the court is satisfied that the defendants or their agents were not negligent in using this tyre, or in the way in which they used it, in connection with this accident. The tyre which burst was composed of an outer tyre and an inner tube. The outer tyre was constructed in the following form. It had a cord composed of 12 plies of a cotton material, each ply being sheathed in rubber. The plies were joined together to form the cord, which was about one inch thick. The ply nearest F the inner surface of the tyre and in contact with the inner tube is called the crown. Outside the cord there was a layer of rubber called the breaker strip, and outside the breaker strip was another layer of rubber, which, when new, was about .874 inch thick. On the outside of this layer was the pattern. This tyre had run about 23,545 miles and at the time of the accident the pattern had been worn level over 5 inches of the breadth of the tyre. The judge found as a fact, and, I think, rightly on the evidence, that the burst was caused by an impact fracture of the cord of the outer tyre. An impact fracture is also in G itself a neutral fact, because it may be due to negligence or it may not. It is a fracture of the cord of the tyre and is brought about by a blow on the external surface of the tyre. In my opinion, the fracture did not in itself explain the accident in a way which relieved the defendants' *prima facie* liability for it. It was a neutral event which might, or might not, happen through the negligence of the defendants. I think that the defendants must prove, or the evidence H as a whole must show, that the burst occurred without any negligence on their part. On the other hand, it is sufficient if they establish that they took due care to secure that the tyre was fit for use on this fatal journey. I may here quote from the judgment of the Court of Exchequer Chamber in *Readhead v. Midland Ry. Co.* (4) (L.R. 4 Q.B. 379, 393) :

"Due care" however undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order.

The evidence established that, if a tyre of this kind receives a blow which is severe and much more than one would expect it to have in the ordinary course of its work, some of the plys may become fractured. This may happen although there is no visible mark on the exterior surface of the tyre. Unless the fracture extends sufficiently deep to affect the plys adjacent to the crown, the fracture may not be capable of detection even if the tyre is removed from the rim, and the crown is looked at and examined by touch. The evidence was that an impact fracture invariably commenced on the outside ply of the cord, and might extend from one to all the plys. The evidence called by the defendants, which I think the judge accepted, was that in about half the number of impact fractures no evidence of the fracture would be detected by an examination of the external surface of the tyre. In these cases there is nothing to indicate that the tyre has developed this dangerous weakness unless it is possible to detect it by taking the tyre off and examining the crown.

The danger of using a tyre which has developed an impact fracture is that the further use of the tyre will cause internal friction and wear in the mass of the plys so that the fracture grows and the tyre weakens, with the ultimate result that the tyre is no longer able to resist the outward pressure exerted on it by the inner tube, and the tyre then bursts. It follows, having regard to this serious risk, that the defendants, as owners of a motor bus used for the conveyance of passengers, owed a duty to them to exercise all due care to see that the tyre had not sustained an impact fracture. The tyre when fixed on the rim was periodically examined and its pressure tested by one Jenkins, an expert tyre fitter in the employ of the defendants. He kept certain sheets relating to his work and it appears from those sheets that he examined this tyre at Llanelly on frequent dates during January and February, 1943, the last occasion being on Feb. 24. On each occasion he also adjusted the pressure. He had also tested the pressure at Llanelly on Feb. 20 and 22. Unfortunately, Jenkins died in Sept., 1945, before the hearing of the case before SELLERS, J. He had given evidence in a previous case heard before LEWIS, J., when the plaintiff was the widow of a man also killed in this accident and the defendants were the same as in this action. Although it appears from the transcript of the evidence in the present case that a transcript of Jenkins' evidence before LEWIS, J., was in the hands of counsel for the plaintiff, and presumably also in the hands of counsel for the defendants, no application was made by either side to SELLERS, J., to admit the transcript of Jenkins' evidence. An application was made to us by counsel for the defendants to admit the transcript as additional evidence, but we ruled that it was inadmissible and said that the court would give the reasons for its decision after the hearing of the appeal had closed. I have had an opportunity of reading the judgment of ASQUITH, L.J., on this point, I agree with it and have nothing to add to his reasons why the evidence was inadmissible. The court, therefore, does not know what evidence Jenkins gave as to the state of the tyre when he examined it on Feb. 24 at Llanelly. The examination was of the tyre on the rim and was, therefore, only of its outer surface. I think it is a reasonable conclusion to draw from the course taken by plaintiff's counsel at the trial that Jenkins in his evidence did not admit that he saw any evidence of a defect in the tyre likely to impair its efficiency. The death of Jenkins put the defendants in a difficulty at the trial through no fault of their own, but it was somewhat lessened by the fact that, when counsel for the plaintiff started to cross-examine Mr. Bourne (the defendants' foreman at the Llanelly garage) as to what Jenkins had said at the previous trial, the counsel for the defendants could have applied to the judge to admit the transcript of Jenkins' evidence, an application which, I think, the plaintiff could then have hardly resisted. They did not do so, and the judge proceeded to deal with the question of Jenkins' negligence without apparently knowing what Jenkins had said when he gave his evidence before LEWIS, J.

In the absence of any evidence as to when the impact fracture was caused which produced the bursting of the tyre, one can fairly say that it may have been caused at a variety of times. It may have been caused by the tyre striking some object immediately before the burst. It may have been caused by one severe blow some days or even weeks before, which fractured some of the plys and the damage gradually extended and produced the burst. It may possibly have been caused by two blows in the same place on the tyre at different times,

neither of which were severe or such as were calculated to arouse any serious apprehension in the mind of a reasonable driver. On this aspect of the case the judge said :

I rule out any likelihood of the impact fracture having first occurred in the course of the last journey or at the time of the explosion. No one spoke of an impact and nothing was found in the road with which the wheel could have come into violent contact . . . The impact which caused the fracture must be found to have occurred on some earlier occasion and the defendants had done nothing about it, with the result that the 'bus was making this journey with a very defective tyre and in a dangerous condition as a passenger-carrying vehicle. The continued use of the tyre brought it nearer and nearer to bursting point . . . I think the probabilities are that inspection would have revealed the fracture of the cord in the case of a tyre so worn.

By "inspection," the learned judge presumably meant after removal of the tyre from the rim.

- B I think that the defendants, in order to avoid liability, must prove to the satisfaction of the court that they took all reasonable steps to ascertain that the tyre was fit for use on Feb. 27, and this I think on the evidence they failed to do. It may have been fit or it may not have been fit. The mere external examination of a tyre which had run 21,750 miles since Aug. 1, 1942, part of which was done on bad roads, driven by drivers who had had no instructions to report an unusual and heavy blow to the tyre, and without any examination of its internal surface during the whole of that time, seems to me to leave the defendants with the burden undischarged of satisfying the court that they had taken all reasonable steps to avoid this accident. With tyres of this size, the evidence was that it is very rare to have a burst and I, therefore, conclude that in the absence of any latent defect in this tyre (and this was not suggested), the fracture was caused by a serious and unusual blow, a blow which ought to have been reported by the driver. There is no record of any such report. If the blow had been reported, the tyre should have been examined externally and perhaps taken off the rim for examination of its interior surface. It is possible that two blows at different times may have combined to produce this dangerous condition of the tyre, but I do not think this is a reasonable explanation because the probabilities are so much against it. The judge rejected the idea and I am not prepared to disagree with him. There was a conflict of evidence as to the desirability of taking a tyre off and examining its interior surface after it had run 3,000 to 4,000 miles. The defendants' witnesses said that, unless there was some reason to take the tyre off the rim because of a puncture or suspected serious injury to the tyre or the inner tube, the safest course was to leave the tyre *in situ*, because of the risk of getting the inner tube pinched when the outer tyre was replaced. The judge came to no conclusion on this issue. I think the defendants were not required to make such an examination, provided the risk of an impact fracture and the necessity of reporting any serious blow to the tyre were impressed on the driver, and there was no external evidence on the tyre of such a blow.

- F The judge found the defendants liable on two heads. He first held Jenkins to blame because he did not cause the tyre to be condemned and replaced or, at any rate, to be removed and examined owing to the presence of a certain puncture or gaping hole in the outer tyre which was visible after the accident. G The defendants' evidence was that the puncture was caused by a nail. They also admitted that the nail which made such a hole would be very unlikely to be removed without some probe to pull it out. The judge based his decision as to Jenkins' negligence on the ground that this puncture appeared to be of old standing and from this he arrived at two decisions : (i) that Jenkins was negligent in not having repaired the puncture and in not causing the tyre to be taken off and examined internally ; (ii) the negligence of Jenkins in this respect H indicated that he might also have been negligent in failing to observe the mark of a severe blow on the exterior surface of the tyre such as might be calculated to produce an impact fracture. When the judge said that the puncture appeared to be of old standing, I think he meant that it appeared to him to be one which was of old standing at the time of the accident on Feb. 27, 1943. It is true that the judge saw the tyre four years afterwards, but the puncture, except for being washed and surveyed and exhibited at the previous trial, was in the same state as to actual size and condition at the date of this trial as it was in February, 1943, except in one respect. On the judge's finding the hole or

puncture had not penetrated right through the outer tyre at the time of the burst. I have carefully examined the puncture and do not feel disposed to disagree with this conclusion of the judge as to its age. It is, of course, possible that the hole may have been made on the morning of Feb. 27, or on Feb. 26 or 25. It seems to me that here the burden of proof comes into play and I myself do not think that, having regard to the appearance of the hole, it is reasonable to hold that it was done then. If the matter is left in doubt, the defendants, in my view, fail to satisfy the court that the tyre by reason of this unrepaired condition was fit for use on this omnibus on the morning of Feb. 27. There was clear evidence that the hole rendered the tyre unfit for use, or, at any rate, one which should be examined internally before further use. Mr. Pannell, the defendants' chief engineer admitted that it was a very nasty gash in the tyre, and that a tyre fitter should certainly have put the tyre on one side for further attention. Another of the defendants' witnesses, Mr. Cooks, the service engineer of Goodyear Rubber Tyre Co., who had 400 motor omnibuses under his care in respect of their tyres, said that he would remove a tyre with such a puncture. Mr. Cowley, a tyre fitter employed by the defendants, admitted that a hole such as that now in the tyre should be at once reported, and that, if the hole had been there on Feb. 24, Jenkins should have taken the tyre off and examined it. Mr. Bourne, the defendants' foreman at the Llanelly garage, also agreed that, if the hole had been there on Feb. 24, Jenkins should have taken the tyre off and replaced it. I think that the judge was justified in holding that Jenkins was negligent in not having repaired the puncture. I do not, however, agree with the second conclusion of the judge that Jenkins also probably failed to observe the mark on the exterior surface of the tyre which was probably made at the same time as the impact fracture. The plaintiff at the trial relied on this puncture as being the cause of the impact fracture of the tyre, but during the hearing the outer tyre was cut open in the vicinity of the puncture and it then became apparent that there was no association between the puncture and the fractured cord, and the judge so found in his judgment. On this head of negligence, therefore, it seems to me that, if Jenkins had been careful in his work, he would have removed and examined the tyre before filling in the hole and he might then have detected the fractured plys of the cord. To that extent the defendants have not satisfied me that they through their agents took all reasonable steps to make and keep this tyre fit for use.

The second head on which the judge found that the defendants were negligent was one which formed no part of the plaintiff's case, but was evolved during the hearing because of the evidence as to the hidden danger of impact fractures. The practice suggested by the learned judge to the witnesses as desirable and eventually adopted in his judgment was that the owners should inform each driver of a public motor service vehicle of the nature of impact fractures, and should require them to report any blow to the tyre of such severity that a fracture might be caused. The learned judge considered that such a report would call for a removal of the tyre and an internal examination of the cord by sight and touch. If no weakness was revealed, then the nature of the impact could be more fully considered, and the tyre either passed as sound or another inspection arranged after an interval of use to see if further deterioration had set in. The judge accepted the evidence given by a representative of a large omnibus undertaking that this procedure was practical, but it was admitted that no such steps were taken by the defendants in this case. In the learned judge's view, if this practice had prevailed with the defendants and if, in consequence, Jenkins had been told that the tyre had received a severe impact, Jenkins should have condemned the tyre, having regard to its weakened state. A great weight of evidence, however, from experts and others intimately concerned with the motor omnibus business was given that such a system was impracticable and was not used by any company. I do not think that it would be right to find the defendants negligent because they had not given specific instructions to their drivers as to the risk of impact fracture, or as to the necessity of reporting any blow to a tyre which might reasonably be expected to produce such a fracture. I, therefore, do not agree with the finding of negligence by the learned judge under this head.

There is a further point against the defendants which was pressed on us by counsel for the plaintiff and which requires consideration. This double deck

omnibus, fully loaded, was proceeding in the "black-out" along a narrow road (about 22ft. wide) and was rounding a left hand bend with a slight decline with houses on one side and an embankment on the other side. Its off front tyre was well worn, had run about 23,545 miles and was nearing the limit of 25,000 miles when it would go into the workshop for thorough examination. It had not been taken off for examination for nearly 18 months, during which time it had run about 21,750 miles. The driver at the time of the accident was proceeding in the "black-out" through a built-up area where the law required him under a penalty to proceed at a speed not exceeding 20 miles an hour. There is no positive finding by the judge as to what his actual speed was at the time of the burst. The judgment on this part of the case is as follows :

As the journey was undertaken in the black-out hours, the speed limit was 20 miles an hour in the built-up area which composed most of the route, and I feel no doubt that the 'bus travelled in excess of that on the average, and was probably doing more than that at the time of the bursting of the tyre, but probably not more than 25 or 26 miles an hour.

The learned judge in his judgment says that he does not think any accurate calculations of speed are possible but I do not see why this is so in this case. The material data are unusually precise. There was reliable evidence as to the total distance run from the factory to the place of the accident, *viz.*, 5 miles 220 yards. The journey was divided into two distinct sectors. The first was

1½ miles along a private road, while the second, the remaining 3½ miles, was along a public road. There was reliable evidence that the total time taken was not more than 15 minutes. The omnibus left the factory just after 6.15 a.m., according to the driver who heard the factory hooter sound at 6.15 before he started. The result of the accident was that a wire attached to a telegraph pole, and broken by the omnibus in its career along the pavement, rang a fire bell at the fire station, at a time recorded in the official log there as 6.28. There

is other reliable evidence that the accident occurred a little before 6.30. The first 1½ miles of the route was along a winding and rough road, about 12ft. wide, in which a local speed limit of 10 miles per hour was imposed by the Ministry of Supply. The driver admitted that it was a dangerous road with many curves and said that he was not doing more than 10 miles an hour along it. After getting on to the main road the omnibus was going through a built-up

area except for 3/5ths of a mile. It had a governor which, if in use, cut out at 30 miles per hour and would be difficult to alter. In these circumstances, if one allows 8 minutes for the first 1½ miles along the narrow road, at an average speed of 10 miles and making no allowance for one stop to pick up passengers, that leaves 7 minutes for covering 3½ miles, an average speed of 32 miles an hour, again making no allowance for one stop to put down passengers. The omnibus,

which was employed exclusively for the conveyance of workers from the factory and was not plying for hire, did not stop shortly before the accident, and there was only this 3/5ths of a mile in which the driver could go at more than 20 miles an hour without breaking the law. In any case his maximum speed was limited, or should have been limited by the governor, to 30 miles per hour. In these circumstances it seems to me almost inevitable that he was travelling throughout the journey from the time he joined the main road at a speed which

was far in excess of that imposed by law on that type of omnibus in the "black-out," a speed which, in my opinion, was negligent. In my view, he was probably going at an excessive and negligent speed at the moment when the tyre burst. It is remarkable that the driver of the omnibus should be anxious to put his speed so low in his evidence, evidence which I think was untrue. I do not believe his evidence that the highest speed he reached on the trip was not more than 20 miles an hour, or that he was driving at a speed of 12 to 15 miles an hour at the time of the accident, or that the accident happened between 6.35 and 6.40 a.m.

The learned judge has not attached importance to the speed of the omnibus, because (i) no one has said that the speed caused the burst ; (ii) there was some evidence that at less speed the vehicle would have gone across the road and over the embankment sooner than it did ; (iii) the omnibus would not have been in any difficulty if the tyre had not burst ; (iv) the driver had no reason to anticipate that a tyre would burst so as to regulate his speed by reference to that possibility. With due respect to the learned judge, I am unable to agree

with three of these reasons. As to (i), the expert evidence of the defendants was that, once an impact fracture has started, it tends to spread and that this tendency is increased by fast driving, specially of a heavily laden vehicle. As to (ii) it seems to me unreasonable to say that, if the omnibus had been proceeding at a proper speed, it would have struck the kerb at a broader angle and, therefore, would have fallen over the embankment sooner. If it had done so, it probably would not have fallen over on its side on to the railway trucks. The resistance of the kerb and of the railings would have tended to pull the omnibus up and it would probably not have fallen bodily over the embankment. I do not think that the omnibus would have diverged at a broader angle across the road if it had been going slower. It could only do this on the assumption that the steering wheel was forced more to the right and I see no reason for thinking that a slower speed would bring that about. As to (iv), it seems to me that, if impact fractures are accidents which are definite possibilities and have this characteristic that their presence cannot be detected until they have reached a dangerous state and the plys near the crown are affected, then it follows that the longer a tyre has been in use without careful examination of the crown after removing the tyre from the rim, the more risk there is that it may have developed an impact fracture. There was evidence that a worn tyre with no tread is more liable to get an impact fracture than a tyre with the tread not worn away. In these circumstances the driver of this fully laden double deck omnibus using this tyre ought to have been careful not to drive at an excessive speed. I think that the excessive speed on this journey directly contributed to the bursting of the tyre and it also contributed to the damage sustained by the omnibus and to the consequent death of the plaintiff's husband. It is surely the physical injury sustained by the dead man and not the mere bursting of the tyre which is the cause of action. In any case, I think it is for the defendants to satisfy the court on the evidence as a whole that the speed was not negligent, although it substantially exceeded the statutory speed limit, as I am satisfied that it did. I think that they quite failed to do so.

For these reasons, in my opinion, the defendants have not established that they, through their servants or agents, were not guilty of negligence whereby the plaintiff's husband lost his life, and she is not entitled to recover damages as awarded by the judge. On the contrary, I think that the plaintiff has established negligence against the defendants causing the death of her husband. I am in favour of dismissing this appeal.

SCOTT, L.J.: I have read the judgments of my brethren, and with that of ASQUITH, L.J. (which he will read presently) I entirely agree, including that part of it which deals with the defendants' application to us to allow the shorthand transcription of the evidence of Jenkins, given at the hearing of a previous trial of an action before LEWIS, J., to be put before the court. I have, indeed, read and re-read my brother BUCKNILL, L.J.'s judgment and have given the case the most anxious consideration, but in the end I find myself unable to accept either of his two final conclusions, namely, that the accident was caused by the negligence of the defendants in one or both of two ways: (i) by failure in their duty of tyre maintenance, and (ii) by the excessive speed at which the omnibus was being driven at the moment when the inner tube of the tyre burst and caused the omnibus to cross the road, run over the footway and capsized.

I agree that the mounting of the omnibus on the footpath was a fact which raised the presumption expressed in the phrase *res ipsa loquitur*. That phrase, however, represents nothing more than a *prima facie* presumption of fault. It is rebuttable by the same defence as is open to any defendant accused of negligence, against whom the plaintiff's evidence has made out a *prima facie* case. When the plaintiff has done that, the *onus* is said to shift to the defendant. In a case where *res ipsa loquitur* the *onus* starts on the defendant and requires him to prove affirmatively that he has exercised all reasonable care, but that proof is very greatly facilitated if he can show that the event which caused the plaintiff damage happened through some cause for which no blame can attach to him, even though it cannot be specifically identified, and, if it can be so identified, his task is not only facilitated but achieved. If he thus succeeds in demonstrating positively the probable operation of such cause, whether specifically identifiable or not, the *onus* is then discharged, and the presumption

of fault on his part ceases and the plaintiff is left in the position of having failed to prove his case. Even if he can point to no specific cause, he still discharges it if he can show that he used all reasonable care. In the present appeal, however, there was before the mounting on to the footway an anterior link in the chain of causation, *viz.*, the tyre-burst which diverted the omnibus from its course on the road on to the footway. I will assume with BUCKNILL, L.J., that the presumption of *res ipsa loquitur* is still applicable, notwithstanding the intervention of the new link in the chain of causation, although I feel by no means convinced that the prevention of a tyre-burst is within the control and management of an omnibus company in any sense or degree comparable with the case of the occupier of an upper floor in a warehouse with an open doorway in its external wall abutting on a public road, on to which a barrel, if not controlled, can roll out and fall. However, the observations which I have just made about the probative burden of the defendant in regard to the first presumption are equally applicable to the second. The precautions taken by them in tyre maintenance were reasonably careful, but a partial rupture of the inner cord (on which the power of resistance to pressure from the inflated tube depends) may happen in spite of all such precautions, and then gradually spread to the crown, without any external indication to sight or touch. The doctrine of *res ipsa loquitur* then goes out of the picture, and the court has to decide on the balance of proof on each side. In the present case the only positive proof of negligence attempted by the plaintiff was the expert's theory that the puncture caused the burst. That was completely disproved by the defendants and rejected by the judge, and the plaintiff was then left with the doctrine of *res ipsa loquitur* and nothing else.

I do not read LORD SIMONDS' observation [in *Woods v. Duncan* (3)] which my brother quotes, as in any way differing from that of ERLE, C.J. [in *Scott v. London Dock Co.* (2)] also quoted by him, and of the two the earlier and leading statement of the proposition is the more directly apposite to the aspect of the doctrine of proof which I am now discussing. How should the phrase of ERLE, C.J. (3 H. & C. 596, 601), "under the management of the defendant or his servants," be applied to the defendant company? Primarily, the servant "managing" the omnibus was its driver, but against him there can be no complaint unless it be bad driving. As against him there is a serious charge of "excessive" speed, having regard to the character of the road—its surface, gradient and curve—and the defendants would be liable if the driving, being thus bad, thereby caused the burst. That, however, is a totally separate question and to introduce it into the issue whether some other servant of the defendants to whom the duty of tyre maintenance was remitted was guilty of negligence would cause confusion of thought. I, therefore, entirely concur in the separation by BUCKNILL, L.J., of the speed issue from the question of tyre maintenance.

In relation to maintenance there are, in my opinion, only two topics which on the totality of evidence stand out as calling for consideration. One is the contention for the plaintiff that the company was negligent in not instructing all its drivers to report on every occasion when they felt an unusually violent bump by a wheel against something in the road—whether projecting above its surface or a pot-hole in its surface. This must be a matter of degree, and I read the evidence as indicating that the drivers would normally regard it as their duty to report if anything really abnormal occurred. BUCKNILL, L.J., has dealt with that suggestion of a negligent failure to instruct drivers and I agree entirely with him that any effective rule about reporting was wholly impracticable. Tyres cannot be taken on and off like an overcoat. It is obviously not a practical business proposition to call for tyre-removal unless there is some patent reason for suspecting something wrong with the particular tyre, and it was shown conclusively in evidence that an impact fracture to one or even several of the numerous plies which make up the cord may occur without any indication of the internal injury showing externally whilst the tyre remains on the wheel. Indeed, even if it is taken off, there will in all probability be nothing disclosed in the crown then exposed to view, unless the fracture has extended through the many plies to the crown or, at least, to the ply next to it, and even then the indication will not be visible, but only manifest to the sense of touch, by a possible yielding to pressure from the fingers. I agree with the

conclusion of BUCKNILL, L.J., that there was nothing negligent in the defendants' system of tyre maintenance.

The second topic for consideration is one which was raised by the puncture or "gaping hole," observed in the tyre on examination after the accident. The plaintiff's case below, as put forward by her expert, was that this puncture was the cause of the burst, but that case was completely disproved and rejected by the learned judge. Nevertheless, my brother BUCKNILL, L.J., treats it as having indirectly caused the burst. His reasoning is based on three steps : A
(i) that its present appearance, as seen by us, is identical with its appearance as seen by the learned judge ; (ii) that it had been caused before Jenkins examined the tyre on Feb. 24, 1943, and then had the same external appearance as when the learned judge saw it ; and finally (iii) that Jenkins was negligent in not forbidding any further use of the tyre, pending removal and examination of it when detached from the wheel—in short, that Jenkins was negligent in (a) failing to see it, B
or (b) in failing to remove the tyre from the wheel for inspection, and (c) allowing the tyre to continue in use. I cannot agree with these conclusions, for I think that they really depend on tacit assumptions which are not justified. Two dominant facts about the hole were proved : (i) that on examination of the tyre detached from the wheel, soon after the accident, it was found that the hole did not reach right through the 12 plies of which the cord was composed, but ended somewhere short of the crown—in other words, that it penetrated less than the full inch of the thickness of the cord. Therefore, it may have been a comparatively short nail or other iron or steel thing which penetrated. What it was, must be mere conjecture. The second important fact is that at a later post-accident date, soon after the first examination had definitely ascertained the limited depth of penetration, it was found that the hole had been enlarged in depth and then showed right through the crown, *i.e.*, the innermost ply, which meant that somebody of the various persons, who properly or improperly D
may have been examining the hole, had forced a tool right through. That it had never (before removal) reached the crown was certain, because, if it had, there would have been a puncture of the tube lying against the crown or at least a mark on it, and there was none. I, therefore, think that we must infer that the appearance of the external orifice which impressed both the learned judge and BUCKNILL, L.J., was brought about either by the tool, which was improperly so used as to lengthen the hole, or by sheer stupid fiddling with the orifice by somebody interested and, perhaps, merely inquisitively meddling after the accident. These reflections cause me to conclude that there is nothing like a balance of probability that the "appearance" in question was present on Feb. 24 when the last pre-accident examination took place. If I am right, Jenkins missed nothing on Feb. 24. E

If the so-called puncture is discarded as an irrelevant matter, I can see no justification for the view that (the speed issue apart) there remains any balance F
of probability that the defendants were guilty of negligence in the maintenance of this tyre. As far as I can judge, their system seems to have been in all relevant ways careful and efficient.

On the issue whether excessive speed caused the burst, in spite of the powerful exposition of BUCKNILL, L.J., of the evidential case against the driver in respect of average speed, I cannot agree that his speed *at the critical moment* is proved to have been excessive. Still less can I accept it as proved that the speed of the omnibus either caused, or contributed to causing the burst. I accept the calculation of BUCKNILL, L.J., and, therefore, assume that the average speed was over 32 miles per hour with the consequence that over the whole distance covered at that average speed the driver was guilty of a statutory breach of duty. But it does not follow that the disaster was caused by that breach. G
Three separate issues are involved in the question of causation. The first is H
what the driver's speed was on the particular few yards of road covered by the omnibus in the second or two just before the burst deflected his course from his proper side of the road. The evidence of his passengers who were called was on the balance against the inference that *at that moment* they noticed any sign of excessive speed. The second is whether that speed, whatever it was at the moment before the burst, was reasonably likely to be the cause, or a contributing cause, of the burst. If the wheel at that very moment had struck some substantial obstacle in the road, the causal *nexus* might well have been inferred,

but immediately after the accident the road was inspected with great care and not the faintest evidence was forthcoming as to any projection or even pot-hole being observed on the surface over which the off-side wheels had run just before reaching the point on the road where the two dark lines began which remained visible on the road and, by common agreement, had been caused by the rims of the wheel or by some part of the omnibus itself after the deflation of the tyre through the sudden bursting of the inner tube had altered the direction of its course. This evidence seems to me to eliminate all possibility of the wheel having run into or against any fixed obstacle, contact with which might, if the speed at that moment was excessive, have produced the burst under the dynamic force of the blow. Accordingly, although the average speed on the mileage covered was excessive, the facts in evidence seem to me inconsistent with any inference that the burst which deflected the omnibus was caused through the driver driving too fast.

The third issue is entirely separate and alternative to the first two. There was a suggestion, that, even if excessive speed did not cause the burst, it may yet have caused the disaster, because, on this theory, the omnibus, if at a lower speed, would have stopped short of the footway, or not plunged over the embankment. My answer to that contention for the plaintiff is that it must be considered in its relation to the finding of this court on the prior issue of negligence in relation to the burst, and, if I am right in my conclusion that the plaintiff fails on that issue, the alternative allegation of negligent speed must be judged wholly apart from the disproved allegation of speed having caused or contributed to the causing of the burst. Let me, therefore, assume that the burst had been the result of some latent defect in the manufacture of the tyre itself, which it was impossible to diagnose—just as if it had been a defect discoverable only by the eye of an X-ray before X-ray vision had been invented. On that hypothesis there was nothing to put the defendants or their driver on guard against the hidden danger, and, equally, there was no relevant act of negligence on the part of the driver in ignoring the risk of a road obstruction (because *ex hypothesi* there was none). On those premises the burst goes out of the picture altogether. How in such circumstances can he be blamed?

On the question of admissibility of the transcript of certain evidence taken from a shorthand-note at the former trial, to which BUCKNILL, L.J., makes reference, I entirely agree with the statement by ASQUITH, L.J., in his judgment on that matter. In the result, I think that the defendants' appeal should succeed.

ASQUITH, L.J. : The position as to *onus* of proof in this case seems to me to be fairly summarised in the following short propositions. (i) If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst *per se* is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laurie v. Raglan Building Co., Ltd.* (1), where not a tyre-burst but a skid was involved. (iii) To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (b), if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres: *Woods v. Duncan, The Thetis* (3). The second limb, (b), of the last proposition is the relevant one for the purposes of this case. I think that this summary accords both with the more detailed analysis in the judgment of BUCKNILL, L.J., and with the views expressed in slightly different language by SCOTT, L.J.

If this is, in truth, the burden on the defendants, I am of opinion, for the reasons which are given at length by SCOTT, L.J., and which I will not restate, that they have discharged it. Out of respect, however, for the judgment of

BUCKNILL, L.J., with whom I have the misfortune to differ on this part of the case, I will briefly summarise the grounds of my disagreement. Negatively, I do not think the defendants fail to discharge the *onus* on them by reason only that it is certain that during the omnibus's last journey the driver on the average materially exceeded the legal speed limit, because there is, in my view, and as SCOTT, L.J., has pointed out, no evidence that this excessive speed caused the burst, or thereby the accident, or that it prevailed immediately before the accident. Nor do I think they so fail by reason of the existence of the puncture as a circumstance, which, while admittedly it did not cause the burst, should have put them on inquiry and caused an internal examination of the cover. Such an examination might, in any event, have revealed nothing, as impact fractures are often symptomless. The puncture may have occurred between Feb. 24 and 27—after Jenkins' last examination of the tyre. I do not see how the learned judge, examining the puncture more than four years after it was caused, (and after it had, admittedly, been teased and probed and deepened by the insertion of instruments), could possibly say in July, 1947, what it looked like just after the accident on Feb. 27, 1943, or how long before the accident on Feb. 27, 1943, it occurred. It may have occurred on the fatal journey itself. Affirmatively, it seems to me that the defendants have discharged the burden on them by proving that they observed a reasonable system of inspection in regard to their tyres. It seems to me to be a reasonable system to examine internally tyres, whose life on good roads extends to 100,000 miles, every 25,000 miles when they have been running on fairly bad roads such as these—unless some special need is proved for examining them internally before 25,000 have been run. None such has, in my view, been proved to have occurred in this case. For these reasons, together with those stated by SCOTT, L.J., I am of opinion that the defendants have discharged the *onus* on them and that the appeal should be allowed.

I would add a few observations on another point. Counsel for the defendants pressed the court to admit in evidence testimony given by one Jenkins in proceedings arising from the same accident, but with a different plaintiff, and tried before LEWIS, J., in 1943. Jenkins, a tyre tester or fitter employed by the defendants, died in 1945, between that trial and the trial of the present case. Counsel based his application on two grounds, of which the chief was that the testimony was made admissible in the present case by the Evidence Act, 1938, s. 1. Section 1 (1) provides :

In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible . . .

Counsel had first to establish that the testimony he sought to have admitted was a "statement made by a person in a document" within s. 1 (1). Who is "the person" and what is the "document" in this case? The "document" can only be the transcript of the evidence. The "person" must be either (a) the dead man, Jenkins, or (b) the maker of the typed transcript of the evidence. I will call him for short "the reporter." Alternative (a) (apart, altogether, from the artificiality of describing a witness whose evidence is taken down and embodied in a transcript as a person "making a statement in a document") is ruled out by the express terms of s. 1 (4), which provides as follows :

For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

In the present case none of these conditions was fulfilled. The deceased, Jenkins, was not the maker or producer with his own hand of the transcript, nor is there any evidence that he signed or initialled it, or vouched for its accuracy in writing. (The case might have been otherwise, obviously, if his evidence had been in a signed deposition). Alternative (b) is that the "person" making a "statement" in the "document" is the "reporter"—the maker of the transcript. If this contention is otherwise well founded, it is not barred, like the first alternative, by s. 1 (4), since the transcriber "makes or produces" the transcript "with his own hand." Is it otherwise sound? The defendants say it is, by reason of the terms of s. 1 (1) (i) (b), which is as follows :

(i) if the maker of the statement . . . (b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters.

It was argued that within the language of this provision the transcript is a "document" and a document which is a "continuous record," that the transcript writer made a "statement" in this "document," and in so doing was performing a duty to record information supplied to him, *viz.*, Jenkins' evidence, and that Jenkins was "a person who had, or might reasonably be supposed to have, personal knowledge of" the matters dealt with in the statement.

In support of his submission that the facts of this case fall within s. 1 (1) (i) (b) of the Act of 1938, counsel cited *Edmonds v. Edmonds* (5), a decision of this court and binding on us, and *Bullock v. Borrett* (6), a decision of FINLAY, L.J., sitting as an additional judge of the King's Bench Division. In *Edmonds v. Edmonds* (5) a husband was bringing divorce proceedings against his wife in England on the ground of her adultery with the co-respondent in India which the husband alleged had resulted in the birth of an illegitimate child there. In India the wife had brought bastardy proceedings against the co-respondent in respect of the illegitimate child. In the Indian proceedings, a Mrs. Ingles had given evidence which supported the wife's claim and hence the hypothesis of the wife's adultery. This evidence was given on commission and taken down by a commissioner who signed the document. The Court of Appeal held that the document so signed, recording Mrs. Ingles' evidence, was admissible in the English suit for divorce by virtue of s. 1 (1) (i) (b). The Court of Appeal undoubtedly took the view that evidence given before the commissioner in the Indian proceedings could answer the description of "information supplied" to such commissioner within s. 1 (1) (i) (b), for the purpose of its admissibility in the English proceedings. There are, however, it seems to us, two important distinctions between the facts of that case and those of the present. In that case the evidence was held to be "information supplied" to the maker of the document, the maker of the document being the commissioner—the court. To say that evidence given in court is information "supplied to" the court seems to us an entirely different thing from saying, as we are invited to say in this case, that evidence given in court is information supplied to the reporter. If a man dictates a letter giving information to the person to whom he is writing, it is an abuse of language to say that he is engaged in "supplying information" to his shorthand typist. But there is a further ground of distinction. There is no suggestion in the report of *Edmonds v. Edmonds* (5) that Mrs. Ingles was in any way interested in the result of either the Indian or the English proceedings. It is clear, on the other hand, that Jenkins was a "person interested" in the result of the 1943 action and would, if he had lived, have been interested in the result of the present proceedings, which were instituted before those which came to trial in 1943. His reputation as a tyre-tester was involved, and, apart from that, he was interested as an employee in his employers winning the case: see *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.* (7).

Section 1 (3) of the Evidence Act, 1938, is as follows :

Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

It was argued in answer to this objection that, where sub-s. (3) speaks of "any statement made by a person," the "person" spoken of is not the person whose evidence is reported (Jenkins), but the person reporting it—in other words, that the word "person" in sub-s. (3) is the same "person" as in sub-s. (1), *viz.*, in this case, "the reporter," and that the reporter is *not* a "person interested." On consideration, in spite of the similarity of the phrases employed in the two sub-sections, we do not think so narrow a construction can prevail. We think in sub-s. (3) "a person" means any person whatsoever provided he is interested. On the narrower construction the mere accidental interposition of a shorthand writer would let in statements of interested parties whose evidence, because interested, the Act intended to exclude, and sub-s. (3)

would be largely stultified. *Bullock v. Borrett* (6), the other case relied on by counsel for the defendants is easily distinguishable, and, though commanding the respect due to the learned Lord Justice who decided it sitting in the King's Bench Division, is not binding on this court. The construction of the Evidence Act, 1938, is not free from difficulties, but, in our view, the evidence sought to be admitted is not let in by its provisions.

Counsel for the defendants relied as a subsidiary argument on the fact that at the trial of this case there were put to a witness (in one question at least) views which cross-examining counsel suggested Jenkins had expressed in the earlier trial. Counsel for the defendants relied on the rule that, if a part of a document is read by one side, the whole of the text of it must, if the other side insist, also be read. We do not think that the operation of that rule, assuming it otherwise applicable, is attracted in every case in which counsel cites to a witness A statements given by a witness B in previous proceedings, and says to A, "Do you agree?" No objection seems to have been made to these questions at the time, nor, at the time, was any application made to let in the rest of Jenkins' evidence. We are of opinion that on neither ground can the evidence in question be let in.

Appeal allowed with costs.

Solicitors: *Stanley & Co.*, agents for *David H. Clarke*, Swansea (for the defendants); *Kenneth Brown, Baker, Baker*, agents for *D. Brinley Morris*, Llanelly (for the plaintiff).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

HAMPS v. DARBY.

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley and Evershed, L.JJ.), July 19, 1948.]

Animal—Pigeon—Homing pigeon—Spoiling crops—Right to kill—Property in pigeon.

The plaintiff, the owner of certain homing and racing pigeons, released them for exercise, and they alighted on the defendant's land and fed on his growing peas. To protect the peas the defendant shot at the birds, killing four and wounding one. In an action by the plaintiff for damages for the destruction of and injury to the pigeons, the defendant contended that there could be no property in homing pigeons, and, even assuming that there could be such a property, the destruction and wounding of the plaintiff's birds was justified.

HELD: (i) so long as the birds retained an *animus revertendi* the plaintiff could claim a special property in them, the appropriate form of action for him to take in respect of their destruction or wounding being trespass to goods.

Dewell v. Sanders (1618) (Cro. Jac. 490; 2 Roll. Rep. 3), criticised and explained.

(ii) there was evidence to support the finding of the county court judge that the defendant had failed to prove that there were no practicable means other than shooting of stopping the birds doing damage to his crops or that he had acted reasonably in regarding the shooting as necessary to protect the crops, and, therefore, the plaintiff was entitled to succeed.

Cresswell v. Sirl ([1947] 2 All E.R. 730), applied.

[AS TO PROPERTY IN PIGEONS, see HALSBURY, Hailsham Edn., Vol. 1, p. 532, para. 915; and FOR CASES, see DIGEST, Vol. 2, pp. 207, 211, Nos. 37, 65-67.]

Cases referred to:

- (1) *Cresswell v. Sirl*, [1947] 2 All E.R. 730; [1948] K.B. 241; [1948] L.J.R. 654.
- (2) *Dewell (Duell) v. Sanders*, (1618), Cro. Jac. 490; 2 Roll. Rep. 3; 2 Digest 216, 118.
- (3) *Taylor v. Newman*, (1863), 4 B. & S. 89; 2 New Rep. 275; 32 L.J.M.C. 186; 8 L.T. 424; 27 J.P. 502; 2 Digest 216, 119.
- (4) *Hudson v. MacRae*, (1863), 4 B. & S. 585; 3 New Rep. 76; 33 L.J.M.C. 65; 9 L.T. 678; 28 J.P. 436; 25 Digest 10, 64.
- (5) *Horton v. Gwynne*, [1921] 2 K.B. 661; 90 L.J.K.B. 1151; 125 L.T. 309; 85 J.P. 210; 14 Digest 37, 72.
- (6) *Farey v. Welch*, [1929] 1 K.B. 388; 98 L.J.K.B. 318; 140 L.T. 560; 93 J.P. 70; Digest Supp.
- (7) *Cotterill v. Penn*, [1936] 1 K.B. 53; 105 L.J.K.B. 1; 153 L.T. 377; 99 J.P. 276; Digest Supp.

APPEAL by the defendant from an order of His Honour JUDGE LAWSON CAMPBELL made at Peterborough County Court on Feb. 9, 1948, awarding damages to the plaintiff whose pigeons had been destroyed by the defendant while they were feeding on his (the defendant's) peas. The Court of Appeal, in dismissing the appeal, held that so long as there was evidence of an *animus revertendi* by the birds the plaintiff retained a property in them and that there was evidence that the defendant had not considered alternative methods of scaring the birds before shooting at them.

Scott Cairns, K.C., and *Stuart Horner* for the defendant.

Van Oss for the plaintiff.

July 19. **LORD GREENE, M.R.** : The judgment which is about to be read is that of **EVERSHED, L.J.**, and myself.

The following judgments were read.

EVERSHED, L.J. : This is an appeal by the defendant from a judgment and order of His Honour JUDGE LAWSON CAMPBELL sitting in the Peterborough County Court whereby he awarded a sum of £200 to the plaintiff as damages for the destruction and wounding by the defendant of certain homing pigeons of which the plaintiff claimed the ownership and possession. It appeared that the plaintiff was a breeder of homing pigeons which he kept for the purpose, among other things, of racing. It also appeared that it was the practice of the plaintiff at certain times of the day to release his pigeons from his dovecote for exercise. On May 22, 1947, at about mid-day, the plaintiff, according to his custom, released nine of such pigeons. The pigeons, in the course either of their outward or of their homeward journey, alighted on a field of the defendant and proceeded to feed on his peas. The defendant thereupon shot at the birds. Four of them he killed. A fifth was wounded in the neck, but made its way home. It is a significant point in the case (to which we later refer) that the defendant fired altogether five shots, four, according to an independent witness, in close succession, and the fifth after an interval. As the defendant was using an ordinary double-barrelled sporting gun, it follows that he had been able to reload twice.

Counsel for the defendant has put his case on alternative grounds. First, he says that by the law of England there is no property in homing, racing or tamed pigeons when out of their dovecote or loft such as will entitle the proprietor of the dovecote or loft to maintain an action for trespass or otherwise against him who has shot the birds. Secondly, he says that, assuming such a right of property, the destruction and wounding of the plaintiff's birds by the defendant was, in fact, justified on the principle recently expounded by this court in regard to the shooting of dogs in *Cresswell v. Sirl* (1).

On the first point, although, as later appears, there can be found several statements in authoritative text-books, no case has been discovered in which the question has been directly the subject of a decision of the court. In these circumstances, counsel for the defendant has strongly relied on the observations contained in *Dewell v. Sanders* (2). The material part of the report, which is found at the end, following the word "Note," is as follows :

Note, that in the argument of this case, **DODERIDGE, J.**, said, that if pigeons come upon my land I may kill them, and the owner hath not any remedy ; but the owner of the land is to take heed that he take them not by any mean prohibited by the statutes : to which opinion **CROKE** and **HOUGHTON** accorded. But **MONTAGUE, C.J.**, held the contrary, and that the party hath *jus proprietatis* in them, for they are as domestics, and have *animus revertendi*, and ought not to be killed ; and for the killing of them an action lies ; but the other opinion is the best.

From this note it is made clearly to appear that, in the opinion of three out of four of the judges concerned in the case, tamed or homing pigeons passed out of the property or possession of the proprietor of their dovecote and become *nullius in terra* as soon as they had, on their release, taken wing, and this effect is ascribed to the case by **DR. GLANVILLE-WILLIAMS** in his book on **ANIMALS**, though the author expresses the view that it is incorrect and against the weight of other authority : see p. 252. On the other hand, as counsel for the defendant observes, the opinions attributed to the majority of the judges in **CROKE'S REPORT** have never been adversely criticised in any case which has, during the

period of over 300 years since *Dewell v. Sanders* (2) was decided, come before the courts. In the circumstances, it has been necessary to examine *Dewell v. Sanders* (2) somewhat closely.

It may, in the first place, be observed that the observations in the note which we have quoted were *obiter*. The facts in *Dewell v. Sanders* (2) were that a court leet had imposed a fine on the proprietor of a dovecote, the freeholder of the manor, on the ground that a common nuisance had been created by its erection, and, the fine not having been paid, distress had been levied on the proprietor's assets. The proprietor proceeded to challenge the validity of the distress, and the real question in *Dewell v. Sanders* (2) was whether the court leet had any jurisdiction to make the award which it had made. The court answered the question in the negative. In answering that question, it became relevant for the court to consider whether the erection or maintenance of a dovecote could amount either to a public or private nuisance, but, in our opinion, it is clear that the general question whether a man could have any *jus proprietatis* in flying pigeons was strictly irrelevant to the issue raised. For that reason, no doubt, the observations relied on by the defendant are contained, not in the report of the decision of the court itself, but in a note appended to the decision. In our opinion, it is at the least doubtful whether, in fact, the report in CROKE accurately records the views expressed by the majority of the judges. Counsel for the plaintiff has drawn our attention to the further report (in the Norman French language) of the same case in 2 Roll. Rep. From this report it appears that the observation of DODERIDGE, J., to the effect that the pigeon when away from the dovecote could be lawfully destroyed was subject to the important qualification that it was at the time doing damage, and both DODERIDGE, J., and HOUGHTON, J., refer to the existence in the register of forms of writ appropriate to a claim for damages in respect of tamed pigeons when flying abroad. According to the report in 2 Roll. Rep., CROKE, J., alone—who was the editor of the reports bearing his name—propounded the view that tamed pigeons became *nullius bona* when away from their dovecote. In our view, therefore, *Dewell v. Sanders* (2) cannot be regarded as providing reliable, still less convincing, authority for the view that no such right of property can exist in homing pigeons when in flight away from their loft as would support an action for damages for their destruction.

Counsel for the defendant has further prayed in aid the terms of the Larceny Act, 1861, s. 23, and certain decisions on that section. The terms of s. 23 are as follows:

Whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay, over and above the value of the bird, any sum not exceeding £2.

The first case under the section came before BLACKBURN, J., and MELLOR, J., in *Taylor v. Newman* (3). In that case CROKE's report of *Dewell v. Sanders* (2) was cited. For present purposes the main significance of *Taylor v. Newman* (3) lies in that BLACKBURN, J., after stating that it had been a matter of doubt whether there could be any right of property in homing pigeons on the wing, indicated his acceptance of the opinion ascribed by CROKE to the majority of the judges in *Dewell v. Sanders* (2). The prosecution in *Taylor v. Newman* (3), in fact, failed, and in the later cases in which *Taylor v. Newman* (3) was considered (that is, *Hudson v. MacRae* (4), *Horton v. Gwynne* (5), *Farey v. Welch* (6), and *Cotterill v. Penn* (7)), there has been considerable discussion of the true grounds of the decision. In the first of them BLACKBURN, J., himself expressed the view that it was based on the proposition that flying pigeons, being *ferae naturae*, were not the subject of common law larceny, as the carrying off of a dog was not. In the last case, HEWART, C.J., said that the report must be regarded as unsatisfactory, and there is no doubt that since the date when *Taylor v. Newman* (3) was decided there has been considerable difficulty in determining its true *ratio decidendi*. As regards BLACKBURN, J.'s exposition of his former decision, we may observe that the terms of s. 23 of the Act of 1861 appear clearly to proceed on the basis that homing pigeons (even when abroad) may be the subject of common law larceny. Had Parliament supposed, on the authority of the note to CROKE's report of *Dewell v. Sanders* (2) or otherwise, that flying pigeons could in no circumstances be larcenable, we cannot help

thinking that the section would have been differently worded. We may further observe that the question whether a bird or an animal is larcenable is wholly distinct from the question whether a right of property may subsist in it for the purposes of maintaining a civil action. In this respect BLACKBURN, J.'s reference, by way of comparison, to the dog was not, perhaps, a happy one. For the dog is certainly not *ferae naturae*. It is true that it could not be the subject of common law larceny, but that was because it was thought to be of no value for food or for profit. Beyond doubt, the owner of the dog had a right of property in it and could sue in the civil courts in respect of its loss. In our judgment, consideration of the question of liability for larceny is by no means necessarily pertinent to the question of property. If, in the present case, the decisions on the Larceny Act lend any support to the defendant's argument, it must be on the ground, not only that the decision in *Taylor v. Newman* (3) was rightly explained in the later case by BLACKBURN, J., but that the basis of the decision was the absence of any proprietary interest in pigeons flying abroad, and, if that be the basis, then, as clearly appears from the judgment of BLACKBURN, J., in *Taylor v. Newman* (3), it rests and depends on the validity of the note to *Dewell v. Sanders* (2) in CROKE's report. Apart from the doubts which on other grounds have later been cast on the soundness of the decision in *Taylor v. Newman* (3), its basis (on this view of it) would, in any event, be destroyed if the authority of CROKE's note is successfully challenged. It comes back again, therefore, to the same point with which we have already dealt.

It follows, in our view, that the cases on which counsel for the defendant has relied are of doubtful authority for the proposition for which he has cited them. On the other hand, there is, in my judgment, compelling authority to the opposite effect. In *Dewell v. Sanders* (2) (2 Roll. Rep.) itself there is a reference to BRACON to the effect that proprietorship in tamed pigeons remains so long as they retain in fact an *animus revertendi* to the control of the proprietor of their dovecote "*columbae nostrae sunt eo habent animos revertendi.*" The matter is, moreover, treated at length in BLACKSTONE'S COMMENTARIES, Vol. II, at p. 391 :

A qualified property may subsist in animals *ferae naturae*, *per industriam hominis* : by a man's reclaiming and making them tame by art, industry, and education ; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty.

and a little later on :

... our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitae naturae* ; and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *ferae naturae*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an enclosed warren, doves in a dovehouse, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession : but, if at any time they regain their natural liberty, his property instantly ceases, unless they have *animus revertendi*, which is only to be known by their usual custom of returning . . . The law therefore extends this possession farther than the mere manual occupation ; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property ; for he hath *animus revertendi*. So are my pigeons, that are flying at a distance from their home (especially those of the carrier kind) and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester ; all which remain still in my possession, and I still preserve my qualified property in them, but if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them.

Then, again, a little later :

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible ; a property, that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *ferae naturae* again ; and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly

mine : and an action will lie against any man that detains them from me, or unlawfully destroys them.

Reference may also be made to SIR WILLIAM HOLDSWORTH'S HISTORY OF ENGLISH LAW, vol. 7, p. 489 :

But it is clear from an early date (perhaps under the influence of Roman Law) it was recognised that property could exist in animals *ferae naturae* which had been tamed. and later on the same page the learned author observes :

BROOKE, J., pointed out (in the Year Book, 12 H. VIII, Trin. Pl. 3) that the fact that such animals were not the subject of larceny did not prevent them from being the subject of private ownership, if they were in any way useful to mankind.

And after a reference to our first father Adam, the citation proceeds :

. . . and when I have taken fowls and by my industry have made them tame through the restraint on their liberty, now I have a special property in them, because they are made obedient to me by my labour, and then it is not lawful for anyone to take them . . . For if I have a singing bird, though it be not pecuniarily profitable, yet it refreshes my spirits and gives me good health, which is a greater treasure than great riches. So if any-one takes it from me he does me much damage for which I shall have an action.

But, if it is established that there may be a special property in tamed or reclaimed pigeons, there remains the question, what form of action may be maintained in respect of them ? In the report at 2 Roll. Rep. of *Dewell v. Sanders* (2), reference is made to the forms of action, to be found in the register, available to the proprietor of tamed pigeons, and these are mentioned by DR. GLANVILLE WILLIAMS in note (2) on p. 248 of his book. From these references, it is, in our judgment, clear that the proper form of action in such a case as the present is that of trespass to goods, for, so long as the bird, in fact, retains its *animus revertendi* to the proprietor's dovecote, it is deemed to be in the proprietor's possession. The point is clearly and concisely stated in POLLOCK & WRIGHT ON POSSESSION IN THE COMMON LAW, at p. 231, in the following terms :

The animal once tame or reclaimed may continue in a man's possession although it fly or run abroad at its will if it is in the habit of returning regularly to a place where it is under his complete control. Such habit is commonly called *animus revertendi*.

It follows, therefore, in our judgment, that the owner of tamed or reclaimed pigeons continues to have property in and possession of his birds after they have flown from his dovecote, so long as the birds retain in fact an *animus revertendi* to his control. In the present case it was, in our judgment, clearly proved—and the learned county court judge held—that such *animus revertendi* subsisted in the pigeons which the defendant shot. The plaintiff is, therefore, in our view, entitled *prima facie* to maintain his action in respect of their destruction and wounding. The first ground relied on by the defendant, therefore, fails.

There remains, however, the second question, whether the defendant, though *prima facie* liable for the destruction of and damage to the plaintiff's property, can justify the action which he took. If we are right in our conclusion on the first point, it is conceded that the test to be applied is the same as that applicable to the destruction of other animals in the possession and proprietorship of another—the test recently laid down by this court in the case of a dog in *Cresswell v. Sirl* (1). The learned county court judge quoted the relevant passage in the judgment of this court which formulates the test, and it is convenient to quote it again in this judgment. SCOTT, L.J., said ([1947] 2 All E.R. 730, 733) :

We think the relevant rules of law may be thus stated : (1) The onus of proof is on the defendant to justify the preventive measure of shooting the attacking dogs. (2) He has by proof to establish two propositions, but each proposition may be established in either of two ways : *Proposition No. 1* : That at the time of shooting, the dog was either (a) actually (in the above sense) attacking the animals in question, or (b) if left at large, would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented. *Proposition No. 2* : That either (a) there was, in fact, no practicable means, other than shooting, of stopping the present attack or preventing such renewal, or (b) that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack.

His Honour's judgment then proceeded as follows :

A Can the defendant in the present case sustain this onus which lies on him ? I do not think he can. It is true that at the moment of shooting the pigeons were on the ground and feeding on the crop so that the defendant establishes proposition (i), but I think he fails to establish either limb of proposition (ii). The view I formed, not only from the evidence given by the defendant but from the way he gave it, was that he never directed his mind at all to the question whether the pigeons were tame or wild or whether there was any practicable way of getting them off the crops other than shooting them. He had seen pigeons on this field before and realised there would result some damage to his crops, and he shot without further consideration. He has, in my view, entirely failed to establish shooting as the only practicable means and I think a reasonably careful man would have made at least some examination to discover whether the birds were wild or not and would, unless clearly satisfied they were wild, have tried the effect of a scaring shot before killing the birds as an ultimate resort. I was informed, and accept, that there is no great difficulty in distinguishing between wild and homing pigeons in a good light and at fairly close range, both of which advantages the defendant had.

B There can be no doubt that *prima facie* the questions which the learned judge posed and answered are questions of fact, and *prima facie* his findings cannot be challenged in this court, but counsel for the defendant has sought to persuade us to depart from the general rule on one or both of the grounds which are open to him in this court, namely, that the judge misdirected himself as a matter of law and that there was no evidence on which his conclusions could be supported. He summarised his argument in the course of his reply as follows : First, that there was no evidence that the defendant had not directed his mind to the question whether there was any other practicable way of protecting his property ; secondly, that the uncontradicted evidence of the defendant as to his having shouted at the birds was not found by the judge to be untrue and there was no evidence that any other form of noise—particularly a scaring shot—was likely to have been more effective to drive the birds away ; and, thirdly, that the finding of unreasonable conduct on the defendant's part was vitiated by the introduction of the irrelevant question : Had the defendant been unreasonable in not trying first to observe whether the birds were wild or tame ? On one or other of these grounds counsel for the defendant contended that the case ought to be remitted to the county court for re-hearing.

E Now, at the time when the action was heard, the decision of this court in *Cresswell v. Sirl* (1) had not been given. A full report of the case and of the judgment had, however, been published (in the ALL ENGLAND LAW REPORTS) before the county court judge gave his judgment in the present case, and, as appears from his judgment, there is no doubt that he considered and purported to apply the tests which *Cresswell v. Sirl* (1) laid down. Counsel for the defendant has, nevertheless, argued that, since *Cresswell v. Sirl* (1) had not been decided at the date of the trial, it cannot fairly be said that the evidence and arguments were properly directed at the trial to what have since been shown to be the real questions for determination. We do not think this criticism can be sustained. There is no doubt from the pleadings and the judge's notes that on this part of the case both evidence and argument were directed to the general question whether the defendant could justify what he had done, and this general question necessarily involved consideration of practicable alternatives and reasonableness on the defendant's part. When the learned judge came to deliver his judgment and had before him the precise tests to be applied, he was, in our view, both justified and entitled to reach the appropriate conclusions on the basis of the evidence he had heard. There is no hint or suggestion in his judgment that the decision in *Cresswell v. Sirl* (1) had raised questions not covered by the evidence at the trial. An examination of the notes of the evidence shows equally, in our view, that all the relevant matters of fact were fully canvassed.

H We next observe that the onus of proving justification for the shooting lay on the defendant. The judge stated in plain terms that in his view the defendant had failed to discharge the onus : “ . . . I think he fails to establish either limb of proposition (ii). ” The first head of complaint of counsel for the defendant appears to us to fail to appreciate that the onus lay on his client. The question was not whether the negative was shown, that the defendant had not directed his mind to practicable alternatives, but whether the defendant, in

order to make good the second limb of proposition (ii), had shown that he had. The second head of complaint of counsel for the defendant is, we think, open to the same objection. Nor is that all. The defendant, in his evidence in chief, had, indeed, said that when he saw the birds he "walked across field and made noise to scare them. They didn't go so I got gun," but from his cross-examination it appears that when the defendant first saw the birds he was on the far side of the field from them and that when he made a noise they got up, though (apparently) they again settled, and that, having got the gun, he then approached the birds from the other side of the field nearest to them. It is true that there is no express reference in the judgment to this evidence, but it cannot, in our judgment, be said that the county court judge is bound to deal in his judgment with every piece of evidence given and state whether or not he accepted it. On both the first and second heads of the complaint of counsel for the defendant the question which the judge was putting to himself was not whether a scaring shot would have driven the birds away, but whether, in the absence of such a shot, the defendant could discharge the onus of shewing either (a) that there were no practicable means of protecting his property other than by shooting to kill, or (b) that the defendant reasonably thought that there were no other such practicable means. In our opinion, so far from this being a misdirection, it was a perfectly correct way of approaching the question. The judge is not, in our view, finding by implication that a scaring shot would have been successful. It was quite unnecessary for him so to find. We understand his judgment as meaning merely that, so far as (a) is concerned, killing was not shown to be the only practicable means of defence in the absence of demonstration that scaring was or would have been ineffective, and, so far as (b) is concerned, a reasonable man would not have proceeded to kill before trying the effect of a scaring shot. The absence of evidence as to whether a scaring shot would or would not have been effective is accordingly, in our view, irrelevant. Evidence was not, we think, necessary before the judge would be entitled to take the commonsense view that the every-day expedient of a scaring shot ought to have been tried. The third head of complaint of counsel for the defendant may be said to raise a matter of law, namely, whether consideration of the question: Ought the defendant to have attempted first to discover whether the birds were wild or tame? amounted to a misdirection. In our judgment, it cannot be said that in this respect the learned judge in any way misdirected himself. In our judgment, in approaching the second limb of the second proposition in *Cresswell v. Sirl* (1) (namely, whether the defendant reasonably thought that there were no practicable means, other than shooting to kill, of protecting his property), it was in the circumstances relevant to consider whether the defendant had applied his mind at all to the character of the birds. We agree that the question whether the birds were valuable or not was beside the point, and there is nothing in the judgment to suggest that the judge concerned himself with value, but it seems to us impossible to hold that, in deciding whether or not the defendant had discharged the onus on him, the judge was not properly entitled to consider whether the defendant, in making up his mind what steps he should take, thought at all whether the birds were wild birds (which he was entitled to shoot at sight) or tame birds (which *prima facie* he was not), and all the more since on this point there was obviously some inconsistency in the defendant's own evidence.

Counsel for the defendant concentrated in his argument primarily on the second limb of the relevant proposition, but he also contended that on the evidence there was shown to be no practicable alternative in fact to shooting the birds for the protection of the defendant's property—or, at least, that there was no evidence to the contrary effect. On this part of the case counsel for the defendant particularly relied on the circumstance, already noticed, that the defendant had, apparently, had time to reload twice and to fire, in all, five shots at the birds. We were, accordingly, asked to infer, necessarily, that a scaring shot would not, in fact, have been effective to drive the birds away. It is, no doubt, true that the operation of firing five shots and reloading twice takes an appreciable period of time. On the other hand, it cannot, we think, be assumed that the effect of shots fired to kill is necessarily the same as that of scaring shots. Much, obviously, might depend on the number of birds, in fact, hit by the first shot or shots. However that may be, the judge found as a fact that the defendant had "entirely failed to establish shooting as the

only practicable means," and it seems to us impossible to say that such a conclusion was one at which, on the evidence, including the evidence of the number of shots fired, the judge could not properly arrive.

A It follows, therefore, in our judgment, that it is impossible to disturb the conclusions of the judge that the defendant had failed to discharge the onus laid on him. It is hardly necessary to add that we are concerned only with the facts of this particular case and with the judge's conclusion in this case on those facts. We must not be taken to be laying down any general rule (apart from the proposition enunciated in *Cresswell v. Sirl* (1)) which will be decisive of other cases in which farmers may shoot pigeons feeding on their crops. On the evidence as recorded in this case we can well understand that another judge might have reached a different conclusion, but that circumstance does not justify our interference with the judge's finding, and we do not forget that we have not had the advantage, afforded to the judge, of seeing the defendant B in the witness box—a matter which, as we read the judgment, was of no little importance in the present case. The result is that, in our judgment, this appeal fails, and, as there is no question of the quantum of the damages awarded, the judgment of the county court should be affirmed accordingly.

C WROTTESLEY, L.J. : On the question whether the plaintiff had such property in the pigeons which were killed while feeding on the defendant's peas as to entitle him to bring an action for trespass to goods against the killer, I have had the advantage of reading the judgment of LORD GREENE, M.R., and EVERSHERD, L.J., and I am in agreement with it and cannot usefully add anything to it.

D As to the question whether the defendant was justified in shooting these pigeons in order to protect his young peas, the relevant facts appear to me to be as follows. The plaintiff breeds and races racing pigeons for a hobby at his home in the town of Peterborough. He had 20 birds. From the evidence called on his behalf, it appears that, when they are well fed at home, these pigeons do not feed when out on exercise. It also appears that when let out for exercise E they should be away only 15 or 20 minutes, but, of course, if they do feed on the neighbouring farms they are later in returning. The nine birds let out on this occasion (May 22) would appear not to have been properly fed, for they did not return and an hour after they were let out were still devouring the defendant's peas, 1½ miles away. The defendant is by trade a farmer in partnership with his mother, and at the end of April had drilled, among other fields, a five-acre field with peas. He had seen pigeons attacking this particular field before, and, to use the judge's own words, "realised there would be some damage to his crop." I have no reason to suppose the judge did not accept the defendant's evidence that they were there every day, nor that on this particular day he saw F these very pigeons on this field and made a noise to scare them. But they did not go, so he got his gun. For that would square with the plaintiff's evidence that these pigeons stayed out from 12 noon to 1 p.m. instead of returning at 12.20 p.m. or thereabouts to their loft. The defendant appears to have walked up to the pigeons, who did not go away. He fired five shots at them, and hit five birds. Four were killed and one was wounded, but was able to fly back G to the loft. I cannot find any trace in the note of a suggestion at the trial that the defendant's duty was first of all to fire a scaring or warning shot, and there is reason to think this was not put to the defendant when he was in the box.

H When the county court judge delivered his judgment, he based himself on the decision of this court in *Cresswell v. Sirl* (1) and held that the duty of the defendant was, first, to direct his mind to the question whether the birds were tame or wild, or whether there was any practicable way of getting the birds off his crop other than shooting them. The county court judge went on to hold that, in his view, the defendant had "entirely failed to establish shooting as the only practicable means," and that he thought "a reasonable man would have made at least some examination to discover whether the birds were wild or not and would, unless clearly satisfied they were wild, have tried the effect of a scaring shot before killing the birds as an ultimate resort." The gist of this decision appears to me to be that the defendant ought to have fired a warning shot, and that that by itself would have scared the pigeons so that they would have gone and not returned, and, as he did not, he had no justification for firing

at and killing and wounding the pigeons, and so must pay £200 to the owner of the marauding pigeons. I should have been more readily satisfied of this but for the fact that after four shots from a double-barrelled 12-bore gun, including at least two periods for reloading, which, apparently, killed or wounded four birds, there were still some of the plaintiff's pigeons for the defendant to shoot at, that is to say, within 40 or 50 yards. We are not, I suppose, as judges forbidden to know something of the range at which birds like pigeons are likely to be killed or wounded with shot guns. Moreover, we know from one of the plaintiff's own witnesses that after the first four shots there was such a pause as to be noticed by that witness. Yet still the pigeons appeared to have lingered within shot of the defendant. This rather remarkable phenomenon may be regarded as throwing, at any rate, some doubt on the suggestion that after one scaring shot these birds would have flown away and left the defendant's peas alone. For what actually transpired when the defendant did fire a shot seems to show that shooting to kill was the only practicable, and certainly the only efficacious, way of getting rid of the birds. For this purpose, a shot fired to kill was just as much a scaring shot as a shot fired in the air. More than one such shot I cannot believe that a busy farmer can be expected to fire. He has, of course, his living to earn and plenty to do without chasing marauding pigeons, however valuable, from one end of his field to the other, or paying for labour to scare tame pigeons which are not properly fed at home.

On the other hand, this is an appeal from a county court, in which the judge is the final judge of all questions of fact, unless it can be said that no reasonable man could have come to the conclusion at which the judge arrived on the material before him. I am not prepared to go as far as this. Even though the matter of the scaring shot was not put to the defendant, which was unfortunate, it is an act sufficiently obvious (in the light of the decision in *Cresswell v. Sirl* (1)) to justify the county court judge in considering it as a means of saving the crop, even though no evidence was called to deal with the point specifically. Nor can I say that the county court judge misunderstood the test which he applied, namely, the law as laid down in *Cresswell v. Sirl* (1), but those propositions must, I think, be applied reasonably, especially bearing in mind where the burden of proof is laid. For instance, the burden of establishing the negative proposition that there was no practicable means of saving the stock or crop under attack except by shooting (that is, to kill) may become a very difficult or even impossible burden to discharge. Strictly, all the farmer can say usually is: "I could not think on the spur of the moment of any alternative that was likely to be effective." Beyond that, all is likely to be surmise. Farmers cannot, I think, be called on to stand and watch their stocks or crops being destroyed while they endeavour to calculate the possibilities which may be put to them at a trial on behalf of the owner of the marauding dog or pigeon.

Appeal dismissed with costs.

Solicitors: *Ellis & Fairbairn*, agents for *J. Hunt*, Peterborough (for the defendant); *Oldham, Cornwall & Wood Roberts*, agents for *Greenwoods*, Peterborough (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ALEXANDER MOUNTAIN & CO. v. RUMERE, LTD.

[COURT OF APPEAL (Scott and Cohen, L.JJ.), July 12, 1948.]

Practice—Parties—Misnomer—Substitution of plaintiff—Action begun in name of firm—Sole proprietor of firm dead—Substitution of proprietor's executrix as plaintiff—R.S.C., Ord. 16, r. 2.

By R.S.C., Ord. 48A, r. 1, an action can be brought in a firm's name only where there are two or more partners. A.M. was the sole proprietor of a business which he carried on in the name of "A.M. & Co." After his death his executrix, who continued to carry on the business under the same trading name, brought an action in the name of "A.M. & Co. (trading as a firm)," the action being in respect of a contract made by A.M. during his lifetime. On an application to amend the writ by substituting the executrix as plaintiff,

HELD : while the action did not fall within R.S.C., Ord. 16, r. 2, as having been "commenced in the name of the wrong person as plaintiff," the case might properly be treated as one of misnomer and the writ amended by substituting the executrix as plaintiff.

Decision of LORD GODDARD, C.J. ([1948] 2 All E.R. 144), reversed.

Tetlow v. Orela, Ltd. ([1920] 2 Ch. 24) and Clay v. Oxford, (1866) (L.R. 2 Exch. 54), distinguished.

A [AS TO SUBSTITUTION OF PLAINTIFF, see HALSBURY, Hailsham Edn., Vol. 26, p. 20, para. 17; and FOR CASES, see DIGEST, Practice, pp. 267, 404-406, Nos. 49, 50, 1051-1076.]

Cases referred to :

- (1) *Tetlow v. Orela, Ltd.*, [1920] 2 Ch. 24; 89 L.J.Ch. 465; 123 L.T. 388; Digest, Practice 267, 50.
- B** (2) *Clay v. Oxford*, (1866), L.R. 2 Exch. 54; 4 H. & C. 690; 36 L.J. Ex. 15; 15 L.T. 286; Digest, Practice 267, 49.
- (3) *Glanville & Co., Ltd. v. Lyne*, [1942] W.N. 65; 86 Sol. Jo. 147; 2nd Digest Supp.
- (4) *Stafford Corpn. v. Bolton*, (1797), 1 Bos. & P. 40; 13 Digest 284, 156.
- (5) *National Bank of St. Charles v. De Bernales*, (1825), 1 C. & P. 569; Ry. & M. 190; 13 Digest 280, 113

C APPEAL by the executrix of the sole proprietor of the plaintiff firm from an order of LORD GODDARD, C.J., dated June 8, 1948, and reported [1948] 2 All E.R. 144, refusing leave to amend the writ by the substitution of herself as plaintiff. The appeal was allowed. The facts appear in the judgment of COHEN, L.J.

C. H. Duveen for the plaintiff.

Gardiner, K.C., and *W. Gumbel* for the defendants.

SCOTT, L.J. : I will ask COHEN, L.J., to deliver the first judgment.

D **COHEN, L.J. :** This is an appeal from a decision of LORD GODDARD, C.J., refusing an application by the executrix of Mr. Alexander Mountain that the writ in this action should be amended by substituting for the description of the plaintiff, "Alexander Mountain & Co," the words "Doris Mountain, widow, executrix of Alexander Mountain, deceased." The late Alexander Mountain carried on business in the name of Alexander Mountain

E & Co., and in the course of that business he deposited a quantity of steel tubing with the defendants. He demanded back this tubing, but difficulties arose and this action was begun for damages for detainee, or, alternatively, conversion.

F Under R.S.C., Ord. 48A, r. 1, an action can be brought in a firm name only where there are two or more partners. In this case it was ascertained shortly before the trial that the business of Alexander Mountain & Co. had been the sole property of Mr. Alexander Mountain. At the issue of the writ Mr. Mountain was, to the knowledge of everyone, dead, and there is no suggestion that anyone thought that the writ was being issued on behalf of a living person. As soon as they discovered the fact that the business had been carried on by Mr. Alexander Mountain without any partners, the solicitors for the firm informed the defendants of the position and notified them that they would apply, when the action came on, for leave to amend the proceedings in the manner I have indicated.

G When the case came before the LORD CHIEF JUSTICE his Lordship, with considerable reluctance, expressed the view that he had no jurisdiction to make the amendment. Before him the matter was argued mainly on the basis that he had jurisdiction to make the order under R.S.C., Ord. 16, r. 2, which provides :

H Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

The LORD CHIEF JUSTICE, basing himself in the main on a decision of RUSSELL, J., in *Tetlow v. Orela, Ltd.* (1) came to the conclusion that he had no jurisdiction to make in the writ the alteration which the executrix sought to make. In *Tetlow v. Orela, Ltd.* (1) the action had been commenced in the name of Joseph Tetlow, and the writ had been issued in the name of Joseph

Tetlow in the mistaken belief that Joseph Tetlow was alive. Joseph Tetlow's executrix, who since her appointment had carried on the business, applied to have her name substituted as plaintiff. Basing himself on the decision in *Clay v. Oxford* (2), RUSSELL, J., held that he had no jurisdiction to make the order which was sought. In *Clay's* case (2) the action was commenced in the name of John Clay as plaintiff. Afterwards it was discovered that John Clay had died before the issue of the writ, and the Court of Exchequer reversed an order for the substitution of John Clay's executrix and executors as plaintiffs. *Tetlow v. Orela, Ltd.* (1) is not binding on us, but the decision in *Clay v. Oxford* (2) is, and, if the facts in the present case were indistinguishable, I should unhesitatingly follow that decision, but in both those cases the writ was issued on behalf of a dead man, in the mistaken belief that he was alive. In the present case there was no such misapprehension, and, in my opinion, this case is distinguishable from the cases to which I have referred.

Alexander Mountain died in July, 1947, and his widow was the sole executrix and beneficiary under his will. In a joint affidavit filed by her and her brother-in-law, she said that after her husband's death she continued to carry on her husband's business in the name of Alexander Mountain & Co., with the assistance of her brother-in-law, Mr. Haron. What Mr. Haron did in relation to the company he did with her authority and as her agent, and in that capacity he gave instructions with regard to the present proceedings to Messrs. Forsyte, Kerman & Phillips, the company's solicitors. Unfortunately, he did not tell them the true position, which was that the executrix was the sole person entitled to carry on the business. The solicitors were under the impression that Mr. Haron was a partner. Mr. Watts, the managing clerk, said in his affidavit that when he issued the writ he had no knowledge that Mr. Alexander Mountain had been carrying on business in his own name under the style of Alexander Mountain & Co. and that after his death Mrs. Doris Mountain was continuing to carry on the business herself in the same name. It is plain that Mr. Watts knew that Mr. Mountain was dead, and the true view on the evidence is that the solicitors, acting through Mr. Watts, intended to issue this writ on behalf of the person entitled to the business of Alexander Mountain & Co. Under a misapprehension the writ was issued in the name of Alexander Mountain & Co., which was an improper proceeding, because R.S.C., Ord. 48A, r. 1, does not entitle a single person to sue in the name of the firm. But although R.S.C., Ord. 16, r. 2, does not apply, the case, in my opinion, is really one of misnomer, which is referred to in the ANNUAL PRACTICE, 1946-47, p. 10, in these terms: "Misnomer of plaintiff—See an article in *Law Journal* of May 9, 1942, at p. 150." In that article the learned author lays down thus what he conceives to be the rule as to misnomer:

In *D. Glanville & Co., Ltd. v. Lyne* (3), it is said that the only matter calling for report is the form of order for costs, but it appears, on a perusal of the very short report of the case, that a point of some general importance is involved. A writ had been issued in the name of "D. Glanville & Co., Ltd.", the claim being for damages for breach of contract . . . At the trial it appeared that "D. Glanville & Co., Ltd." was a misnomer, the real name of the company being "Dudley Glanville & Co., Ltd." It also appeared that the contract was *ultra vires* the company, so that (on the merits) there would in any case have to be judgment for the defendant. In these circumstances, says the report ([1942] W.N. 65), the judge "refused the plaintiffs leave to amend by substituting the name of Dudley Glanville & Co., Ltd., in order to make them liable for costs instead of the solicitors. The defendant intimating her willingness to accept party and party costs only, he made an order in this form (a representative of the original solicitors being present and waiving notice of the application for costs): Judgment for the defendant on ground of non-existence of plaintiffs. Defendant's costs to be paid by the plaintiff's solicitors."

With all due deference to the learned judge, it is submitted that there never was a time, not even in the days before the rigour of the procedure at common law had been modified by statute, when such a judgment on the trial of an action could have been appropriate in a mere case of misnomer. It may be doubted whether it would have occurred to anyone in the above case to suggest a judgment in this form if the plaintiff had been an individual, one of whose names had been omitted, or wrongly abbreviated, instead of a corporation. There is, however, no magic in the name of a corporation. It is true that a corporation, whether a limited company or otherwise, can sue only in its corporate name, but, equally, an individual can sue only in his proper name. A glance at the history of procedure in regard to this point, a point

of considerable importance when the number of actions commenced by corporations is considered, appears to put the true position beyond doubt. If reference is made to the index either of the YEARLY PRACTICE or the ANNUAL PRACTICE it will be seen that there is no heading "misnomer" at all. Why? If any old practice books are referred to there will be references enough. The reason is this. "A mistake in the name of a party to the suit is ground for a plea in abatement only, and cannot be objected as a variance at the trial" (STEPHEN, PRINCIPLES OF PLEADING, 1st ed. (1824), p. 320: see, also, TIDD, NEW PRACTICE (1837), pp. 67, 320). That is to say, if the plaintiff's name did not correctly appear in the writ, the defendant could formerly plead this in order to defeat the action in the particular form in which it was originally brought, but this did not prevent the plaintiff bringing another action in proper form, and pleas in abatement had normally to be pleaded within four days of the delivery of the declaration. If the defendant, therefore, did not at once take advantage of a misnomer in this way it was not open to him to take advantage of it at all. "At no time," says CHITTY, PLEADINGS, 7th ed., 1844, vol. I, p. 266, "even in the case of a corporation, was misnomer of a plaintiff pleadable in bar. [It] is not, and never was, a ground for setting aside the proceedings, or for a motion in arrest of judgment, or of non-suit at the trial, at least if it appeared that the defendant was aware that the action was brought by the person who actually sues." Thus in *Stafford Corpn. v. Bolton* (4) the plaintiffs sued as the "mayor and burgesses of the borough of Stafford," whereas their corporate name was "the mayor and burgesses of the borough of Stafford in the county of Stafford." The trial judge nonsuited the plaintiffs on this ground, but this was set aside because the error, if material at all (which was doubted), should have been pleaded by way of abatement: see also *National Bank of St. Charles v. De Bernaldes* (5), when the plaintiffs name as given by the charter was "The Bank of St. Charles," and 1 WMS. SAUNDERS (1871 Ed.), p. 614 *et seq.*

This was the position up to the passing of the Civil Procedure Act, 1833, s. 11 of which abolished pleas in abatement for misnomer altogether. It gave the defendant the right, instead of pleading in abatement, "to cause the declaration to be amended, at the cost of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name." This Act is now itself repealed, and all pleas in abatement are finally abolished by R.S.C., Ord. 21, r. 1. A plaintiff, whether an individual or a corporation, is, of course, still required to bring his action in his proper name. There does not appear to be any specific rule of court dealing with the matter, nor do the rules of court deal with misnomer in any way. It, therefore, appears that R.S.C., Ord. 72, r. 2, applies; *i.e.*, "the present procedure and practice" (*i.e.*, the practice in force when the rules of 1883 were framed) remains in force, and the defendant by summons, supported by affidavit, could compel the plaintiff to amend. If he does not do so, and the matter proceeds to trial, it is submitted that the misnomer can then be amended, and that in no circumstances could the misnomer affect the substantive judgment which the court is called upon to pronounce.

That statement of law, with which I respectfully agree, was not brought to the attention of the LORD CHIEF JUSTICE, and I cannot help thinking that, if it had been, a different result might have ensued. Having regard to the affidavits, I think we can properly treat this case as one of misnomer, and allow the writ to be amended by substituting the executrix as plaintiff. In my opinion, the appeal should be allowed.

SCOTT, L.J.: I entirely agree with what my Lord has said, and I would only add one point. In *Tellow v. Orela, Ltd.* (1) RUSSELL, J., referring to R.S.C., Ord. 16, r. 2, says this ([1920] 2 Ch. 24, 26):

In my opinion that rule means that, where an action has been commenced between two living parties by a living plaintiff, and the living plaintiff afterwards turns out to be the wrong person, an application may be made to the court, and the court can substitute another person for the living plaintiff or may add another person as co-plaintiff as the case may be.

This writ was issued on behalf of a living person wrongly described. The living person was Mr. Haron or the widow. It is a case of misnomer and that passage in the judgment of RUSSELL, J., shows that he was not addressing his mind to the question which arises in this case.

Appeal allowed, with costs of appeal in any event.

Solicitors: Forsythe, Kerman & Phillips (for the plaintiff); C. Grobel, Son & Co., agents for Arthur Robson, Chiswick (for the defendants).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

MOATE v. MOATE.

[CHANCERY DIVISION (Jenkins, J.), July 5, 1948.]

Husband and Wife—Summary proceedings as to property—Presumption of advancement—Purchase by intended husband in name of intended wife—Subsequent marriage.

On Nov. 13, 1930, while he was engaged to marry W., H. purchased in the name of W. a dwelling-house subject to a mortgage of £1,042, paying some £207. W. entered into a covenant with the mortgagees to repay the mortgage money and to observe all covenants and conditions in the mortgage. On Dec. 7, 1930, H. and W. were married, and H. thereafter paid the instalments due under the mortgage. The relationship of H. and W. deteriorated, but H. continued to make the mortgage repayments. In June, 1946, W. ceased to render H. any conjugal rights. On Sept. 19, 1946, H. made the final mortgage repayment of £487, and the receipt indorsed on the mortgage stated that repayment had been made by W.

HELD: (i) there was no practical distinction for the present purpose between a purchase by an intending husband in the name of an intending wife and a purchase by a husband in the name of a wife; a presumption of advancement arose in both cases; and, in the absence of a rebuttal by H. of that presumption, W. was beneficially entitled to the house.

(ii) even if there were a presumption of a resulting trust, on the facts there was a gift of the house and the mortgage repayments to W.

[AS TO PRESUMPTION OF ADVANCEMENT, see HALSBURY, Hailsham Edn., Vol. 33, pp. 149-153, paras. 249-254; and FOR CASES, see DIGEST, Vol. 25, pp. 510-517, Nos. 67-123.]

ADJOURNED SUMMONS under the Married Women's Property Act, 1882, to decide the beneficial ownership of a dwelling-house which had been purchased by an intending husband in the name of the intending wife, the marriage taking place soon afterwards. JENKINS, J., held that there was a presumption of advancement in favour of the wife. The facts appear in the judgment.

T. R. Waters for the husband.

Bassett for the wife.

JENKINS, J.: This is a summons under the Married Women's Property Act, 1882, in which the plaintiff is Mr. Harold Stanley Moate and the defendant is his wife, Elizabeth Nellie Moate. The question which I have to decide is, in substance, whether the house known as "The Limes," 72, Lampton Road, Hounslow, is the beneficial property of the wife, or whether it is held by her on some trust for the husband, or for herself and the husband, or for herself and the husband and the children. There is a further question whether, on the assumption that the house belongs to the wife, the husband has any claim against the property in respect of payments which he made after the acquisition of the house in discharge of a certain mortgage subject to which the house was purchased.

The parties were married on Dec. 7, 1930, after an engagement which had lasted for some eighteen months. The house, No. 72, Lampton Road, was purchased, that is to say, the purchase was completed by conveyance, on Nov. 13, 1930, during the months preceding the marriage, but many months after the beginning of the engagement. The conveyance of Nov. 13, shows that the house was purchased subject to a mortgage on which a sum of £1,042 was then outstanding. The price, subject to the mortgage, was £207 odd. The husband paid the £207, but the conveyance was, at his request, made to the wife. It is a conveyance by the then owner with the concurrence of the mortgagees, the urban district council of Heston and Isleworth, to the wife subject to the mortgage, and the wife entered into a covenant with the mortgagee council to pay the outstanding balance of the mortgage and to observe and perform all the covenants, stipulations and conditions contained in the mortgage. The mortgage principal was repayable by monthly instalments. From the date of purchase onwards the husband in fact paid the instalments. There were five children of the marriage and, apparently, the marriage was a successful one for

A a considerable time. For 13 years or so the parties lived together in amity, the husband paying the instalments of the mortgage. Their relations seem to have deteriorated round about the fourteenth year, for I am told in the evidence that the parties ceased to share a room and to live together in June, 1944. By 1946, the wife had ceased to render any conjugal rights at all to the husband. Notwithstanding the deterioration in their relationship, which had become as serious as it could be by June, 1946, the husband went on paying off the instalments of the mortgage. Finally, having been put in a position so to do by the realisation of some other property in which he was interested, he paid off the balance of some £437 remaining due on the mortgage on Sept. 19, 1946, and that payment was acknowledged by a receipt indorsed on the mortgage signed and sealed on behalf of the mortgagees council, the receipt stating the payment to have been made by the wife, she, of course, so far as the mortgagees council was concerned, being the mortgagor. There was no improvement in the relationship between the parties, and in 1947 the wife began proceedings against her husband for divorce on the ground of cruelty. Those proceedings are being contested and are still pending.

B The first thing I propose to consider is what presumption one way or the other should the court collect from these facts. It will be observed that the whole of the purchase money for the house, i.e., both the £207 originally paid, and the total required to discharge the mortgage subject to which the house was C purchased was found by the husband. On the other hand, the purchase was in the name of the wife. So far as the conveyancing of the matter is concerned, she, and no-one else, appears as the owner and she incurred the contractual liability with the mortgagees council for the payment of the mortgage debt. Apart from incurring that obligation, the whole of the money was found by the husband, and that obligation he ultimately discharged out of his own money. D The husband provided the money but the relation of the parties was that of husband and wife so it was a case of a purchase by the husband of property in the name of his wife. There one must pause and point out another circumstance which will have been already apparent, namely, that at the date of the actual purchase of the property the parties were not actually husband and wife, but they were engaged to be married. The property was purchased by the E intending husband in the name of the intended wife, and she in due course after the purchase did become his wife. Unless this must be treated as something different from the ordinary case of a purchase by a husband in the name of his wife, there is no doubt that the presumption on the facts I have stated is that the husband purchased the property and paid off the mortgage on it by way of gift to his wife, so that the presumption of resulting trust which arises in the case of a purchase of property by one in the name of another who is a stranger F to him is rebutted by the relationship, and one is left with the presumption of advancement which ordinarily obtains in transactions of this kind between a husband and a wife. Is that presumption prevented from arising by the fact that this property was purchased when the marriage was in contemplation G but had not yet been solemnised? I was pressed by counsel for the husband to hold that a transfer by an intended husband to an intended wife is for this purpose no more than a transfer from one stranger to another. It seems to me that that view of the matter, if I may say so with respect, is entirely contrary to commonsense. I can see no practical distinction for this purpose between a transfer by an intending husband to an intending wife and a transfer as between a husband and a wife. The reason for presuming advancement is stronger where the gift is made in contemplation of the marriage before it is actually solemnised than it is where the transaction is post-nuptial. It seems to me the presumption would be, in the former case, that the intending husband is making a gift to H the lady in consideration of the marriage, a gift by way of wedding present which he intends to take effect in her favour beneficially provided the marriage is duly solemnised. I, therefore, hold that the presumption in this case is that the husband intended this to be a provision by way of gift to his wife provided the marriage was duly solemnised.

If that view is right, I am clearly of opinion that the husband, on whom the onus lies of rebutting that presumption, has entirely failed to rebut it. He found himself unable to claim that he intended his wife to be a trustee for him. His LORDSHIP referred in detail to the evidence, observing that in a claim made

to the War Damage Commission, and in letters written by the husband to the wife, the wife had been treated as the owner of the house and continued:—) How does the matter stand supposing counsel for the husband is right in saying that where the purchase under consideration by a husband in the name of his wife was made when they were simply engaged and not actually married, the presumption is the ordinary one of a resulting trust. That would shift the onus, but the question of resulting trust or gift would still be a question of fact. The only difference would be that it would be for the wife to show that there was a gift as opposed to it being for the husband to show that there was not a gift. Supposing that the matter ought more properly to be dealt with in that way, the conclusion to which I have come is still that on the evidence in this case there was in fact a gift of the house to the wife. Her evidence, which I see no reason to doubt in any material respect, was clearly to the effect that before they were married, at a time when the actual date of their marriage had not been fixed, the husband took her to show her this house which he had found and told her, in effect, that he was buying it as a wedding present for her. The most probable explanation of the transaction is what the lady says in evidence, and I see no reason to doubt it. On that footing the payments made in discharge of the mortgage would simply be gifts to the wife, as it were supplementary gifts, if I may so describe them, completing the wedding gift which the husband had promised to make before they were married.

If the position had been that the wife was a trustee of the house for the husband, the discharge of the mortgage debt would automatically have ensured for his benefit, but the position being, as I have held it to be, that the wife took the house beneficially, the payments of the mortgage, in order to ensure for her benefit, would have to be what I have described as supplementary gifts. Whatever may be said of the period of engagement and the position as regards transfers of property to the intended wife during that period, no question arises, or can arise, with regard to the payment in or towards the discharge of the mortgage made during the marriage, but those payments were presumptively by way of gift or advancement to the wife, and the onus would be clearly on the husband to show that they were not gifts. In my judgment, he has clearly, as regards the matter of the mortgage repayments, failed to discharge that onus. It does not seem to me that the fact, on which some reliance was placed on his behalf, that the payments were continued after the relations between the parties had deteriorated really tells in his favour. I should have thought if anything it told against him, because, if it was not his intention when making these payments to add to and complete the provision he had made for his wife, it seems to me to be really incredible that he should have gone on making the payments in the same way without any precaution to avoid benefiting his wife, which he did in fact do. He simply went on paying the instalments and finally paid this substantial sum of £480 after the relations between the parties were admittedly very bad indeed, and he allowed that to be done and to be acknowledged by means of a receipt which stated the wife to be the payer of the money. In my judgment, there is nothing in that circumstance or in any of the evidence to rebut the ordinary presumption as regards the mortgage payments. In the result, I am of opinion that the husband's claim to this property fails and must be dismissed with costs.

Application dismissed with costs.

Solicitors: *Arnold, Fairfield & Co.* (for the husband); *Law & Wansman*, agents for *Smart & Bossmann*, Walton-on-Thames (for the wife).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

In the Estate of HILL (deceased). BRAHAM v. HASLEWOOD AND ANOTHER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), May 27, 1948.]

Evidence—Admissibility—Statement in document—"Person interested"—Proof of deceased solicitor's clerk—Probate action anticipated—Partner of firm propounding will—Evidence Act, 1938 (c. 28), s. 1 (3).

- A In anticipation of probate proceedings in respect of the validity of a will, which was propounded, as one of the executors, by a partner in a firm of solicitors, a clerk employed by the firm prepared a statement of the evidence he would be able to give at the trial, but before the action was commenced he died. The statement was tendered in evidence under s. 1 of the Evidence Act, 1938.

- B HELD: the clerk was not a "person interested" within the meaning of s. 1 (3) of the Act, and, therefore, the statement was admissible in evidence.

Plomien Fuel Economiser Co., Ltd. v. National Marketing Co. ([1941] 1 All E.R. 311), distinguished.

- C [FOR THE EVIDENCE ACT, 1938, s. 1 (3), see HALSBURY'S STATUTES, Vol. 31, p. 146.]

Cases referred to:

- (1) *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.*, [1941] 1 All E.R. 311; [1941] Ch. 248; 110 L.J.Ch. 180; 165 L.T. 119; 2nd Digest Supp.
(2) *Holton v. Holton*, [1946] 2 All E.R. 534; 2nd Digest Supp.

- D PRELIMINARY POINT as to the admissibility of evidence in a probate action in which the defendants, one of whom was a partner in a firm of solicitors, were propounding a will. A clerk in the employment of the firm of solicitors, in anticipation of proceedings in relation to the validity of that and another will, prepared a statement of the evidence he proposed to give at the trial of the action, but before the action was brought the clerk died. The statement was tendered in evidence under s. 1 of the Evidence Act, 1938, and admitted, E the court holding that the clerk was not "a person interested" within the meaning of s. 1 (3) of the Act. The facts appear in the judgment.

Cartwright Sharp, K.C., and *Victor Russell* for the plaintiff.
Karminski, K.C., and *Marshall-Reynolds* for the defendants.

- F WALLINGTON, J.: The point in this case is in a very small compass. As counsel for the defendants has very fairly agreed, there is no doubt that when this document came into existence, although no proceeding was then pending, it was anticipated that there would be proceedings in relation to the validity of one or other or both of the two wills dealt with by the pleadings. The preliminary matters of proof have been satisfactorily dealt with. It has been proved that Mr. Symonds (whose statement is tendered as evidence) is dead and that the document tendered is one which he was responsible for producing, and it has been authenticated, as required by the Evidence Act, 1938, s. 1 (4), as being written by him.

- G The question remains whether or not Mr. Symonds was "a person interested"—which must mean either interested in the transaction, or in the pending or anticipated proceedings, or both—within the meaning of s. 1 (3) of the Act. If Mr. Symonds was "interested" within the meaning of that sub-section, H then this statement is not admissible as evidence. If he was not, then it is admissible.

On the question what is meant by the word "interested" two authorities have been cited. One is the decision of MORTON, J., in *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.* (1). I need not go through the facts of that case. The issue was whether a tester employed by a company to test certain apparatus sold by them who had signed a proof relating to relevant facts in a passing-off action was "a person interested" within the meaning of this sub-section. MORTON, J., says ([1941] 1 All E.R. 311, 313):

In my view, "a person interested" within the meaning of this section must, in the context, mean a person interested in the result of the proceedings "pending or anticipated." It seems to me that a useful test, though perhaps not the only test, is whether it was better for Petrie that the plaintiff company should succeed in the present action or whether it was a matter of indifference to him?

Pausing there, the test as there laid down by the learned judge would seem to be satisfied if it could be shown that in any way, financially or otherwise, it would have been better for the tester, Petrie, for his employers to succeed in the action. The learned judge proceeds:

Applying that test, was Petrie a person interested? . . . I do not know whether Petrie was paid a salary quite irrespective of the number of tests which in fact he carried out for the plaintiff company . . . but it seems to me that it must be to the advantage of the plaintiffs' tester if the plaintiff company wins this action instead of losing it.

That would seem to indicate that the learned judge, in using the words "to the advantage of the plaintiffs' tester," was thinking of a possible advantageous change in the amount of his salary. He goes on:

The object of the action is to prevent the plaintiffs' trade being damaged by what they say are unfair acts on the part of the defendants, and it seems to me that one whose employment consists of testing the Plomien fuel economiser must be benefited the more the plaintiff company prospers and the more the fuel economisers are sold by that company and tested by him . . . The amount of his work is increased, and I suppose that it is reasonable to infer that his importance to the company is increased, and possibly in time, if not immediately, his remuneration might be increased. I think, therefore, that in this particular case Petrie must be held to be a "person interested," within the meaning of the sub-section.

That appears to me to indicate that the view of the learned judge was that in some way, directly or indirectly, the financial position of the plaintiffs' tester would or might depend on the result of the proceedings, and in that sense he would be "a person interested" in the result of the proceedings. The learned judge goes further, and says:

In the case of a limited company, it would seem clear that every shareholder is a person interested in the success of proceedings brought by the company, and I should think, every director. Whether every servant of the company in every set of circumstances is necessarily "a person interested" is not a matter on which I have formed any concluded judgment. It may be that there are circumstances in which it might be said that a servant of the company was not a person interested. As to that, I express no opinion. However, I think that the general intention of the section is that, if a statement is put in as evidence, to which, of course, no cross-examination can be directed, it should be either a statement made at a time when proceedings are not pending or anticipated involving a dispute as to any fact which the statement might tend to establish or a statement made by what I may perhaps conveniently describe as an independent person.

By the words "independent person," I understand the learned judge to mean a person who is not interested in the result of the proceedings.

It is plain that the learned judge was able to decide that particular case on the basis of an obvious possibility that Petrie's financial position would, or might, sooner or later be changed, and that whether the change would be to his advantage or disadvantage would depend on the result of the proceedings. It is important to observe that in his observations MORTON, J., indicates that the particular "proceeding" was an action based on alleged passing off and alleged breach of contract in respect of the economisers which it was the duty of the tester to test, implying that, in forming his view, he had regard to the direct relation that thus existed between the tester and the subject-matter of the "proceeding." It follows, as it seems to me, that in every case to decide the question of admissibility the facts must be ascertained both as to the person whose statement it is sought to put in evidence, as to the character and subject-matter of the "proceeding," and as to the relation of the person to the subject-matter of the proceeding. It may, indeed, in some cases be necessary to enter on an even more extended inquiry. In making these observations, I desire only to make it clear that, in my opinion, it would be wrong to suppose that a servant of a company must be treated in every case as "a person interested." MORTON, J., expressly excludes any such implication from his

judgment. If I may respectfully say so, I would add that I entirely agree both with MORTON, J.'s conclusion and the reasons given for it.

The other case which has been cited is *Holton v. Holton* (2). In that case the question whether a statement was admissible or inadmissible depended on whether the person who made it, who was the mother of the petitioner, was interested or not within the meaning of this sub-section. The view formed by BARNARD, J., was that she was not, within the words of the sub-section, "a person interested."

A It was not suggested that she had any possible financial or other material interest in the result of the proceedings. It is plain that she had only what was described by one of the learned counsel who argued the case as an emotional or spiritual or sympathetic interest in the result of the proceedings, and the learned judge held that that interest was not one that was hit by the terms of the sub-section. It was part of the argument of counsel for the plaintiff in the present case that judges would be reluctant to admit a proof of even an independent proposed or possible witness, as distinct from a statement made at the time (which I understand to mean at the time when there took place the transaction with which he deals in his proof or draft proof), and counsel argues that the effect of the judgment in the *Plomien Fuel Economiser Co.* case (1) is that the employee of a party whose employment is concerned with the subject-matter of the dispute is "a person interested," and that his statement cannot, therefore, be received in evidence.

C I have come to the conclusion that it would not be right to say that to make the statement inadmissible in every case there must be a probability or possibility of financial advantage or disadvantage resulting to the person whose statement is tendered. That is clearly not the sole test. It is not impossible to imagine a number of circumstances, varying in different cases, in which there would or might be an interest in the result of the proceedings which was not directly or indirectly a financial interest. Therefore, anything I say in this

D case must not be taken as indicating the view—because it certainly is not my view—that, unless there is no financial interest, direct or indirect, a statement of this kind, when tendered, is admissible. There is no doubt that Mr. Symonds, if he had looked forward to the anticipated proceedings and had contemplated the end of them, would have preferred that his clients should succeed rather than that they should fail. Counsel for the defendants

E rightly says that Mr. Symonds had been for many years conveyancing clerk in the service of Messrs. Haslewood, Hare & Co., and he would not be likely, therefore, in that capacity, to come into contact with litigious matters, except, perhaps, in cases raising questions of title in the Chancery Division, but it is plain that he was closely connected with the present matter. He had taken a direct professional interest in the matters relating to one of the wills. He had been concerned with the family quarrels that appear to have taken place.

F He had been concerned with the power of attorney and he was obviously preparing the statement, now tendered as evidence, and looking forward to the time when he might appear as a witness in proceedings as to the effectiveness of one or other of these testamentary documents. There is no doubt that Messrs. Haslewood, Hare & Co., acting for the defendants, were interested at the time when this statement came into existence in the sense that it would

G be their wish that everything proper should be done to secure the victory of their clients in any proceedings that were then anticipated, and I suppose that Mr. Herbert Dering Haslewood, a partner in that firm, one of the two defendants, and one of the executors of the will which is propounded by the defendants, would wish the proceedings to result in the success of the endeavours which were being made to support the will for which he and his fellow executor were responsible. I suppose that in every case, where servants

H of a firm are loyal and industrious, they always do all they can to secure the best results on behalf of their firm, but I have to ask myself, whether that interest—a very natural and proper interest—is of the character intended to be included in the provisions of this sub-section. I do not find myself able so to hold. I think that it is an interest of a kind that none of those persons could ever regard as likely to make any difference to their financial situation or otherwise to affect their position. It could never lead to any improvement in the reputation, prestige, or financial stability of Messrs. Haslewood, Hare & Co., or that of either of the two defendants in the case. For these reasons,

I come to the conclusion that this is a statement made in circumstances that, if Mr. Symonds was not interested, would come within the provisions of this sub-section of the Act, that Mr. Symonds was not "a person interested," and that, therefore, this statement is admissible in evidence and I admit it.

Document admitted.

Solicitors: *Carnt & Mudie* (for the plaintiff); *Haslewood, Hare & Co.* (for the defendants).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*] A

Distinguished. *Re FIELD'S WILL* | *Considered.* *Re GAPE'S WILL*
TRUSTS. [1950] 2 All E.R. 188. | TRUSTS. [1952] 1 All E.R. 827.

Re COXEN (deceased). *MACCALLUM v. COXEN.*

[CHANCERY DIVISION (Jenkins, J.), June 16, 17, 18, July 19, 1948.]

Will—Construction—"Articles of vertu"—Gold chain presented on election as sheriff. B

Will—Construction—"Motor cars which shall be ordered for any dwelling-house"—Motor car ordered, but not delivered or paid for—Whether charged with payment of purchase price—Administration of Estates Act, 1925 (c. 23), s. 35.

Will—Construction—Charitable trust—Uncertainty—Gift of £100 per annum to provide annual dinner for Court of Aldermen acting as trustees—Gift of £1 1s. 0d. for each member of committee of management for attendance at meeting. C

Will—Construction—Gift of dwelling-house—Uncertainty—Condition subsequent—"If in the opinion of my trustees she shall have ceased permanently to reside therein"—"Residence."

By cl. 5 of his will, dated Sept. 4, 1940, a testator, who died on Apr. 7, 1946, bequeathed to his wife "all the furniture plate plated goods linen glass china books . . . manuscripts pictures statuary musical instruments articles of vertu motor cars and all other articles of domestic or household or garden use or ornament and all wines liquors and consumable stores and provisions which at the time of my death shall be in and about or belonging to or ordered for any dwelling-home and/or flat in which I may reside at my decease or the outbuildings or garden thereof." Included among the testator's possessions was a gold chain of value and fine workmanship presented to the testator on his election as sheriff of the city of London, and the testator had ordered a motor car which had not been paid for at the date of his death (no particular car having been appropriated to him) and which was not delivered until a year after that date. D

HELD: (i) any type of article which a connoisseur or virtuoso might collect for its artistic merit or the beauty of its workmanship fell within the description "article of vertu," and the sheriff's chain was such an article. E

(ii) the motor car passed under cl. 5, and was not charged in the hands of the wife with payment of the purchase money by the Administration of Estates Act, 1925, s. 35, because, the property in the car not having passed to the testator at the date of his death, he was not "possessed of or entitled to" the motor car subject to a charge within the section. F

By cl. 17 of his will the testator provided: "My trustees shall stand possessed of the trust fund and the income thereof in trust to pay or make over the same to the Court of Aldermen for the City of London . . . upon trust out of the income of the trust fund to apply once a year a sum not exceeding the sum of £100 . . . to provide a dinner to the Court of Aldermen when they shall meet to decide the business of this trust and to pay to each member of the committee hereinafter mentioned who shall attend during the whole time of any committee meeting the sum of £1 1s. 0d. for his attendance at such meeting and to apply the balance of such income for the benefit of . . . the orthopaedic hospitals of England and other hospitals or charitable institutions carrying on similar work . . . in such shares and proportions as the said committee shall from time to time think fit." He further directed that the committee should consist of six aldermen, and that his trustees should, three years after his death G H

or so soon as convenient thereafter, retire from the trusts and appoint the Court of Aldermen of the City of London in their place. It was contended (a) that cl. 17 must fail *quoad* the trust to provide an annual dinner and the trust to pay £1 1s. 0d. to each member of the committee for his attendance, because the fund was directed to be applied primarily to non-charitable objects and only as to the balance to charitable purposes; and (b) that, as the trust to pay fees for attendance could not be quantified, the whole of cl. 17 must fail. The trust fund amounted to more than £200,000.

HELD: (i) the trusts for the annual dinner and attendance fees were declared in favour of the Court of Aldermen and the members of the committee *virtute officii*, and, although preceding in order the charitable trust for hospitals, they were essentially ancillary thereto, and, therefore, even if they were invalid, the whole income would be applicable to the charitable purpose.

(ii) the trusts objected to were capable of furthering the charitable purpose by promoting efficient management, and, therefore, they were themselves charitable.

By cl. 2 of a codicil dated Aug. 14, 1941, the testator provided: "I devise my messuage land and hereditaments known as Wildwood Seal . . . to my trustees in fee simple upon trust that my trustees shall permit my dear wife Kathleen Alice to reside therein rent free during her life or for so long as she shall desire to reside therein and I declare that from and after her death or if in the opinion of my trustees she shall have ceased permanently to reside therein (whichever shall first happen) my trustees shall stand possessed of the said premises" on the trusts of his residuary trust fund. It was contended on behalf of the wife that the condition subsequent as to residence was void for uncertainty.

HELD: in its context the word "reside" clearly referred to personal residence, and the word "permanently" meant that the cesser of personal residence must be permanent in the sense that the wife must have no "*animus revertendi*," and the condition, as so construed, was prescribed with sufficient certainty and precision.

Per cur.: although in this case the fact that the testator had made the opinion of the trustees the criterion for the operation of the condition had avoided certain difficulties which might otherwise have arisen, the application of such a criterion would not of itself save a condition from invalidity on the ground of uncertainty.

[AS TO REQUISITES OF CREATION OF CHARITABLE TRUST, see HALSBURY, Hailsham Edn., Vol. 4, pp. 165-171, paras. 220-226; and FOR CASES, see DIGEST, Vol. 8, pp. 291-300, Nos. 686-779.]

Cases referred to:

- (1) *Re Zeuche (Baroness), Dugdale v. Zouche (Baroness)*, [1919] 2 Ch. 178; 88 L.J.Ch. 274; 121 L.T. 82; 44 Digest 712, 5568.
- (2) *Re Tomline's Will Trusts, Pretymann v. Pretymann*, [1931] 1 Ch. 521, 526; 100 L.J.Ch. 156; 144 L.T. 592; Digest Supp.
- (3) *Chapman v. Brown*, (1801), 6 Ves. 404; 8 Digest 299, 763.
- (4) *Re Birkett*, (1878), 9 Ch.D. 576; 47 L.J.Ch. 846; 39 L.T. 418; 43 J.P. 111; 8 Digest 300, 776.
- (5) *Re Taylor, Martin v. Freeman*, (1888), 58 L.T. 538; 8 Digest 299, 765.
- (6) *Re Porter, Porter v. Porter*, [1925] Ch. 746; 95 L.J.Ch. 46; 133 L.T. 812, Digest Supp.
- (7) *Re Dalziel, Midland Bank Executor & Trustee Co., Ltd. v. St. Bartholomew's Hospital*, [1943] Ch. 277; [1943] 2 All E.R. 656; 112 L.J.Ch. 353; 169 L.T. 168; 2nd Digest Supp.
- (8) *Re Parnell, Ranks v. Holmes*, [1944] Ch. 107; 113 L.J.Ch. 92; 170 L.T. 40; 2nd Digest Supp.
- (9) *Re Barnett, Waring v. Painter Stainer's Co.*, (1908), 24 T.L.R. 788; 8 Digest 263, 256.
- (10) *Re Charlesworth, Robinson v. Cleveland (Archdeacon)*, (1910), 101 L.T. 908; 8 Digest 254, 160.
- (11) *Fillingham v. Bromley*, (1823), Turn. & R. 530; 44 Digest 442, 2675.
- (12) *Sifton v. Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.

- (13) *Re Wright, Mott v. Issott*, [1907] 1 Ch. 231; 76 L.J.Ch. 89; 95 L.T. 697; 44 Digest 468, 2883.
 (14) *Re Wilkinson, Page v. Public Trustee*, [1926] Ch. 842; 95 L.J.Ch. 528; 135 L.T. 736; 44 Digest 442, 2678.
 (15) *Re Talbot-Ponsonby's Estate, Talbot-Ponsonby v. Talbot-Ponsonby*, [1937] 4 All E.R. 309; Digest Supp.

ADJOURNED SUMMONS to determine the construction of a will. The facts appear in the judgment.

J. Monckton for the plaintiffs (the executors).

Christie, K.C., and *J. G. Strangman* for the first defendant (the widow).

Pascoe Hayward, K.C., and *Lindner* for the second defendant (one of the persons entitled on intestacy), and the third, fourth and fifth defendants (persons formerly in the testator's employ).

Ungoed-Thomas, K.C., and *Wilfrid Hunt* for the sixth defendant (the Court of the Mayor and Aldermen of the City of London).

Danckwerts (A. W. L. Franklin with him) for the Attorney-General.

JENKINS, J. : By cl. 5 of his will, the testator bequeathed to his wife :

... all the furniture plate plated goods linen glass china books (except books of account) manuscripts pictures statuary musical instruments articles of vertu motor cars and all other articles of domestic or household or garden use or ornament and all wines liquors and consumable stores and provisions which at the time of my death shall be in and about or belonging to or ordered for any dwelling-house and/or flat in which I may reside at my decease or the outbuildings or garden thereof.

It appears that at the time of his death the testator's possessions included some masonic regalia, a chain of office which is described in the originating summons as the Lord Mayor's chain of office, but which appears in fact to be a chain presented to the testator on his election as sheriff of the city of London, some jewellery, some wearing apparel, some wine stored on the premises of Richard Mathews & Company, Ltd., at the date of the testator's death, and in addition an order had been placed for the testator by the testator's wife on his behalf for a Lanchester motor car which was not delivered until, I think, a year or thereabouts after the testator's death. The question that I have now to decide is whether certain of these articles which I have enumerated pass under the gift contained in cl. 5 of the will which I have read. No dispute arises about the masonic regalia, the jewellery, the wearing apparel, or the wine. That leaves the sheriff's chain of office and the Lanchester motor car.

As to the chain of office, that is described in an affidavit of Lady Coxen, who explains that it was, in fact, the chain presented to her late husband on his election as sheriff in the city of London, as an article of beautiful workmanship. That is all the evidence I have about it—the occasion of its presentation, and the fact that it was of beautiful workmanship. Returning to cl. 5 of the will, it is, I think, common ground that the only words under which the chain can pass are the words "and articles of vertu." The question, therefore, is whether the chain presented to the testator on his election as sheriff can properly be brought within that description. "Articles of vertu" is an expression of no very closely defined meaning. It has been discussed in two cases to which I was referred in the course of the argument. The first case is *Re Baroness Zouche* (1), where certain dictionary definitions of the word were adduced in argument. In the course of argument, counsel referred to some definitions ([1919] 2 Ch. 182): "The expression 'an article of vertu' or 'vertu' is not used in French or Italian in the same sense as in English and means 'an object of art, antiquity or curiosity'." That definition is taken from the IMPERIAL DICTIONARY, vol. 4, p. 558. "In the OXFORD ENGLISH DICTIONARY, Vol. 10, p. 237 (c), it is defined as 'a curio, antique or other product of the fine arts'." Counsel submitted (*ibid.*) that it included :

... books and MSS. collected, not for their literary excellence, but because of some quality such as artistic excellence, or antiquity, or rarity, or curious lettering, or because they are interesting as curiosities.

The items in question in that case were certain rare books and manuscripts. P. O. LAWRENCE, J., in his judgment, said (*ibid.*, 185) :

I think an article, in order to be an "article of vertu," must have some artistic merit; there may be articles which are very rare and which are of great interest to

men of taste and education which could not be properly described as "articles of vertu." I think the term connotes that there is an artistic element in the article, and for that reason I have come to the conclusion that if the present case had rested on "articles of vertu" alone, further evidence would be required in order to bring, for instance, the Mazarin Bible within the description of "articles of vertu."

A I have also been referred to *Re Tomline's Will Trusts* (2) which was decided by MAUGHAM, J., and which concerned the Paston Letters. The gift in the will included "all the pictures prints statues sculptures articles of vertu books furniture and plate." The learned judge in that case dealt with the meaning of the expression "articles of vertu" and said ([1931] 1 Ch. 525):

B Apart from that consideration to which, it may be, not very much weight ought to be attached, what is the meaning of the phrase "articles of vertu books furniture and plate in my mansion houses at Orwell Park and Riby Grove"? Do the three volumes in question, according to the ordinary meaning in the English language of "articles of vertu," fall within that description or within the term "books"? On that, by the industry of counsel, I have been referred to probably all the material cases which have been decided in the last hundred years. First, I wish to express my opinion with regard to the phrase "articles of vertu," a phrase which I have always thought a somewhat unhappy one, because it is often used without a very exact knowledge of what it includes.

C The learned judge then refers to the decision of P. O. LAWRENCE, J., to which I have already made reference and he gives the substance of what that learned judge said. MAUGHAM, J., goes on to say (*ibid.*, 526):

D I may be allowed to add that there must be many objects of antiquity or curiosity which are not, ordinarily speaking, articles of vertu. I have suggested two, a prehistoric axe-head and an Egyptian mummy. I do not think that anybody in ordinary parlance would describe either of those things as an article of vertu. For my part I, like P. O. LAWRENCE, J., think that an article of vertu must be in some sense a product of the fine arts; and the phrase connotes, if not artistic merit, a certain effort on the part of the person who originally produced it, in the direction of what he conceived to be the fine arts.

E Those passages from those two cases, together with the dictionary definitions referred to in them, seem to comprise all the assistance available to me in deciding this question about the sheriff's chain. It seems to me that the expression "articles of vertu" embraces a very large potential class of articles, and the only common factor possessed by this class is artistic merit of some form or another. Any type of article which a connoisseur or virtuoso might collect for its artistic merit, or the beauty of its workmanship, falls I think within the category. Therefore, in view of the fact that this sheriff's chain is admittedly a valuable article, and what Lady Coxen describes as an article of beautiful workmanship, I think I am justified in holding that it falls within the category of articles of vertu within the meaning of cl. 5 of the testator's will. If the testator had in the course of his will disposed of articles under other generic descriptions than those which occur in cl. 5 of the will—for instance, if he had left to someone else "all my articles of personal adornment" or had used some other expression capable of including this chain, and perhaps more specifically apt to property such as this chain than the expression "articles of vertu," a difficult question might have arisen. But in this will, so far as F I understand it, the only expression which could comprehend this chain is the expression "articles of vertu," and for the reasons I have stated I think that expression is capable of including the chain, and I see no sufficient reason, therefore, why I should not construe it as including the chain. So I will hold that the chain passes to Lady Coxen under cl. 5 of the will.

G H The next question is as regards the Lanchester motor car. Inasmuch as it appears from the evidence that the motor car had been ordered by Lady Coxen on behalf of the testator in his lifetime, it seems to me to be reasonably plain that it was, within the meaning of cl. 5, a motor car ordered for any dwelling-house and/or flat in which the testator might reside at his decease. Those words are, perhaps, not remarkably apt to the case of a motor car because one generally orders a motor car for oneself and not for one's dwelling-house, but it is clear that the relevant clause extending the gift to things ordered for a dwelling-house, and so on, does qualify the whole enumeration which precedes it, because that enumeration is simply introduced by the definite

article "the," and that clearly refers forward to the relative clause which shows what articles of the various descriptions the testator intends to include in his gift. Therefore, it appears to me reasonably plain that on the true construction of cl. 5 the motor car passes under it.

That does not entirely conclude the question of the motor car for it had been ordered but not paid for, and further questions are raised as to whether Lady Coxen—who, as I have decided, is entitled to the motor car—is entitled to it subject to the obligation of paying for it. It is urged on behalf of those interested in residue, though tentatively urged, that Lady Coxen has that liability cast on her by virtue of the Administration of Estates Act, 1925, s. 35, which provides :

- (1) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged, shall as between the different persons claiming through the deceased, be primarily liable for the payment of the charge ; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.
- (2) Such contrary or other intention shall not be deemed to be signified—(a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate ; or (b) by a charge of debts upon any such estate ; unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

It is contended that the motor car was, within the meaning of that section, subject to a charge for its purchase price, so that, accordingly, Lady Coxen takes the motor car subject to the obligation to pay for it. In my judgment, that submission is misconceived. The section applies only to a testator who, at the time of his death, is "possessed of or entitled to" property subject to a charge. It is not impossible that a testator might die entitled to a motor car which had been sold to him and which had become his property for which he had not paid, but was still held for his account by a vendor subject to a lien for unpaid purchase money. That is not an impossible state of affairs, but that state of affairs can, surely, only arise where the property in the chattel, namely, the motor car, has passed to the testator, and he has not paid the purchase money. In this case it is not shown (and I think it is reasonably clear on the evidence that it is not the case) that any particular motor car had been at the time of the testator's death appropriated to the performance of this particular contract, or in any other way that property in any particular motor car had passed to the testator under the contract. It seems to me, therefore, that the essential condition for the operation of s. 35 of the Act—namely, that the testator should be entitled to the motor car subject to a charge for payment of money—was not fulfilled. In my judgment, in such a case the effect of cl. 5 of the will, so far as goods ordered are concerned—at all events where the goods were in the situation in which this particular motor car was, that is to say, in the state of not having been appropriated to meet the contract under which they were ordered—is that the testator's executors have to complete the contract so that the particular item is delivered. When it is delivered they must make it over to Lady Coxen as falling within the specific gift to her contained in cl. 5, and no question of Lady Coxen paying the purchase price arises at all either under the Administration of Estates Act, 1925, s. 35, or otherwise.

[HIS LORDSHIP took time to consider his judgment on further questions raised by the summons.]

July 19. **JENKINS, J.**, read the following judgment. The testator in this case, Sir William George Coxen, a former Lord Mayor of London, died on Apr. 7, 1946, leaving his widow, Dame Kathleen Alice Coxen, and one brother him surviving, and his will dated Sept. 4, 1940, with one codicil thereto dated Aug. 14, 1941, was proved on Aug. 24, 1946, in the Principal Probate Registry.

The first of the two questions which I now have to deal with concerns the validity of the trusts declared by cl. 17 of the will concerning the testator's

residuary trust fund. The trusts in question (declared subject to the payment of certain annuities as to which no question arises and in the event which happened of the testator having no children) are in the following terms :

- A My trustees shall stand possessed of the trust fund and the income thereof in trust to pay or make over the same to the Court of Aldermen for the City of London to be called "The Sir William Coxen Trust Fund" upon trust out of the income of the trust fund to apply once a year a sum not exceeding the sum of £100 per annum to provide a dinner to the Court of Aldermen when they shall meet to decide the business of this trust and to pay to each member of the committee hereinafter mentioned who shall attend during the whole time of any committee meeting the sum of £1 1s. for his attendance at such meeting and to apply the balance of such income for the benefit of or to pay over the same to all or any of the orthopaedic hospitals of England and other hospitals or charitable institutions carrying on similar work (it being my desire that a preference shall be given to the Royal National Orthopaedic Hospital of Great Portland Street, London), in such shares and proportions as the said committee shall from time to time think fit it being my feeling that young children up to the age of 14 years should be periodically examined to see that they are growing into healthy men and women and that correction in any faults in them that may arise should be made from time to time and it is my desire that the said Court of Aldermen should from time to time appoint a committee of six aldermen of the City of London four who have passed the Chair and two who have not passed the Chair to administer the trust fund And I declare that the receipt of the person who professes to be the treasurer or other proper officer for the time being of any such hospital or institution shall be a sufficient discharge to the said committee.

I should also refer to cl. 20 of the will which is in these terms :

- D I desire that all the persons who are then my trustees shall at the expiration of three years after my death or so soon thereafter as they may in their discretion deem it convenient so to do retire from the trusts of this my will and appoint as trustees in their place the said Court of Aldermen or such persons as the said court shall nominate for this purpose to the intent that the trusts of this my will shall thereafter be carried into execution by or under the direction of the said court.

- E It is not, and clearly could not be, disputed that the purposes for which the balance of the income of the trust fund is expressed to be applicable under the provisions of cl. 17 are perfectly good charitable purposes. It is, however, contended on behalf of the testator's brother (who, subject to Lady Coxen's interest, would be entitled under the Administration of Estates Act, 1925, to any interest in the testator's estate not disposed of by the will and codicil) that the trusts to be satisfied before such balance is arrived at, that is to say, the trusts

- F out of the income of the trust fund to apply once a year a sum not exceeding the sum of £100 per annum to provide a dinner to the Court of Aldermen when they shall meet to decide the business of this trust and to pay to each member of the committee hereinafter mentioned who shall attend during the whole time of any committee meeting the sum of £1 1s. 0d. for his attendance at such meeting

- G are not charitable trusts, and not being charitable are void as infringing the rule against perpetuities. The case is, therefore, said to be one of the type in which a fund or the income thereof is directed to be applied primarily to purposes which are not charitable and as to the balance or residue to purposes which are charitable.

- H I was referred to a number of cases in which the effect of dispositions of this type has been considered, and the result of the authorities appears to be :— (a) that where the amount applicable to the non-charitable purpose can be quantified, the trusts fail *quoad* that amount, but take effect in favour of the charitable purpose as regards the remainder; (b) that where the amount applicable to the non-charitable purpose cannot be quantified, the trusts, both charitable and non-charitable, wholly fail because it cannot in such a case be held that any ascertainable part of the fund or the income thereof is devoted to charity; (c) that there is an exception to the general rule in what are commonly known as the "tomb cases," *i.e.*, cases in which there is a primary trust to apply the income of a fund in perpetuity in the repair of a tomb not in a church, followed by a charitable trust in terms extending only to the balance or residue of such income, the established rule in cases of this particular class being to ignore the invalid trust for the repair of the tomb and treat the whole income as devoted to the charitable purpose; and (d) that there is an

exception of a more general character where as a matter of construction the gift to charity is a gift of the entire fund or income subject to the payments thereout required to give effect to the non-charitable purpose, in which case the amount set free by the failure of the non-charitable gift is caught by and passes under the charitable gift: see (for example) *Chapman v. Brown* (3), *Re Birkett* (4), *Re Taylor* (5) *Re Porter* (6), *Re Dalziel* (7), *Re Parnell* (8). See also TUDOR ON CHARITIES, 5th ed., pp. 61 and 62, and cases there cited.

It is argued that, neither of the above mentioned exceptions being applicable, there must, at all events, be a failure of the trusts of cl. 17 *quoad* the trust to provide an annual dinner and the trust to pay one guinea to each member of the committee for his attendance at any committee meeting. It is argued further that, although the income applicable to the dinner trust can be quantified by reference to the maximum of £100 per annum set by the will, there is no means of quantifying the income applicable to the payment of guineas to members of the committee, because this depends on the number of committee meetings held and the number of members attending during the whole of each meeting. It is suggested that by meeting daily, or, perhaps, several times a day, the members of the committee might entitle themselves to claim a wholly unpredictable number of guineas on which no limit can be placed by the court. It is, therefore, claimed that the case is one of those in which the amount applicable to charitable purposes cannot be ascertained, with the result that the whole of the trusts of cl. 17 (apart, of course, from the provision for the annuities) must fail as (for instance) in *Re Porter* (6). I find this suggestion repugnant to common sense. The fund here in question is, I understand, something over £200,000. Suppose the committee met as often as once a week throughout the year (an obviously extravagant estimate) and every committee man attended during the whole of each meeting so as to qualify for his guinea, that would only absorb 312 guineas or £327 12s. per annum, which, being added to the maximum of £100 per annum applicable to the dinner, would make a total of only £427 12s., an insignificant fraction of the total income of the fund. Assuming that the two trusts now under consideration were, indeed, invalid, and assuming the effect of such invalidity to be to produce an intestacy with respect to the income to which they extend, as opposed to augmenting the income applicable to the charitable purposes, I cannot but think that the court would find means to quantify the income applicable to the invalid trusts rather than divert from purposes admittedly charitable (say) eleven-twelfths of the income of a fund because a part of such income, incapable of exact quantification but incapable also on any reasonable estimate of exceeding (say) one-twelfth, is directed to be held on invalid trusts. On this aspect of the case I think the observations of SIR GEORGE JESSEL, M.R., in *Re Birkett* (4) (9 Ch.D. 578, 579) are much in point. It seems to me that he clearly would have found no difficulty in ascertaining a figure which the trust for paying guineas for attendances at committee meetings could "under no conceivable estimate" exceed, in confining any intestacy due to the invalidity of that trust and the dinner trust to the figure of annual income arrived at by adding his estimate for the former to the maximum set by the will for the latter, and in holding that the charitable trust took effect with respect to the remainder of the income.

I do not, however, think that the argument for the testator's brother should succeed even to this limited extent. It seems to me to ignore the important circumstance that the two disputed trusts are declared in favour of the Court of Aldermen and the members of the committee *virtute officii* and on the assumption that the Court of Aldermen will accept the trust, and will duly appoint a committee of six aldermen to administer the fund. The testator, no doubt, regarded the provision of an annual dinner on the occasion of the court meeting on the business of the trust as conducive to the attainment of his charitable purpose by encouraging acceptance of the trust by the court and stimulating a good attendance at the annual meeting and a benevolent interest among the aldermen in the affairs of the fund, and, no doubt, also regarded the trust for payment of guineas to members of the committee as similarly conducive by promoting willing service on the committee and punctual and regular attendance at its meetings. Both trusts, though preceding in order the charitable trusts, therefore, seem to me to be essentially ancillary to the

charitable trust, and they can clearly only take effect as ancillary to it, because, unless the court accepts the charitable trust and constitutes the committee to administer the fund, there can be no question of providing an annual dinner or of paying guineas to members of the committee. It, therefore, seems to me that, even if the two disputed trusts must be held invalid as being for purposes neither charitable in themselves nor incidental to the attainment of the charitable purpose, the result must simply be that the entire income of the fund is applicable to the charitable purpose on the ground that the

A testator has devoted the whole income to the charitable purpose but has subjected a part of it to trusts designed to promote that purpose by particular means to which effect cannot legally be given. This conclusion can be tested by considering the position which would arise if the Court of Aldermen declined to accept the trust. In such event the two disputed trusts (assuming them to be otherwise valid) would clearly fail for want of qualified objects; yet it

B seems to me it would be perfectly plain that the whole income of the fund would be applicable to the charitable purpose without any question of intestacy as to the amount which would have been required to provide the dinners and the guineas if the trusts for those purposes had not failed. I see no ground for holding that a different result should ensue from the failure of those ancillary trusts for the reasons urged on behalf of the next-of-kin.

It remains to consider whether the trusts in question are, indeed, invalid.

C In my judgment, they are not. It is, no doubt, perfectly true that a trust simply to provide an annual dinner for the Court of Aldermen of the City of London is not charitable, any more than the trust to provide dinners for the Painters Stainers' Company in *Re Barnett* (9) was charitable. It is also, no doubt, perfectly true that a trust simply to pay periodical guineas to selected aldermen of the City of London is not charitable, but the trusts here in question

D are of a different character. The annual dinner is to be provided for the Court of Aldermen as trustees of the charitable trust when they meet on the business of the trust, and the guineas are payable only to aldermen who are members of the committee administering the charity when they meet for that purpose and subject to the express condition that a member in order to qualify for his guinea must be present during the whole of a given committee meeting. The annual dinner and the guinea attendance fees can, therefore, fairly be regarded

E as in the nature of remuneration in kind or in cash to the trustees and committee of management for their services in administering the affairs of the trust, and, as I have already said, the testator, no doubt, thought that these concrete expressions of his appreciation of the time and trouble involved would be conducive, in the ways mentioned above, to the attainment of his charitable purpose. In other words, his motive and object in providing for the annual dinner and the guinea attendance fees was, I think, clearly to benefit the

F charity and not the members for the time being of the Court of Aldermen or the members for the time being of the committee appointed by them. It cannot be said that these particular modes of furthering his charitable purpose are, in fact, incapable of furthering it. On the contrary, I think there is every reason to suppose that it will be furthered thereby, and of this I think the testator was the best possible judge. Himself a former alderman, sheriff and

G Lord Mayor, no one could know the Court of Aldermen better than he did, or be more capable than he was of devising the most effective method of enlisting their interest in, and sympathy and support for, a charitable project which, after all, has no particular connection with the City of London.

As regards the annual dinner in particular, I find some support for the view I have formed in the decision of EVE, J., in *Re Charlesworth* (10), where he held that a trust to apply the income of a fund in payment of the expenses

H of the dinners consumed by members of a charitable religious society when attending the meetings of the society was charitable as increasing the usefulness and efficiency of the society, and thus producing effects which were for the advancement of religion. I was also referred to an order of the Vice-Chancellor dated Nov. 26, 1828, which approved a scheme supported by the Attorney-General for the administration of Lawrance Atwill's Charity, of which the Skinners Company were trustees, which included a provision increasing the allowance to be made for an annual dinner for the Skinners Company out of the income of the endowment from £20 (the sum specified

by the testator) to £100, owing to the decrease in the value of money in 1828 as compared with 1588, the year of the testator's will. But I have only the order before me, without the arguments or reasons for the decision, and, accordingly, cannot extract any general principle from it.

It was suggested on behalf of the testator's brother that a trust for the payment of remuneration in perpetuity to the trustees for the time being of a charitable trust for their time and trouble in acting as such trustees is void as infringing the rule against perpetuities because such a trust involves a gift in perpetuity which is not *per se* charitable. No authority was cited to me for the proposition, which I decline to accept. Such a trust is, in my view, a charitable trust not because the recipients of the remuneration are objects of charity, but because the provision of the remuneration promotes the efficient management of the trust. The remuneration is, in effect, an expense of administration. If this were not so, grave difficulties would, as it seems to me, often arise in the administration of charitable trusts. It is, of course, possible to imagine a case in which, owing to the smallness of the funds available, trusts similar to those declared by cl. 17 of the present will might result in the bulk of the income being absorbed in the provision of the annual dinner and the attendance fees, but I think a case of that sort would have to be dealt with by way of scheme, though conceivably the true conclusion might be that there was in the events which happened no effective charitable trust. Be this as it may, I do not think hypothetical difficulties of this type should affect the decision in the present case, in which the size of the fund makes it abundantly plain that only an insignificant proportion of the total income available will be required to provide the annual dinner and attendance fees, even if the maximum is spent on the dinner and the committee meets more often than committees of this type usually do. For these reasons I propose to answer the relevant question by a declaration to the effect that all the trusts of the "Sir William Coxen Trust Fund" declared by cl. 17 of the will are valid charitable trusts.

The other outstanding question is of an entirely different character, and concerns the disposition of the testator's property known as "Wildwood Seal" contained in cl. 2 of his codicil which is in the following terms:

I devise my messuage land and hereditaments known as Wildwood Seal in the county of Kent to my trustees in fee simple upon trust that my trustees shall permit my dear wife Kathleen Alice to reside therein rent free during her life or for so long as she shall desire to reside therein and I declare that from and after her death or if in the opinion of my trustees she shall have ceased permanently to reside therein (whichever shall first happen) my trustees shall stand possessed of the said premises upon the trusts and with and subject to the powers and provision in my said will declared and contained of and concerning my residuary estate (therein referred to as "the trust fund") and I direct that during her life or for such time as she shall reside therein my said wife shall at her own expense pay the usual outgoings and keep the said messuage and premises in good repair and condition and insured against fire to the full value thereof in some office of repute.

It is contended on behalf of Lady Coxen that the provision under which "Wildwood Seal" is to become subject to the trusts affecting the testator's residuary estate "if in the opinion of my trustees she shall have ceased permanently to reside therein" is void for uncertainty because it is a condition subsequent determining her interest in events which are not defined with sufficient precision to make it possible to decide in all conceivable circumstances whether her interest has or has not determined by reason of the provision in question. In support of this contention reliance is placed on *Fillingham v. Bromley* (11) where there was a gift over in the event of the devisee failing "to live and reside" on a certain estate, and it was held that it was too uncertain what the testator meant by the words "live and reside" for the court to determine that there had been a forfeiture, and on *Sifton v. Sifton* (12) where it was held by the Privy Council that a stipulation in a will to the effect that certain payments to be made to the testator's daughter should be made only so long as she should continue to reside in Canada was a condition subsequent which was void for uncertainty. On the other hand, in *Re Wright* (13) where a testator gave a house to his trustees on trust to permit his niece to hold and occupy the same free of rent subject (*inter alia*) "to her residing upon the

A said premises during her lifetime," KEKEWICH, J., found himself able to hold on the facts that the niece did not reside there within the meaning of the will, and, accordingly, that there would have been a forfeiture under the condition but for the fact that (as he went on to hold for reasons which are not material for the present purpose) the condition had ceased to apply on her marriage. In *Re Wilkinson* (14), TOMLIN, J., held with respect to a gift by a testatrix to a niece (to whom she had also given a dwelling-house) of the income of a fund "for and during the term of her natural life or until she shall voluntarily cease to make the said dwelling-house her permanent home" that the event prescribed by the words "until she shall voluntarily cease to make the said dwelling-house her permanent home" was not too uncertain to be ascertained. It is true that he held the provision in question to be a limitation and not a condition subsequent, and that his decision is, therefore, not directly in point, but I think the following passage from his judgment ([1926] Ch. 849) has an undoubted bearing on the question I have to decide :

B I confess I do not feel any difficulty in giving a rational meaning to the words "to make the dwelling-house her permanent home"; I think it is reasonably plain what that means; it seems to me it means, to keep it up as what may be colloquially called her headquarters. I do not think there is any particular difficulty in attaching a reasonable meaning to the phrase. I do not propose, and I do not think it necessary for me today to define precisely what I understand the phrase to mean. I am satisfied that it bears a sufficiently definite meaning to enable me to say that there is no case of uncertainty which renders the gift in any way bad, or defective. The fact that the language of the will is not uncertain has, of course, no necessary bearing upon the question whether when particular events have happened there may not be some difficulty in saying whether or not they fall within that which is contemplated by the will; but that is not a matter with which I have anything to do.

D Lastly in *Re Talbot-Ponsonby's Estate* (15) CROSSMAN, J., held with respect to a devise of an estate to the testator's son "upon condition that he made the same his home" that the condition was not void for uncertainty. In the course of his judgment he said ([1937] 4 All E.R. 312) :

Whether in particular circumstances the devisee has ceased to make the estate his home or not may be difficult to determine, but I am not prepared to hold that it is an impossibility to determine it. I do not hold the condition void for uncertainty.

E Reverting to *Sifton v. Sifton* (12) I find in the judgment of the Committee (delivered by LORD ROMER) the following passage ([1938] 3 All E.R. 445) :

F Their Lordships' attention was called during the arguments to numerous authorities in which the court has been called upon to consider the meaning of the words "reside" and "residence" and the like. These authorities, however, give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached to the devise of a house that the devisee should reside in the house for at least six weeks in a year can present no difficulty. In some contexts, the word "reside" may clearly denote what is sometimes called "being in residence" at a particular house. In other contexts, it may mean merely maintaining a house in a fit state for residence. It is plain, however, that in the present case the word "reside" means something different from either being in residence or merely maintaining a residence. No one can suppose that the testator intended either that his daughter should never leave Canada, or that, so long as she maintained a residence in Canada, she might spend the whole of her time abroad. He must have intended that, though Canada was to be her home in general, yet she was to be at liberty to leave Canada for some purposes and for some periods of time. Unfortunately, he omitted to define either the purposes or the periods.

G This passage, I think, shows (a) that the meaning (whether definite or uncertain) of the words "reside" and "residence" in a will depends on the context in which the words are used, (b) that in some contexts a perfectly definite meaning can be attached to such words, and (c) that the words "reside" and "residence" have different (and less readily ascertainable) implications when used in relation to residence in a particular country from those which they have when used in relation to residence in a particular house. There is, therefore, nothing in *Sifton v. Sifton* (12) which precludes me from holding the condition here in question to be a valid condition provided I am able to attach a sufficiently definite meaning to it in the context afforded by the codicil, and (as shown by *Re Wilkinson* (14) and *Re Talbot-Ponsonby's Estate* (15)) in deciding whether I am able to do so or not I must keep in mind the distinction

between uncertainty as to the events prescribed by the testator as those in which the condition is to operate (which is, generally speaking, fatal to the validity of such a condition) and difficulty in ascertaining whether those events (sufficiently prescribed by the testator as a matter of definition) have happened or not, which is not necessarily fatal to such validity. Returning to cl. 2 of the codicil, I have no doubt as to the meaning of the word "reside" in the context which it affords. The trustees are to permit Lady Coxen "to reside" in the house "rent free during her life or for so long as she shall desire to reside therein." I think this quite clearly means personal residence. I think it follows that personal residence is also meant in the words of the disputed condition "if she shall have ceased permanently to reside therein."

It remains to consider what is meant by the word "permanently." This occasions some difficulty as the word is so placed as to be grammatically capable of qualifying either "ceased" (so as to give the meaning "permanently ceased to reside") or "reside" (so as to give the meaning "ceased to reside permanently," or, splitting the infinitive, "ceased to permanently reside"). I think it is reasonably plain that the former (that is "permanently ceased to reside") is what is meant. Therefore, the condition is, as a matter of definition, to operate in the double event of (a) Lady Coxen ceasing personal residence in the house and (b) such cesser being permanent. The latter event involves intention. Lady Coxen must have given up all intention of ever again resuming personal residence in the house, or in other words, must have no "*animus revertendi*." To put it objectively, she must have given up personal residence once and for all. It seems to me that so far as definition goes the double event involved in the condition as I have construed it is prescribed with sufficient certainty and precision. I see no reason why a judge of fact should not on any given state of facts be perfectly capable of deciding whether it has or has not happened. Indeed, the problem is no more insoluble than the question whether a given individual has in a given state of facts abandoned his domicile of origin and acquired a domicile of choice, which the court has never regarded as incapable of decision. The circumstance that it may be difficult in this or that state of facts to determine whether the double event has happened or not, does not, in my judgment, make the condition bad: see *Re Wilkinson* (14) and *Re Talbot-Ponsonby's Estate* (15). I do not see why it should ever be impossible to do so.

I have so far treated the condition as if it was simply in the terms "if she shall have ceased permanently to reside," whereas its actual terms are "if in the opinion of my trustees she shall have ceased permanently to reside." That I think makes a very material difference. The opinion of the trustees that the double event has happened, and not simply the happening of the double event, is what brings about the cesser of Lady Coxen's interest. If the testator had insufficiently defined the state of affairs on which the trustees were to form their opinion, he would not, I think, have saved the condition from invalidity on the ground of uncertainty merely by making their opinion the criterion, although the declaration by the trustees of this or that opinion would be an event about which in itself there could be no uncertainty, but, as I have already indicated, I think the relevant double event is sufficiently defined to make it perfectly possible for the trustees (as the judges of fact for this purpose) to decide whether it has happened or not, and, in my view, the testator, by making the trustees' opinion the criterion, has removed the difficulties which might otherwise have ensued from a gift over in a double event the happening of which, though in itself sufficiently defined, may necessarily be a matter of inference involving nice questions of fact and degree. For these reasons I hold that the provision in question is valid.

Declaration accordingly. Costs of all parties as between solicitor and client to be raised and paid in due course of administration out of the testator's estate.

Solicitors: *Nash, Field & Co.* (for the plaintiffs and the second, third, fourth and fifth defendants); *Godden, Holme & Co.* (for the first defendant); *The Comptroller and City Solicitor* (for the sixth defendant); *Treasury Solicitor.*

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re SOUTH NEWINGTON (KINGSTON-UPON-HULL)
MUNICIPAL ELECTION PETITION. LEWIS v. SHEPPERDSON.

[KING'S BENCH DIVISION (Birkett and Slade, JJ.), July 13, 14, 1948.]

Election—Municipal election—Ballot papers—Validity—Papers insufficiently marked with official stamp—Initials written on papers—Mark near name of candidate—Local Government Act, 1933 (c. 51), s. 29, sched. II, pt. III, paras. 18, 34 (a), (c), (d).

A By the Local Government Act, 1933, s. 29: "Subject to the provisions of this Act, an election of councillors of a borough shall be conducted in accordance with the provisions of sched. II to this Act." By sched. II, pt. III, para. 18: "A ballot paper shall be delivered to an elector who applies therefor, and immediately before delivery—(a) the ballot paper shall be marked with the official mark, either embossed or perforated . . ."

B By sched. II, pt. III, para. 34: "Any ballot paper—(a) which does not bear the official mark; or . . . (c) on which anything is written or marked by which the elector can be identified except the printed number on the back; or (d) which is . . . void for uncertainty; shall not be counted . . ."

C At a municipal election, the official mark for the ballot paper was ten perforated holes. A paper was rejected on which there was only one perforated hole and in two places marks where the holes should have been, but the perforation had not gone through the paper. A ballot paper on which the official mark was visible, but the stamp had failed to perforate the paper, was allowed:—

D HELD: where a voter, who had expressed his intention of voting for a particular candidate, was in no way to blame and the only defect in the ballot paper was on the part of the official machinery by which the election was conducted, special consideration should be given so that the voter should not be disfranchised; the intention to apply the official mark was clearly indicated; and the fact that the official stamp had been imperfectly applied did not invalidate the votes.

Gloucester (County) Cirencester Division Case, Lawson v. Chester-Master (1893) (4 O'M. & H. 194), and Birmingham Case, Woodward v. Sarsons (1875) (L.R. 10 C.P. 733), applied.

E Some ballot papers had initials written underneath the cross against the name of the candidate chosen:—

HELD: ballot papers on which initials had been written were void under the Local Government Act, 1933, sched. II, pt. III, r. 34 (c), as the voters could be identified, and they should, therefore, have been rejected.

F A ballot paper which was counted had some pencil marks over the cross against the name of one of the candidates:—

HELD: there was nothing appearing on the ballot paper to invalidate the vote, and it was properly counted.

[AS TO VOID BALLOT PAPERS, see HALSBURY, Hailsham Edn., Vol. 12, pp. 359, 360, para. 730; and FOR CASES, see DIGEST, Vol. 20, pp. 109-113, Nos. 883-910.]

Cases referred to:

- G (1) *Birmingham Case, Woodward v. Sarsons*, (1875), L.R. 10 C.P. 733; 44 L.J.C.P. 293; 32 L.T. 867; 39 J.P. 776; 20 Digest 111, 892.
(2) *Gloucester (County) Cirencester Division Case, Lawson v. Chester-Master*, (1893), 4 O'M. & H. 194; 20 Digest 110, 890.

H SPECIAL CASE, stated, pursuant to an order of BIRKETT, J., dated Mar. 19, 1948, and made under the Municipal Corporations Act, 1882, s. 93 (7), on a municipal election petition brought by an unsuccessful candidate under s. 87 (d) of the Act. The petitioner questioned the election on the ground that the respondent "was not duly elected by a majority of lawful votes." The rejection by the returning officer of certain ballot papers, and the admission of others, was challenged. The Divisional Court now held that the respondent was duly elected by a majority of two votes and dismissed the petition. The facts appear in the judgment of the court delivered by BIRKETT, J.

H. R. B. Shepherd and P. Malcolm Wright for the petitioner.
Collard for the respondent.

Cur. adv. vult.

July 14. **BIRKETT, J.**, read the following judgment of the court. This is a petition which arises out of an election for the ward of South Newington in the county borough of Kingston-upon-Hull, for a councillor for that borough. The election took place on Nov. 1, 1947. Mr. Clifford Lewis, the petitioner in this case, was a candidate at that election, and Mrs. Tally Shepperdson, the respondent, was also a candidate—in fact, the petitioner and the respondent were the only two candidates at the election. When the poll was concluded, the returning officer counted 4,114 votes on the ballot papers. Of those votes 2,058 were for Mrs. Tally Shepperdson, the respondent, and 2,056 were for Mr. Clifford Lewis, the petitioner. Thereupon, the respondent was duly declared elected to the office of councillor for the said borough. The matter with which we are now dealing comes before us by way of a Special Case which was ordered in March, 1948, and the facts on which we are asked to come to a decision are the facts which are set out in the Special Case. I say that because a point was raised, with which I will deal hereafter, which was outside the Special Case.

It appears that the returning officer for the election rejected 17 ballot papers, and we are informed in the facts in the Case that the parties agreed that 13 of those 17 votes were properly and correctly rejected. Four, therefore, of the 17 were challenged, and came by way of Special Case to this court. Of those four one was a ballot paper purporting to be a vote for the petitioner on which it was said that there was one perforated hole. The Case informs us that the official mark for the ballot paper was ten perforated holes, and on this particular paper, which is described as having one perforated hole, there are, in addition to the one perforated hole, two holes which are embossed, *i.e.*, the perforation has not gone through the paper, but they were intended manifestly to be perforated holes. The petitioner contends that this is a good and a valid vote and ought to have been counted, while the respondent says that the vote was properly rejected on the ground that there was a want of the official mark. With regard to Nos. 2 and 3 of that category of four, one was a vote marked with a cross for the respondent on which the word "Attan" had been written, and the other was a paper with a cross against the name of the petitioner, on which the name "Moore" had been written. With regard to those two votes, counsel agreed that the court could disregard them, inasmuch as the parties had come to an agreement that they cancelled each other out. Therefore, the court has been no longer troubled with Nos. 2 and 3. The fourth vote in that first category of votes was a vote for the petitioner, and it was challenged on the ground that the initials "F.G." were written on the paper. The petitioner claimed that that was a good and a valid vote, and the respondent said that it was not. Therefore, out of that first category of four votes, two votes remain in issue, both of which on the face of them are votes for the petitioner.

On Dec. 18, 1947, by order of the county court, a scrutiny of the ballot papers which had been counted at the election was held, and on that scrutiny seven further papers, in addition to the four, were challenged and contested. Of these seven, the first (*viz.*, No. 5) was a vote purporting to be for the respondent, and the mark was there on the voting paper, but the perforation had not been made. The respondent thereupon contends that that vote is a good vote and was properly counted, whereas the petitioner says that the vote ought not to have been counted, because the official mark was wanting. The second one (*viz.*, No. 6) is a vote purporting to be for the petitioner, and that ballot paper has, in addition to the mark of the voter, the initials "J.E.C." written on it. The petitioner says that, notwithstanding those initials, the vote is valid and ought to have been counted, whereas the respondent says that it is a bad vote and ought not to have been counted, because it contains on its face writing from which the voter can be identified. With regard to the remaining five votes in that list of seven (*viz.*, Nos. 7-11), they are all said to have been void for uncertainty and ought not to have been counted by the returning officer. The first two contained a mark under the name of the petitioner which is partly in the place reserved for the voters for the petitioner and partly in the place reserved for voters for the respondent. With regard to the third vote, it is a vote purporting to be for the petitioner with a mark underneath it. With regard to the fourth (*viz.*, No. 10), it purports to be a vote for the petitioner with a marking over it, and the last of the seven (*viz.*, No. 11) is a vote purporting to be for the petitioner with an indefinite mark. Of these five, counsel for the

respondent conceded that all those votes were properly counted for the petitioner with the exception of No. 10, the one with certain pencil markings over it. Therefore, of this category of seven, three are contested, of which one is a vote for the respondent and two are votes for the petitioner. Then there was a further ballot paper put before us which clearly showed a cross against the name of the respondent, but bears no official mark of any kind, either embossed or perforated. That ballot paper is not included in the Special Case. We said

A that we would reserve consideration whether, as it was not included, we had power under the Special Case to deal with it. Subject to that ballot paper, of the five votes which are in issue four are for the petitioner and one is for the respondent.

The matter is governed by the Local Government Act, 1933. Section 29 of that Act says :

B Subject to the provisions of this Act, an election of councillors of a borough shall be conducted in accordance with the provisions of sched. II to this Act.

Schedule II, pt. III, para. 18, deals with the marking of ballot papers :

A ballot paper shall be delivered to an elector who applies therefor, and immediately before delivery (a) the ballot paper shall be marked with the official mark, either embossed or perforated . . .

C Then there are various other directions about the number, name and description of the elector. The other relevant paragraph is sched. II, pt. III, para. 34, which is headed "Void ballot papers" :

Any ballot paper (a) which does not bear the official mark ; or (b) on which votes are given for more candidates than the elector is entitled to vote for ; or (c) on which anything is written or marked by which the elector can be identified except the printed number on the back ; or (d) which is unmarked or void for uncertainty shall not be counted . . .

D In this case, therefore, the relevant matters in para. 34 are : (a) a ballot paper "which does not bear the official mark" ; (c) a ballot paper "on which anything is written or marked by which the elector can be identified except the printed number on the back" ; and (d) a ballot paper "which is unmarked or void for uncertainty."

E We were referred to several authorities, of which the first, a very important case, is *Birmingham Case, Woodward v. Sarsons* (1). There are many matters in that case which have no application to the matters with which we are concerned, but LORD COLERIDGE, C.J., delivering the judgment of the court, made the following observations (L.R. 10 C.P. 733, 743-745) :

F As to the first, we are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, *i.e.*, that there was no real *electing* by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should

G be satisfied that there was reasonable ground to believe that a majority of the electors *may have been* prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament . . . As to the second, *i.e.*, that the election was not really conducted under the subsisting election laws at all, we think, though there was an election in the sense of there having been a selection by the will of the constituency, that the question must in like manner

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be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as matter of fact, that the election was not an election under the existing law. It is not enough to say that great mistakes were made in carrying out the election under those laws: it is necessary to be able to say that, either wilfully or erroneously, the election was not carried out under those laws, but under some other method. For instance, if, during the time of the old laws, with the consent of a whole constituency, a candidate had been selected by tossing up a coin, or by the result of a horse-race, it might well have been said that the electors had exercised their free will, but it should have been held that they had exercised it under a law of their own invention, and not under the existing election laws, which prescribed an election by voting.

The judgment then deals with the question of the Ballot Act, 1872, which was a matter in that case, and with the various questions with regard to the directions as to voting. Then these observations occur (*ibid.*, 746):

These observations lead us to the conclusion that the enactments as to the rules in sched. I [to the Ballot Act, 1872], and the forms in sched. II, are directory enactments, as distinguished from the absolute enactments in the sections in the body of the Act. And in such case, in order to determine the preliminary question, which is, whether there has been a material breach of the Act—and which must be determined before determining what effect such breach has upon a vote or on the election—the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

The judgment then deals with the manner of voting, and says (*ibid.*, 747, 748):

And therefore, by the general rule before mentioned, it would be necessary that the absolute enactment that the paper should be marked secretly should be obeyed exactly; but it would be sufficient that the manner of marking the paper should be obeyed substantially. If these two enactments be so obeyed, there is no material breach of the Act. The extent of error which is to vitiate so as to annul the ballot paper is further to be gathered from the statute itself. By s. 2 [of the Act of 1872] "any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is *written or marked, by which the voter can be identified*, shall be void, and not counted." It is not every writing or every mark besides the number on the back which is to make the paper void, but only such a writing or mark as is one by which the voter can be identified. So, in r. 36: "the returning officer shall report the number of ballot papers rejected and not counted by him, under the several heads of (1) 'Want of official mark'; (2) 'Voting for more candidates than entitled to'; (3) '*Writing or mark by which voter could be identified*'; (4) 'Unmarked, or void for uncertainty'." And then, in sched. II, in the note to the form before referred to, we have this warning: "If the voter votes for more than — candidates, or places *any mark* on the paper *by which he may be afterwards identified*, his ballot paper will be void, and will not be counted." The result seems to be, as to writing or mark on the ballot paper, that, if there be substantially a want of any mark, or a mark which leaves it uncertain whether the voter intended to vote at all or for which candidate he intended to vote, or if there be marks indicating that the voter has voted for too many candidates, or a writing or a mark by which the voter can be identified, then the ballot paper is void, and is not to be counted: or, to put the matter affirmatively, the paper must be marked so as to show that the voter intended to vote for some one, and so as to show for which of the candidates he intended to vote. It must not be marked so as to show that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted. If these requirements are substantially fulfilled, then there is no enactment and no rule of law by which a ballot paper can be treated as void, though the other directions in the statute are not strictly obeyed. If these requirements are not substantially fulfilled, the ballot paper is void, and should not be counted; and, if it is counted, it should be struck out on a scrutiny. The decision in each case is upon a point of fact, to be decided first by the returning officer, and afterwards by the election tribunal, on petition.

Then the court went on to deal with the facts in the particular case.

The only other case to which I need refer is *Gloucester (County) Cirencester Division Case, Lawson v. Chester-Master* (2), where HAWKINS, J., said (4 O'M. & H. 194, 195, 196):

In several others of the ballot papers the official stamp itself had beyond doubt been applied to the back, but there seems to have been a deficiency of ink upon the stamp, and the impression was not by any means so clear as it would have been if

greater care had been taken by the stamper. It was obvious, however, to us, and would be equally obvious to the presiding officer; and we think it is not necessary that there should be in every respect a clear and distinct impression of every part of the stamp, but that it is quite sufficient if the evidence afforded by that which appears on the back of the paper leads us to the conclusion that the stamp was applied there with the intention of making the required mark; and we cannot help remembering that which we constantly see—official stamps upon law proceedings imperfectly impressed, and yet not open to objection, nor even questioned. We think, therefore,

A that all the objections to the ballot papers upon the ground that the official marks were defectively marked upon the backs of them fail, and that it is quite sufficient if there is such evidence of the official mark, whether it is perforated through the paper, whether the ink is caused to run through the paper so as to indicate the official mark, or whether the stamp is applied but fails to make a perfect mark, in all such cases, if there be evidence that the presiding officer has intended to make, and has in fact made, what, fairly looked at, indicates that a recognisable official mark is upon the back of the ballot paper, votes marked on such papers ought to be held good votes

B in the absence of any other substantial objection.

That being so, the decision to which we have come with regard to the challenged votes in this case is that the first one to which I have already made reference, *viz.*, the one for the petitioner on which there appears the one perforated hole and the two embossed holes, ought not to have been rejected on the ground that there was a want of the official mark, although the ten perforated holes

C plainly do not appear. Applying the reasoning in the *Cirencester* case (2), we are satisfied that the marks which do appear indicate the intention to apply the official mark. Although it was not perfectly done, we think the paper ought not to have been rejected on that account. In every other respect the vote is perfectly plain, and no other substantial objection can be raised to it. We think that, in a case where the voter is in no sense to blame, where he has

D intended to vote and has expressed his intention of voting in a particular way, and, so far as his part of the transaction is concerned, has done everything that he should, and the only defect raised as a matter of criticism of the ballot paper is some defect on the part of the official machinery by which the election is conducted, special consideration should (and, no doubt, would) be given, in order that the voter should not be disfranchised. So far as this one vote is concerned, it is quite clear from the cross in the petitioner's section that the

E voter did all that he could possibly do to record his vote. The only challenge was the fact that the official stamp had been imperfectly applied. We are satisfied that there was the clear intention to apply it and we shall allow that vote for the petitioner.

The next ballot paper to consider is the vote for the petitioner with the initials "F.G." on it. Learned counsel for the petitioner, I think, recognised his difficulty there quite frankly. He had already conceded that, so far as the ballot

F paper was concerned which was marked "Moore," he could not hope to succeed in the contention that that vote ought not to have been rejected, and, similarly, counsel for the respondent made the same concession with regard to the ballot paper with the word "Attan" written on it. The only question, therefore, is whether this vote for the petitioner with "F.G." written on it ought to have been rejected by the returning officer on the ground that it bore marks by which

G the voter could be identified. We are clearly of opinion that it was properly rejected on that ground. The learned counsel put before us yesterday many facsimiles of voting papers with initials on them into which I need not go at this moment, but, having regard to the rule with regard to this particular matter, it is perfectly plain that where a voting paper has the initials "F.G." on it, the voter can be identified. Therefore, we think that that vote, which was purported to be given for the petitioner, was properly rejected by the returning

H officer.

Thus, out of the first category of four (*viz.*, the votes which were rejected), which had been challenged, one of those votes, *viz.*, for the petitioner, ought to have been allowed, and, therefore, the petitioner has one more vote to his credit.

We now come to the second category, consisting of the seven ballot papers which were counted and are challenged. The first is the vote for the respondent in regard to which it was said that the marking had failed to perforate the paper. Applying the principle which I have enunciated from the *Cirencester*

case (2), the voter had clearly voted for the respondent. No possible challenge could be made about that ; the voting paper was clearly and squarely marked, and there was no initial or writing on it. The official mark is plainly there in the sense that there are the imperfectly perforated holes, which I described previously as being embossed, and it is quite plainly a case where, owing to a deficiency in the stamping machine, or something of that nature, the full perforations had not been made. The conclusion to which we have come, applying the principles which I have enunciated, is that that vote for the respondent was properly allowed. With regard to No. 6, the vote for the petitioner on which the letters "J.E.C." appear, applying the principle which I have already mentioned, we think that that vote ought not to have been accepted by the returning officer as there was clearly an infringement of the direction with regard to the ballot paper, since there was on it, in addition to the vote, writing by which the voter could be identified. With regard to the remainder, *viz.*, Nos. 7-11, I need only trouble about No. 10, because it is conceded that the other votes for the petitioner were properly accepted. With regard to No. 10, there was clearly the official mark, and there was most plainly the cross in the petitioner's square, but the voter apparently had put some pencil marks on it, and it was submitted to us that the voter had indicated that he was seeking to cancel the vote. We think that that contention really cannot be sustained. On the other hand, it may very well be that the voter was intending to emphasise his vote. At any rate, we cannot think that anything appearing on that ballot paper is such as to invalidate the vote, and that vote, we think, was, therefore, properly counted for the petitioner.

When the matter came before us, the respondent had a majority of two. The vote which we think ought to be allowed for the petitioner in the first category (*viz.*, No. 1) would, therefore, reduce that majority to one. With regard to the seven in the second category, No. 5 (where the mark had failed to perforate the paper) had already been counted, so that it does not increase the majority. No. 6, the one for the petitioner with "J.E.C." written on it, in our view, ought not to have been accepted, so the respondent's majority goes to two. With regard to No. 10, we think that the vote there for the petitioner was properly counted. The result, therefore, is that, on the result of this scrutiny, the result of the election remains exactly the same. If that be so, we do not deal with the vote which was not included in the Special Case, because we think there is no reason to do so. It is quite plainly a vote for the respondent on which no mark of any character appears by way of official mark, and, undoubtedly, that vote should have been rejected. It would, however, make no difference to the result, so, in that event, we do not propose to deal with it. It was clearly a vote which was outside the Special Case, and we should require a little argument and persuasion before we could come to the conclusion that it was open to us to deal with matters outside the Special Case, but, in the result, it is immaterial whether we do or whether we do not. In those circumstances, we do not propose to deal with it. The result, therefore, of this petition, is that it fails, and our duty is to say that, on this scrutiny, the votes, in the result, remain the same, and the respondent's majority of two votes remains unchanged.

Petition dismissed with costs.

Solicitors : *Smith & Hudson*, agents for *J. A. Iveson & Co.*, Hull (for the petitioner) ; *Russell Jones & Co.*, agents for *Pearlman & Rosen*, Hull (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

SHORT AND ANOTHER v. TREASURY COMMISSIONERS.

[HOUSE OF LORDS (Lord Porter, Lord Uthwatt, Lord du Parcq, Lord Normand, Lord Morton of Henryton), June 28, 29, July 29, 1948.]

Emergency Legislation—Control of undertaking—Compulsory acquisition of company—Transfer of shares to government nominees—Price to be paid for shares—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, (as amended)), reg. 78 (5).

A On Mar. 17, 1943, the Minister of Aircraft Production, in exercise of his powers under the Defence (General) Regulations, 1939, reg. 55 (4), appointed a controller of the undertaking of a company. On Mar. 22, 1943, the Minister ordered to be transferred to his nominees all the shares of the company. On May 31, 1943, by a further order, made under reg. 78 (5) of the Defence Regulations, the price of the shares so transferred

B which were arrived at by reference to the prices of the shares of those classes ruling on the stock exchange at the date of the appointment of the controller. The shareholders contended that, as the transfer was of all the shares in the company, the appropriate mode of fixing the price of the shares was either (i) to ascertain the value of the whole undertaking and then to determine the proportionate value of the separate classes of shares and of individual shares within each class, or (ii) to apportion the value of the totality of the shares in one hand, so as to comprehend the value of the complete control of the undertaking thereby conferred.

C HELD : the price referred to in reg. 78 (5) was that to be paid for "any shares," which referred to those embraced in an individual holding, and not to the value of the shares as a whole; it was convenient to decide the value of individual holdings by reference to the Stock Exchange price at the date of the appointment of the controller; and, therefore, the method of valuation adopted was in principle correct.

Decision of the COURT OF APPEAL ([1947] 2 All E.R. 298), *affirmed*.

D *Per LORD UTHWATT* : If some one shareholder held a number of shares sufficient to carry control of the company, it might well be that the value proper to be attributed to his holding under reg. 78 (5) was greater than the sum of the values that would be attributed to the shares comprised in that holding if they were split between various persons.

E [FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, REGS. 55 AND 78, see HALSBURY'S STATUTES, Vol. 39, pp. 985 and 1057 respectively.]

Case referred to :

F (1) *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam*, [1939] A.C. 302; [1939] 2 All E.R. 317; 108 L.J.P.C. 51; Digest Supp.

G APPEAL from a decision of the Court of Appeal ([1947] 2 All E.R. 298), affirming a decision of MORRIS, J. ([1947] 1 All E.R. 22), who held that when an order was made by the Minister of Aircraft Production under the Defence (General) Regulations, 1939, reg. 78, transferring the shares of a company to his nominees, each shareholder was divested of the value of the shares which he held and the rights to which the shares entitled him and not of some aliquot part of the property of the company, and, therefore, the basis of valuation of the shares which the Treasury had adopted, *viz.*, the Stock Exchange quotations in respect of the shares at the date of the appointment of the controller of the company, was proper. The House of Lords dismissed the appeal. The facts appear in the opinion of LORD PORTER.

H *Sir David Maxwell Fyfe, K.C.*, and *C. W. Turner* for the appellants.

Sir Cyril Radcliffe, K.C., and *H. L. Parker* for the respondents (the Treasury Commissioners).

The House took time for consideration.

July 29, 1948. LORD PORTER : My Lords, this is an appeal from a judgment of the Court of Appeal affirming a decision of MORRIS, J., in the High Court. The question at issue involves a consideration of the sum to be paid to certain shareholders in Short Brothers (Rochester and Bedford, Ltd., whom I shall call Short Brothers, by the Treasury when taking over the shares in that company.

The issued capital of the company consisted of three classes of shares, *viz.*, 230,475 redeemable preference shares of £1 each (as to which no question arises), 250,000 A ordinary shares of 5s. each, and 581,302 ordinary shares also of 5s. each. The voting power was concentrated in the ordinary shares and each A ordinary share entitled its holder to four votes as against one vote in the case of each ordinary share. No distinction, however, has been made or is claimed to exist between these two types of share for the purpose of this case, though it is clear that any one possessing 200,000 A shares would have control of the company. The appellants have, I understand, been chosen so as to represent the interests concerned, Mr. Short holding 22,958 A ordinary and Lonsdale Investment Trust, Ltd., the second appellant, 3,000 ordinary shares. The claim arises in this way as appears in the printed Case for the respondents:

3.—(1) By the Defence (General) Regulations, 1939, reg. 55 (4), a competent authority was empowered for (*inter alia*) the efficient prosecution of the war to appoint by order an authorised controller of any undertaking to exercise with respect to the undertaking such functions of control on behalf of His Majesty as might be provided by the order.

(2) By reg. 78 (1) of the said regulations where an order appointing an authorised controller had been made in the case of an undertaking carried on by a company, the competent authority, if satisfied that it was necessary for the purpose of securing effective control, was empowered with the consent of the Treasury by order to transfer the shares of the company to such transferees as might be specified in the order.

(3) By reg. 78 (4) it was provided that where an order had been made under para. (1) thereof the shares should on such date as might be specified in the order vest in the transferees on behalf of the competent authority free from any mortgage, pledge or charge.

(4) By reg. 78 (5) the price to be paid in respect of any shares transferred by virtue of such an order was to be such price as might be specified in an order made by the Treasury, being a price which, in the opinion of the Treasury, was not less than the value of the shares as between a willing buyer and a willing seller on the date of the order made appointing the authorised controller.

(5) By reg. 78 (7) if any person who immediately before the date of transfer had an interest in any of the shares claimed that the price specified by the Treasury was less than the value aforesaid the value of the shares in which that person had an interest should be determined by the arbitration of a qualified accountant nominated by the Lord Chief Justice of England.

4. By an order entitled Short Brothers (Rochester and Bedford) Limited Control Order, 1943, dated Mar. 17, 1943, the Minister of Aircraft Production, in exercise of his powers under reg. 55 (4), appointed an authorised controller of the undertaking of the company.

5. By an order entitled Short Brothers (Rochester and Bedford) Limited (Transfer of Shares) Order, 1943, dated Mar. 22, 1943, (hereinafter referred to as the "transfer order"), the said Minister, with the consent of the Treasury, transferred as at Mar. 23, 1943, all the shares in the company to his nominees . . .

6. By an order entitled Short Brothers (Rochester and Bedford) Limited (Price of Shares) Order, 1943, dated May 31, 1943 (hereinafter referred to as the "prices order"), the respondents specified the following prices: (a) 22s. 3d. per share in the case of the five per cent. redeemable cumulative preference shares; (b) 29s. 3d. per share in the case of the A ordinary shares; (c) 29s. 3d. per share in the case of the ordinary shares.

7. . . . Both appellants gave notice that they were dissatisfied with the prices fixed for their shares by the prices order and Mr. Sydney John Pears, a qualified accountant, was nominated by the Lord Chief Justice of England to act as arbitrator and to assess the value of the said A ordinary and ordinary shares. For convenience it was agreed that the claims of the appellants should be treated as test cases and that, if the arbitrator held that the prices to be paid by the Treasury to the appellants should be in excess of those specified in the order, the Treasury would pay those revised prices in respect of all shares of these classes, irrespective of whether other former holders had themselves claimed arbitration.

8. The arbitration was held on Oct. 15, 16, 17, 18, 1946, and on Oct. 30, 1946, the arbitrator stated his award in the form of a Special Case for the opinion of the court.

As appears from the award itself the respondents contended that the proper basis of valuation under reg. 78 (5) was to assume that the shares had been purchased in individual blocks from individual shareholders on the date of transfer and to fix the value accordingly, and that, in fact, that value was best ascertained from the prices ruling on the Stock Exchange on the relevant date, *viz.*, the date on which the controller was appointed. The appellants, on the other hand, contended that, the transfer being a transfer of all the shares,

the Stock Exchange value was not a true criterion inasmuch as no order transferring the shares under reg. 78 (1) was authorised unless it provided for the expropriation of all the shares. As they maintained, the proper method for fixing the price was first to ascertain the value of the whole undertaking and then to determine the proportionate value of each class of shares. They stressed the argument that the Crown was taking, and could only take, the whole of the shares, and, therefore, must acquire the whole undertaking. No one, they contended, could acquire all the shares in a company except by paying for the business as a whole, and if the business as a whole is acquired, its value should be paid for. That, they say, was the view of the arbitrator, and he has stated what that value amounts to when the appropriate division among the ordinary shares has been made. Even if, however, the shares be treated as purchased in individual blocks the same result, so the appellants contend, is arrived at, because the potential value which is attributable to the opportunity of acquiring complete control must be taken into account.

My Lords, as I understood the argument of the appellants, no point was made that an inaccurate principle had been adopted or untrue figures accepted if the true method of ascertaining the shares was to value them share by share. Admittedly, the Stock Exchange price was not necessarily the value of shares calculated on this principle, but it was cogent evidence of their value and the appellants acknowledged that it would be useless to send the case back to the arbitrator unless their method of ascertaining the values were adopted. In deciding which of the views presented to your Lordships is right, it is plain that regard must be had to, and the result reached by a consideration of, the language of reg. 78, and, primarily, of para. 5 of that regulation. That paragraph can, I think, be expressed in shortened form so as to exhibit its essential quality. In that case it would run :

The price of any shares transferred shall be not less than the value of those shares as between a willing buyer and a willing seller on the date of the order made by the authority under reg. 55 (4).

The date of an order made under reg. 55 (4) is the date on which a controller of the business is appointed, and in the present case that date was Mar. 17, 1943. The value, then, which the arbitrator must put on the shares is that which they had on Mar. 17, 1943, and, in my view, that which they had before the controlling order was made, whether the effect of making it decreased or increased their value, that date being chosen, as I think, in order to make sure that no fictitious value should be placed on the shares by reason of the fact that the government were taking control and might expropriate them. At that time it was not, in fact, known that the undertaking was to be taken over or the shares transferred. They were not, in fact, transferred until Mar. 22 and the Prices Order did not come into force until Mar. 23. In such circumstances it is difficult to see why the shares, if bought in individual blocks, should have any increased value attributed to them because the whole were transferred at a subsequent date. Nor do I think their value would be enhanced because there was a possibility of the government subsequently taking them over. That factor must have been well known to both brokers and jobbers, and would be a circumstance which would affect the value on the Stock Exchange. There is, therefore, no reason for attributing an increase in value to such a possibility.

As to the alternative argument that the value of the business as a going concern should first be ascertained and then that global sum should be divided in due proportions between the different classes of shareholders, no doubt, if the regulation had stated that the shareholders were to receive the value of their shares calculated on their value on the sale of their business as a going concern, the appellants' claim would be correct, but, to my mind, the regulation makes quite a different stipulation. It is true that under the order all the shares are to be transferred, but though all are transferred to the nominees of the Treasury, all are not transferred *from* one person, and it is the value to the willing seller of his holding which has to be ascertained, not a potentiality of control which he does not possess. The paragraph speaks of the price of "any shares" which naturally refers to those embraced in any individual parcel and it is those shares, not the shares as a whole, the value of which is to be ascertained as between a willing buyer and a willing seller, a phrase which, in my mind, means a willing

buyer and a willing seller of those shares. If it were not so, there would be great difficulty, if not impossibility, in distributing the total sum obtained as the price of the undertaking among the various classes of beneficiaries in cases where there were a number of different classes of shares, and even in the present case where the preference shareholders are only entitled to the nominal value of their shares on a winding-up the question might arise as to their value when they were being paid off, but the company was not being wound-up.

This is the conclusion I should come to on the wording of para. 5 above, but such a construction is supported when one finds the phrase "any shares" used in paras. 6 and 7 as applicable to individual shares and not to the shares as a whole. It is true that that phrase is used in those paragraphs in reference to individual interests in particular shares, and, therefore, it is necessary to interpret its use as applying in those paragraphs to the shares or parcels of shares individually, but the phrase is the same in each case, and I see no reason for interpreting it in a different sense in three successive paragraphs. It is used, I think, of individual shares in paras. 6 and 7 because that is its natural meaning, and the fact that it is so used is a ground for refusing to attribute a less natural meaning to it in para. 5.

My Lords, in reaching this conclusion I do not find myself assisted by the provisions of other statutes or regulations dealing with the price to be paid for expropriated shares. Each contains its own terms and deals with questions incidental to the transfer of the particular interest taken over by the government in specified industries. They follow no general principle and have no bearing the one on the other. Nor, when dealing with shares, do I find any useful analogy in the principles on which the value of land compulsorily acquired is to be determined. If the principles adopted in *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam* (1) be accepted as correct (which for the purposes of this case I am prepared to assume), viz., that land compulsorily acquired must be valued not merely by reference to the use to which it is being put at the time at which its value has to be determined, but also to the uses to which it is reasonably capable of being put in the future, still, in the first place, in the case of land the owner possesses a tangible asset whereas a shareholder has no direct share in the assets of a company. He has such rights as the memorandum and articles give him and nothing more. In the second place, as has already been pointed out, there is no reason to suppose that the potentialities of the shares as existing before the control order was made were not fully represented in the Stock Exchange price. My Lords, for these reasons, which are substantially those which influenced the learned judge and the Court of Appeal, I would dismiss the appeal and order the appellants to pay the respondents' costs.

LORD UTHWATT : My Lords, the point which the appellants seek to make good is that the appropriate method of fixing the price to be paid for shares acquired under reg. 78 is to ascertain the whole value of the undertaking of the company, and then in light of that value to determine the proportionate value of the separate classes of shares and of individual shares within each class.

The matter is put in two ways—first, on the construction of the regulation, and, secondly, (assuming the appellants to be wrong on the question of construction) as a necessary consequence of the value to be attributed to the potentialities of any share acquired pursuant to the regulation. The first argument rests on the undoubted fact that the competent authority exercising the power conferred by reg. 78 must buy all the shares of the company. Paragraph 5 is, it is urged, to be construed against this background. All the shares taken as a single block are worth the value of the undertaking and each share must as a matter of construction of the regulations have a price allotted to it on the basis of that value.

My Lords, I agree that in construing para. 5 the background must be borne in mind, but I fail to see that this fact in any way assists the appellants. The transaction provided for by paras. 1 and 4 of the regulation is in form and substance the acquisition of shares by means of separate dealings with each shareholder. Paragraph 5 follows up this conception. On its plain language it is concerned with the fixing of a price as respects each and every share acquired. It is not concerned with fixing a price as respects all the shares taken as a single

block or, as respects any share, a price based on the value of all the shares taken as a single block. There is nothing in para. 4 to suggest that in fixing a price the nature of the dealing in respect of which a price is to be fixed—an individual dealing—is to be thrust out of consideration, and the simple language used in this paragraph is not capable of being twisted into the complicated formula embodied in the appellants' contention. The picture painted on the background is clear and definite. I desire only to add that, if some one shareholder held a

A number of shares sufficient to carry control of the company, it might well be that the value proper to be attributed to his holding under the regulation was greater than the sum of the values that would be attributed to the shares comprised in that holding if they were split between various persons. The reason is that he has something to sell—control—which the others considered separately have not. The contention of the appellants, if accepted, would, as the Court of Appeal point out, deny him the real value of his holding.

B The second argument, as I understood it in its final form, was as follows. In an inquiry as to the value of the shares as between a willing buyer and a willing seller, all possible buyers are to be taken into account. Among those buyers here was the competent authority, which, if it became a buyer, was necessarily committed to buying all the shares, and was, on the face of the regulation, buying for the purpose of obtaining control. In each individual

C transaction with a shareholder, therefore, the competent authority must be assumed to be ready to bargain in light of the potentialities of the share or its special adaptability to his purpose, namely the forwarding of the acquisition of control by him. Its value to him for that purpose was to be considered. My Lords, I do not think the phrase "potentialities of the share" or "special adaptability" carry one anywhere, or, indeed, have any particular meaning in relation to a share. A share always has the same qualities and potentialities.

D The appearance of a buyer needing the share for his particular purposes does not add to or detract from those qualities. But the argument does not rest on the aptness of these phrases. The substance of it is that the competent authority is to be included among the possible willing buyers, and that, wanting control, he must be taken as prepared to pay for it up to the hilt. Its value is, therefore, to be determined by the proportionate interest in the company's undertaking which it represents. There are, I think, more answers than one to this argument.

E I choose the easiest of them. That answer is that the argument disregards the facts. The competent authority can acquire under the regulation according to its true construction and not otherwise. One is, therefore, thrown back on the regulation. Under the regulation, though all the shares were to be acquired, they were to be acquired only through the machinery of a compulsory transaction with each shareholder. The price was to be not less than the value

F as between a willing buyer and a willing seller on the date of the order appointing an authorised controller—which must be read as on that date immediately before the appointment of a controller took effect. That I call the critical date. The conclusion desired by the appellants—that, in valuing the individual blocks of shares, their proportionate share in the assets of the company measures the value between a willing buyer and a willing seller—cannot, therefore, be reached unless it be assumed that on the critical date—before any steps had

G been taken to bring the company in any form under control—there was a certainty that the competent authority would apply to the company a regulation in possibility applicable to all companies, and a certainty that the competent authority would ultimately step in and buy all the shares. The making of the assumption is obviously out of the question. Without that assumption the argument produces no result. I would dismiss the appeal.

H **LORD DU PARCQ** : My Lords, I find myself in complete agreement with the opinions of my noble and learned friends who have just addressed your Lordships, and also with the opinion of my noble and learned friend, **LORD MORTON OF HENRYTON**, which I have had an opportunity of reading in advance. I do not desire to add any words of my own. I am authorised by my noble and learned friend, **LORD NORMAND**, whose public duties require his attendance elsewhere, to say that he agrees with those opinions and has nothing to add.

LORD MORTON OF HENRYTON : My Lords, the respondents contend that the proper basis of valuation of the shares in Short Brothers (Rochester

and Bedford), Ltd., under reg. 78 is to assume that the Minister has acquired all the shares in the company in individual blocks from individual shareholders on the date of the control order of Mar. 17, 1943, and on this assumption to fix the value of all the shares on the basis of the prices ruling on the Stock Exchange on that date. It is common ground between the parties that there is nothing in reg. 78 which compels the arbitrator to fix the value of the shares on the basis of the Stock Exchange prices. On the facts of this case, however, if the respondents' contention on the main question of construction is correct, I think that the Stock Exchange prices afford a fair criterion of the value of each block of shares, as between a willing buyer and a willing seller, on the relevant date.

For my part, I feel no doubt that the respondents' contention is correct. The regulation contemplates that the competent authority shall acquire all the shares in the company at one and the same time, but it also contemplates that he shall obtain these shares from the individual shareholders and that each shareholder shall be paid for his shares in accordance with the provisions of para. (5) of the regulation, which has already been read. The phrase "the price to be paid" assumes a seller and a buyer, and the "shares transferred" belong to the individual shareholders in the company. Each shareholder is a seller and in each case the competent authority is the buyer. The price is to be "not less than the value of those shares as between a willing buyer and a willing seller" on the relevant date. These words mean, to my mind, that each shareholder is to be assumed to be a willing seller of his shares on that date, and the competent authority is assumed to be a willing buyer of these shares on that date. This is, in my view, the natural meaning of the words used in para. (5), and if that paragraph is read, as it ought to be read, in conjunction with paras. (6) and (7), it becomes still more clear that the price is to be fixed on the basis of sales of their respective holdings by individual shareholders. Paragraph (6) is clearly dealing with the case in which a block of shares belonging to an individual shareholder is subject to a mortgage, pledge or charge, and para. (7) gives each individual shareholder a right to go to arbitration if he thinks that the price to be paid for his shares is less than their true value.

The contention of the appellants gives rise to many difficulties. I shall mention only one. If they are right, the phrase "those shares" in para. (5) means all the shares in the company, and the regulation is providing for a valuation of all the shares in the company, as one mass, on the basis of the value of the whole undertaking. If this is so, the regulation contains no provisions for apportioning this lump sum among the holders of various classes of shares. It is extremely unlikely that any regulation would be framed in such a way, and paras. (6) and (7) seem to me quite inconsistent with the view that only such a "mass" valuation has been dealt with in para. (5). In my view, the Court of Appeal and MORRIS, J., rightly construed reg. 78, and this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *William Charles Crocker* (for the appellants); *Treasury Solicitor* (for the respondents).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* ELECTRIC AND MUSICAL INDUSTRIES, LTD.

[KING'S BENCH DIVISION (Singleton, J.), July 5, 6, 1948.]

Excess Profits Tax—"Income received from investment"—Fees from licences to perform gramophone records in public collected and distributed to members by company limited by guarantee—*Finance (No. 2) Act, 1939 (c. 109), sched. VII, pt. I, para. 6 (1), (2).*

To protect themselves against infringement of their copyright entitling them to the exclusive right of the performance in public of their records, groups of gramophone record manufacturers incorporated a company limited by guarantee and not having a share capital, with power, under its memorandum and articles of association, to exercise and enforce on

behalf of its members all rights and remedies of the members by virtue of the Copyright Act, 1911; to grant, on behalf of its members individually, licences for public performance of records; to collect fees in respect thereof; and to divide the net moneys so received among its members. By art. 6 of the articles of association each member granted to the company sole power to grant licences on his behalf for the public performance of his records, and, by art. 9, all moneys received by the company in respect of the exercise of the rights granted by the member were to be the property of the company.

HELD: the moneys received by a member of the company did not constitute "income from an investment" within the meaning of para. 6 (1) of pt. I of sched. VII to the Finance (No. 2) Act, 1939, but was income arising to the member in the course of its trade as manufacturer of gramophone records, and, therefore, fell to be included in the computation of the member's profits for the purposes of excess profits tax.

Dicta of LORD GREENE, M.R., MACKINNON and TUCKER, L.JJ., in *Inland Revenue Comrs. v. Desoutter Bros., Ltd.*, [1946] 1 All E.R. 58, 59, 63, *applied*.
Inland Revenue Comrs. v. Gas Lighting Improvement Co., Ltd., (1923), (129 L.T. 481), *distinguished*.

[FOR THE FINANCE (No. 2) ACT, 1939, sched. VII, pt. I, para. 6 (1), see HALSBURY'S STATUTES, Vol. 32, p. 1220.]

C Cases referred to:

- (1) *Gramophone Co., Ltd. v. Stephen Cawardine & Co.*, [1934] Ch. 450; 103 L.J.Ch. 248; 150 L.T. 396; Digest Supp.
- (2) *Inland Revenue Comrs. v. Desoutter Bros., Ltd.*, [1946] 1 All E.R. 58; 174 L.T. 162; 2nd Digest Supp.
- (3) *Inland Revenue Comrs. v. Rolls-Royce, Ltd.*, [1944] 2 All E.R. 340; 171 L.T. 238; 2nd Digest Supp.
- (4) *Inland Revenue Comrs. v. Tootal Broadhurst Lee Co., Ltd.*, [1947] 2 All E.R. 409.
- (5) *Inland Revenue Comrs. v. Gas Lighting Improvement Co., Ltd.*, (1923), 129 L.T. 481; 12 Tax Cas. 503; Digest Supp.

CASE STATED by the Special Commissioners of Income Tax, who held that certain fees received by the taxpayers from a company limited by guarantee, incorporated to protect their copyright interests in respect of the performance in public of their gramophone records, were income from an investment within the meaning of the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 6 (1), and therefore were to be excluded from their profits for the purposes of excess profits tax. The appeal by the Crown was allowed. The facts appear in the judgment.

Cyril King, K.C., J. H. Stamp and R. P. Hills for the Crown.
Grant, K.C., and Tribe for the taxpayers.

SINGLETON, J.: The Gramophone Co., Ltd., which was a subsidiary company of Electric and Musical Industries, Ltd., throughout the accounting period, manufactures gramophone records, and in 1933 obtained judgment in the High Court in *Gramophone Co., Ltd. v. Stephen Cawardine & Co.* (1), establishing that manufacturers of gramophone records have such a copyright under s. 19 of the Copyright Act, 1911, as entitles them to the exclusive right of performance in public of records made by them, so that they are entitled to restrain the use of those records for public performances. In due course manufacturers of gramophone records took measures to protect themselves against infringement of their copyright by the use of records for public performances without licence, and the manufacturers—there are two groups of them, the Electric and Musical Industries group and the Decca group—formed a committee to co-ordinate the arrangements for granting licences for public performances of their gramophone records. The business increased, and became very remunerative as the figures in this case show. It was decided later that other means should be taken to look after the copyright interests of the gramophone record makers, and to provide for the collection of fees for the granting of licences. Accordingly, on May 12, 1934, Phonographic Performance, Ltd., was incorporated as a company limited by guarantee, and not having a share capital. Since that time matters of the kind I have mentioned have been in the hands of the Phonographic Co., and in the accounting period July 1, 1943, to June 30, 1944, the sum of £17,265 17s. 1d. was paid over by the Phonographic Co.

to the Gramophone Co. in respect of what I may describe as their share of a balance remaining due, after expenses had been paid.

The question is whether that sum of £17,265 17s. 1d. received by the Gramophone Co. constitutes income from an investment in the hands of the Gramophone Co., and has thus to be excluded from its profits for the purposes of excess profits tax. The submission made on behalf of the Crown is that this sum of £17,000 odd was not income received by the taxpayers from an investment. The argument put forward by counsel for the taxpayers is that the sum constituted income from investment, so that it ought to be excluded from the computation of its profits for the purposes of excess profits tax. A

The question arises under the Finance (No. 2) Act, 1939, s. 12 (1), which reads :

Where the profits arising in any chargeable accounting period from any trade or business to which this section applies exceed the standard profits, there shall, subject to the provisions of this part of this Act, be charged on the excess a tax (to be called the excess profits tax) equal to three-fifths of the excess. B

Schedule VII to the Act provides for computation of profits and capital for purposes of excess profits tax, and in pt. I, which contains rules for adaptations of income tax principles as to computation of profits, para. (6) (1) says :

Income received from investments shall be included in the profits in the cases and to the extent provided in sub-para. (2) of this paragraph and not otherwise. C

Sub-paragraph (2) is :

In the case of the business of a building society, or of a banking business, assurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, being income to which the persons carrying on the business are beneficially entitled. D

It is to be noticed that para. (6) (1) deals with income from investments only, and it is different from the Act of 1937 in that respect, because sched. IV, para. (7) of that Act, provided :

Income received from investments or other property shall be included in the profits in the cases and to the extent provided in this paragraph, and not otherwise . . .

The Act of 1939 in this respect leaves out the words "or other property," and consequently one is concerned only with income received from investments.

To determine the question one has to look at the memorandum and articles of association of the Phonographic Co. and, as I think both sides agree, at certain minutes which have been passed from time to time, and one has to see what has been done in order to get the general view of the position. First, with regard to the memorandum of association, the objects for which the company are established are : E

3 (A) To exercise and enforce on behalf of members of the company, being manufacturers of gramophone records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced (all of which contrivances are hereinafter included in the term "record") and/or the owners of or being otherwise entitled to the benefit of or interest in the copyright in such records (hereinafter called "the proprietors") all rights and remedies of the proprietors by virtue of the Copyright Act, 1911, or otherwise in respect of the public performance of records. F

3 (B) In the exercise or enforcement of such rights and remedies to grant licences and to make and from time to time to rescind, alter or vary any arrangements and agreements with respect to the public performance of such records in any and every respect whatsoever, and to collect and receive and give effectual discharges for all royalties, fees and other moneys payable under any such licences agreements or arrangements or otherwise in respect of such public performances by all necessary actions or other proceedings, and to recover such royalties, fees and other moneys, and to restrain and recover damages for the infringement . . . 3 (C) To obtain from the proprietors such assignments, assurances, powers of attorney, or other authorities or instruments as may be deemed necessary or expedient for enabling the company to acquire the legal estate in the copyrights of such records, and to exercise and enforce in its own name or otherwise all such rights and remedies as aforesaid, and to execute and do all such assurances, agreements and other instruments and acts as may be deemed necessary or expedient for the purpose of the exercise or enforcement by the company of such rights and remedies as aforesaid. G

3 (D) To make and from time to time alter or vary any rules for regulating (1) the manner in which the period or periods for which, and the conditions under which the proprietors shall authorise the company to exercise and enforce the rights and remedies aforesaid of the proprietors in respect of such records aforesaid ; (2) the method and proportions H

by and in which and the times at which the net moneys received by the company in respect of the public performance of any such records as aforesaid shall be divided and apportioned among the members of the company.

Reliance was placed by counsel for the Crown on the commencement of cl. 3 (A), which states that one of the main objects for which the company is established is to exercise and enforce "on behalf of the members of the company . . ." The members are the different companies who were making or producing gramophone records, divided as they were into the two groups I have already mentioned—the Electrical and Musical Industries group and the Decca group. Those companies, seven in number, were signatories to the memorandum, and became members of the company. The first of the articles of association referred to was art. 4 :

The subscribers to the memorandum of association and such other persons as the directors shall admit to membership in accordance with the provisions hereinafter contained shall be members of the company.

Article 6 :

Every member who is the proprietor of the whole or any part of the performing rights in any record may, on or at any time after his election, and shall, if and when requested by the directors in writing so to do, assign to the company in the form prescribed by the company his interest, whether present or future, in such performing rights, and until such assignment and so far as such assignment may not extend, every member, by virtue of his application for membership, and his election as a member by the directors, grants to the company for and during the period of his membership, but subject to the provisions of arts. 10 and 11, the sole power and authority (a) to authorise or permit or forbid the public performance of all or any records the performing rights in which is or shall during his membership be or become vested in him ; (b) to grant licences on his behalf for the public performance of all or any of such records.

As I understand the submission on behalf of the taxpayers it is that in some way the Phonographic Co. obtained a beneficial interest in the copyright of the music and the records. It seems to me that the rights of the Phonographic Co. in the copyright of any such record must be acquired under art. 6, and not otherwise. I have not seen any document purporting to transfer any right otherwise, nor have I seen anything which intimates to the Phonographic Co. that some new record was ready for their handling. All that I am given is art. 6, and when that is examined it shows, in the first place, that every member may assign to the company in the form prescribed his interest in such performing rights. He may do that. It is optional on him at that stage but if he does not do that of his own volition he shall, if and when requested by the directors in writing so to do, assign to the company in the form prescribed by the company his interest in such performing rights. There is nothing to show that at any time any member did assign of his own volition, or that he was requested by the company to do so at any time, or that he did so. Thereupon it seems to me the position must be dealt with under the later part of art. 6 :

. . . until such assignment and so far as such assignment may not extend, every member, by virtue of his application for membership, and his election as a member by the directors, grants to the company for and during the period of his membership, but subject to the provisions of arts. 10 and 11, the sole power and authority . . . (b) to grant licences on his behalf for the public performance of all or any of such records.

So it would appear that the position is that the members of the company (and the Gramophone Co. was one of them), by virtue of the application for membership, grant to the company the sole power and authority to grant licences.

It is said by counsel for the taxpayers that the beneficial interest in the copyright passed to the Phonographic Co. I think, putting it another way, the Special Commissioners found that there was an equitable assignment of copyright. I confess I prefer to read it as it appears from the article itself, that the members must be deemed to have granted to the company the sole power and authority to grant licences, etc. Whether that is quite the same thing I am not so sure, but I think one ought to have regard to the words of the article in the first place. Article 7 is :

Every member, by virtue of his application for membership and his election as a member by the directors, authorises the company for and during the period of his membership in their or his name, but at their sole charge and expense (a) to collect fees and subscriptions and all moneys, whether for the performance of any of the

records the performing rights in which are vested in or controlled by the company or by way of damages or compensation for unauthorised performances thereof . . .

Article 8 is :

No member shall be at liberty to transfer his membership to any other person or to alienate or exercise the performing rights vested in the company by the member, or controlled by the company by virtue of his membership, or by the articles required to be so vested or controlled . . .

Article 9 is very important :

All moneys received by the company in respect of the exercise of the rights, licence or authority granted by the member shall be the property of the company, and shall be by them dealt with in accordance with the rules for the time being in force.

From time to time resolutions were passed as to how the money should be dealt with, and they are bound up with the memorandum and articles of association. The copy of the resolution of Mar. 15, 1937, an extraordinary resolution, is to this effect :

That in pursuance of the powers reserved by cl. 3 (D) of the memorandum of association, on and after Dec. 1, 1936, (1) The distribution of revenue to members shall be on the basis of user of records as shown by the returns made by the company's licensees. (2) The fees received from the British Broadcasting Corporation and other broadcasting companies shall be kept separate and distinct from the fees received from all other licensees. (3) The company's auditors shall certify what proportions of the company's expenses shall be debited as against the collection of each of the two forms of revenue mentioned above ; and (4) Each member shall receive his proportion of each form of revenue based on the user of records after the expenses allocated by the company's auditors thereto shall have been deducted therefrom.

The Case exhibits certain other documents, and, in particular, an agreement of Mar. 19, 1937, made between the taxpayers and the Decca Record Co., Ltd., each on behalf of themselves and their subsidiary companies, relating to the distribution of the revenue of the Phonographic Co. There were slight variations in that. It also exhibits a copy of a minute, dated Oct. 4, 1944, relating to the distribution of the net moneys, and in that document there is a total sum of £66,577 10s. 10d., part of which is represented by the amount in this case. There is also exhibited a copy of an agreement dated Mar. 1, 1940, between the persons, firms, companies and societies, carrying on business as music publishers, whose names are set forth in the first schedule thereto, and the gramophone record manufacturers, of whom the Gramophone Co. is one, relating to the payment to the publishers of 10 per cent. of the gross revenue from public performances, the payment to be made by the Phonographic Co. as agent for the manufacturers. That was used, or called in aid, by counsel for the Crown to show that in that respect at least it was admitted that the Phonographic Co. was acting as agent for the manufacturers generally. There was no dispute as to that. Other articles, to which my attention was drawn, were, in particular, arts. 46 and 68. I am not going to read them. The point which was made in regard to art. 68, and indeed some other matter which was referred to, was that nowhere in the memorandum and articles is there raised any question of any mention of profits. It is said that in art. 68 there is a provision that there must be once at least in every year an income and expenditure account, but there is no provision anywhere for arriving at the profits of the company, and so it is submitted that this company was not a company setting out to make any profit, but was a company formed for some other purpose entirely. The submission of counsel for the Crown is that the company was in fact formed for the express purpose of managing this business, of farming out the right to give public performances of these records, and the right to collect revenue thereon.

On these facts the Special Commissioners made certain findings, but I have felt some difficulty about the paragraph which may be said to contain their findings of fact. Paragraph (6) of the Case is :

Evidence was given at the hearing which we accepted as follows : A minute similar to the minute in para. 5 (4) above was passed by the Phonographic Co. each year.

That is the minute for the division of the money available.

No legal assignment of the right to grant licences was made by the Gramophone Co. to the Phonographic Co. The licence covered every known make of record and the Phonographic Co. was in possession of the copyright of them all:

It is that part in particular which I do not follow.

For the year ended May 31, 1944, between 20,000 and 30,000 subjects recorded were in the repertoire of the Gramophone Co.

The Special Commissioners give their decision in this way :

A The question we have to decide is whether the sum of £17,265 17s. 1d. received by the Gramophone Co., Ltd., in respect of the year ended May 31, 1944, was income from an investment or whether it constituted income arising to that company in the course of its trade as manufacturer of gramophone records. In our opinion, in order for the Crown to succeed in this appeal, it is necessary to establish that the Phonographic Co. was throughout acting as an agent for its members, including the Gramophone Co., Ltd., in granting licences and collecting payments. The circumstances of the case and in particular cl. 3 (D) (1) and (2) of the memorandum and arts. 9 and 46 of the articles, in our opinion, negative the existence of an agency. It is true that no legal assignment was granted by the Gramophone Co., Ltd., to the Phonographic Co. in respect of the granting of licences. In our view there was an equitable assignment by the Gramophone Co., Ltd., of the whole of its beneficial interest in the copyright as regards public performances of records. Thereafter its interest, in this respect, was confined to membership of the Phonographic Co. and the obtaining of its share of the profits available for distribution. We regard the receipt of the sum of £17,265 17s. 1d. in the nature of a dividend from an investment. The Phonographic Co. did, in one respect, act as an agent of the Gramophone Co., Ltd., in making payments to publishers under the agreement dated Mar. 1, 1940. These payments are made out of the share of the respondent company group before the net amount receivable is arrived at. We do not consider that the manner in which these payments were made affects the conclusion at which we have arrived. The Phonographic Co. also made payments to artistes, who performed the recording, under the terms of the specimen letter. These payments were not made as agent of the Gramophone Co., Ltd. In our opinion, in the particular circumstances of this case, the fact that the Phonographic Co. was a company limited by guarantee is not material. We hold that the said sum of £17,265 17s. 1d. was income received from an investment held by the Gramophone Co., Ltd., and that the appeal succeeds.

In those circumstances the Crown appeals, and asks me to say that the findings of the Special Commissioners, in so far as they are findings of law, are wrong. Counsel for the Crown, puts forward two points. In the first place he submits that there was no making over of any property by the Gramophone Co. at all, either in fact or in law. There was a grant of something, but there was nothing to show that any property had passed or that there was anything in the nature of any equitable assignment whatever. His submission was that the general set up shows that that which was taking place was really no more than the Phonographic Co. acted as agents to do that which the Gramophone Co. and other manufacturers might have done for themselves. He instanced the fact that in the early days, after the judgment in the Chancery Court, the arrangements were made or done through the committee. At last, he said, the business became too big for that committee, and so the Phonographic Co. was incorporated in order to do that which the committee had done before. The Phonographic Co. was given certain powers, but all its acts, he submitted, were done as agent for and on behalf of members. His second point was that, if there was anything made over to the Phonographic Co., it was not by way of investment, but was merely a method of exploitation by the manufacturers of the copyright to the extent of the performing rights in the way of their trade. He amplified that a little in this way. He said the arrangement, if it was an agency, was really nothing more than a business deal, the one saying to the other, "I cannot well do this work myself; I am too tied up with other things; you do it on these terms," the terms being contained in the memorandum and the articles of association, the contract between the member, the Gramophone Co., and the Phonographic Co. He submitted there was nothing in the nature of an investment at all. Counsel for the taxpayers pointed out that the Phonographic Co. under the articles had the sole right to grant licences, and he submitted that there was, and could be, no question of agency here, especially having regard to art. 9. He submitted that there passed to the Phonographic Co., by reason of art. 6, a beneficial ownership in the copyright, or in the right to grant licences to give public performances. The Phonographic Co., having that beneficial right, had also, by virtue of art. 9, the ownership of all moneys received by the company in respect of the sale of or payment for the grant, or in respect of

damages received for infringement. Article 6, submitted counsel, taken by itself might not be decisive on the position, but once you have art. 9, there can be no agency. He was in some little difficulty, I thought, in pointing out just what was transferred by art. 6, but his real point was based on art. 9. I asked him what was the asset which was transferred, and he answered me "the asset, or the investment, is my membership of and interest in the Phonographic Co." He said: "I obtained that investment in return for handing over the beneficial interest in the copyright of these records in so far as public performance is concerned." It is a little difficult and complicated. I think his strongest arm against there being an agency really rests on art. 9. Article 9 does not, I think, carry any further forward the passing of anything from the Gramophone Co. to the Phonographic Co. All that it says is that the monies received by the Phonographic Co. are the property of the Phonographic Co. Counsel for the Crown, in reply, treated art. 9 rather as something in the nature of accounting. He pointed out that, if the Phonographic Co. *vis-a-vis* its members remained in the position of agent and principal, then the Phonographic Co. would have to account for the expenditure in respect of each member's records, etc. They would be in much the same position as a trustee, and they would have to account for each individual transaction, whereas under the rules they made by means of the minutes they were able to deal with the position generally and to decide on a general method of distribution, based on the user of records, after expenses allocated by the company's auditors were deducted therefrom. Counsel submitted that was the only reason for art. 9.

I feel, I confess, very considerable difficulty about this. If I have to judge on the general appearance of the matter I cannot help thinking that this looks more like an agency transaction than an investment. On the other hand, the argument under art. 9 has impressed me. The second point has also to be considered. It is that, even if there was anything in the nature of a making over of something to the Phonographic Co., this was all rather a method of exploitation by the manufacturer of the copyright to the extent of performing rights in the way of his trade. In other words, it is a business arrangement made for the convenience of the Gramophone Co. and other manufacturers that they should have someone to manage their business for them in this way. In support of that submission counsel for the Crown cited to me *Inland Revenue Comrs. v. Desoutter Bros., Ltd.* (2), a case not precisely in point, but one in which there are expressions, which are most useful, on "investment" and "income from investment." The decision in that case, in so far as it affects this case, is that the exploitation of a patent in the hands of a manufacturer differed from that of a mere passive owner in that only in the latter case could the income from the patent be properly described as income from an investment. In the circumstances of the case, therefore, the income received by the taxpayers under the agreements was not income derived from investments within the meaning of the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 6, but income of the trade or business and, as such, liable to tax. LORD GREENE, M.R., in his judgment says this ([1946] 1 All E.R. 58, 59):

The third argument was the one that was dealt with by the commissioners ... In a somewhat similar case, *Inland Revenue Comrs. v. Rolls-Royce, Ltd.* (3), a question relating to income derived from patent licences came up for decision. MACNAGHTEN, J., there held that the particular income in that case was not income from an investment within the meaning of para. 6 of the schedule.

The MASTER of THE ROLLS then read the relevant words of sched. VII., pt. I, para. 6, to the Act of 1939 and added:

In order, therefore, that income from an investment is to be treated as a profit, it must be an investment which falls within the language of sub-para. (2). In the *Rolls-Royce* case (3) MACNAGHTEN, J., held that an income derived from the patent licences in that case was not income from an investment within the meaning of para. 6. When the present case was before the commissioners, that decision of MACNAGHTEN, J., had not been given. The commissioners, not being bound by that decision, came to this conclusion: "We, the commissioners who heard the appeal, were of opinion that the word 'investment' in the said para. 6 was apt to include patents which had been licensed and which were yielding a royalty income and that the said royalties were income from investments." MACNAGHTEN, J., reversed that decision, following, without further comment, his own decision, in the *Rolls-Royce* case (3). Attempts

have been made by counsel on both sides to suggest some comprehensive test or definition which would enable the court to discover whether a particular piece of income is income received from an investment or not. MACNAGHTEN, J., in the *Rolls-Royce* case (3) applied a test which was, put shortly, this: that before you can have anything properly called an investment, you must have the placing of money into it in order to acquire it or bring it into existence. Applying that test, MACNAGHTEN, J., came to the conclusion that the patents in that case were not investments because they had come into existence not by putting money into them but by making the invention which the patent protected. Speaking for myself, I am always disinclined to accept any general definition or test for the purpose of solving this type of question. The question whether or not a particular piece of income is income received from an investment must, in my view, be decided on the facts of the case. The facts must be ascertained, and then the question has to be answered. For the court to find itself fettered by some apparently comprehensive attempt at a definition directed to the solution of the problem in relation to one type of property, I cannot help thinking is unfortunate. It may well be that a definition or test, when applied to one type of property, is a useful method of approaching the particular problem in the particular case; but to take it as a guide in other cases is apt to be extremely dangerous, and certainly, in the present case, I do not propose to do it. As I view this case, it falls to be decided in rather a different way. The facts of the case, for the present purpose, are shortly these. Here is a manufacturing company carrying on a manufacturing business in this country. It makes and sells certain specialities protected by patents here, and in the United States of America. A patent is a peculiar type of property. In considering what it is and what is the nature of the income from it, it seems to me to be only confusing to attempt to find analogies and comparisons with war loan, real property, and other types of property. One has to remember exactly what a patent is. I am not concerned to dispute the proposition that in some cases, and in some sets of circumstances, a patent may fall within the description of investment within the meaning of para. 6. But the question in the present case, whether the income derived from these patents is or is not an investment, must be determined by the true character of that income, and the true nature of the source of the income which is derived by this particular company in this particular way.

Later in his judgment, the MASTER OF THE ROLLS said (*ibid.*, 61):

But directly the patent is held by a manufacturer of the patented article, it seems to me that the situation is entirely changed. When you have a manufacturer who is exploiting his monopoly right, not merely by excluding all competitors, but by letting one competitor in on terms, to say that the profits so derived are profits from an investment seems to me to be a misuse of language. It is contrary to what one may call the popular conception of the word "investment," which is not a word of art, but has to be interpreted in a popular sense.

Counsel for the taxpayers, in dealing with this argument, submitted that he had a finding in his favour in this case, and that the question was largely one of fact. I think in many cases it may well be so, but in a case such as this the decision has to be arrived at from a consideration almost wholly of documents—the memorandum, the articles, resolutions and the like. I think really it then becomes a matter of what is the true inference to be drawn and really it is a question of law. So I regard it in the circumstances of this case. MAC-KINNON, L.J., in the *Desoutter Bros., Ltd.* case (2) agreed with the judgment of the MASTER OF THE ROLLS, and said (*ibid.*, 63):

I think that the word "investments" in the relevant sections of the statute is not a word capable of legal definition. Like so many words in modern legislation, it is a word of current vernacular. On the facts of this case, I do not think that the income derived by the appellants under these American agreements was income from investments within the meaning of that English word, for the reasons so aptly stated by LORD GREENE, M.R.

TUCKER, L.J., agreed, and said (*ibid.*):

The company, whose business it is to invent, manufacture, and supply tools cannot, in my view, be said to be making an investment when it takes out patents for the protection of its own products. Nor can it be said to be making an investment when it enters into an agreement for the exploitation of the said patents taken out for that purpose.

A further case was cited to me, *Inland Revenue Comrs. v. Tootal Broadhurst Lee Co., Ltd.* (4), and in that case the decision in *Desoutter Bros., Ltd.* (2) was applied. That case, which came before TUCKER, SOMERVELL and EVERSHED, L.JJ., I need not read, but I draw attention to the fact that all the Lords Justices

refer to passages in the judgment to which I have referred, and in particular EVERSHED, L.J., referred to the judgment of MACKINNON, L.J., in this way ([1947] 2 All E.R. 409, 414):

Those contractual rights included the contractual right to receive sums described as royalties, but, in my judgment, applying the test laid down by MACKINNON, L.J., that the word "investment" must be given a business sense according to current vernacular, it is impossible to say that the sums received are received from an investment in that sense.

Those are the nearest decisions on this point, though counsel for the taxpayers referred me to *Inland Revenue Comrs. v. Gas Lighting Improvement Co., Ltd.* (5). I draw attention to the fact that in the present case I have not had before me any balance sheet showing how the assets are treated, nor have I seen any profit and loss account or anything of that kind. I do not think it matters greatly. I merely draw attention to it, because of the observation of LORD SUMNER (129 L.T. 481, 488). The real argument put forward on behalf of the taxpayers is based on art. 6, coupled with art. 9. Counsel's submission, on the decision in the *Gas Lighting Improvement Co.* case (5), is that there was no difference between that case and the present case. True in that case the company was a company which had a shareholding, whereas in the present case it is a company limited by guarantee, but that, he submitted, made no difference at all. He particularly referred me to two passages in LORD SUMNER's speech (*ibid.*, 489); and he submitted that the taxpayers had parted with an asset in return for an interest in the company and that on the basis of the decision of the House of Lords in the *Gas Lighting Improvement Co.'s* case (5), the motives were quite immaterial. If shares are taken in return that must be held to be an investment, he submitted, and in the present case the fact that the company was a company limited by guarantee made no difference at all, and, consequently, the money should be held to be invested, and the £17,000 odd fell to be treated as income from an investment.

I have considered the submissions made to me, and my conclusion is this. I regard the case as nearer to an agency case than an income from investment case. I agree to some extent with counsel's submission that art. 9 does make it difficult to regard this as an agency case. It seems to me to be something in the nature of a mixture. It is difficult to put into words what I mean, but it really is an arrangement made by the different members, and in particular by the Gramophone Co., for the convenience, I think, of their business. It is largely a matter of agency, but if you resolve it down to the end it does appear to me more in the nature of a business deal, as counsel for the Crown put it. The new ground, which was put forward by the Crown is that the Gramophone Co. handed over its property in its copyright to be managed by the Phonographic Co., along with the property of other members of the Phonographic Co. on the terms of receiving a share of the profits to be derived from the management of the property—I am not sure that "profits" is the right word. I think it is rather on the terms of getting that which they would have got if they had taken the trouble to manage it themselves—subject to any expenses incurred, deducted according to the rules. The letter giving notice that this further ground would be raised on this appeal states:

... the sum of £17,265 17s. 1d. was the consideration received by the Gramophone Co. in respect of the accountable period for the right of the Phonographic Co. to collect the royalties for the period under the Gramophone Co.'s copyrights; and that the relation between the two companies was a contractual relation of trader and customer.

There are several sentences in that new ground which, in my view, do not put the position accurately. I prefer it as put by counsel for the Crown in his argument, and I look on it as beginning with something in the nature of an agency but ending rather as contractual relation of trader and customer. That is what I think it was.

I have considered whether in any sense this can be described as income from an investment. I do not see how it can, according to the ordinary use of language. It is difficult, as I say, to find out what is transferred by the Gramophone Co. to the Phonographic Co. It is wholly different from the basis of any ordinary company trading for profit, because profit does not seem to be in contemplation,

It is in part management, and in part the relationship of trader and customer. It is not, in my view, a case in which the £17,000 odd can be treated as income from an investment in the popular sense or in any other sense. For these reasons I have come to the conclusion that this appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Broad & Son* (for the taxpayers).

A *l* by W. J. ALDERMAN, Esq., *Barrister-at-Law.*]

Varied. C.A. [1949] 1 All E.R. 444.

HAIN STEAMSHIP CO., LTD. v. MINISTER OF FOOD.

[KING'S BENCH DIVISION (Sellers, J.), July 1, 2, 5, 1948.]

B *Charterparty—Freight—Computation—Carriage of specified cargo—Option to charterer to ship other lawful merchandise—Freight to be paid at rate agreed for specified cargo—Vessel completely loaded partly with specified cargo and partly with optional cargo.*

Demurrage—Computation—Lay days—Carriage of specified cargo—Option to charterer to ship other lawful merchandise—Vessel completely loaded partly with specified cargo and partly with optional cargo—Calculation of demurrage on cargo actually loaded and discharged.

C A charterparty provided that the chartered vessel should load a full and complete cargo of wheat and/or maize and/or rye in bags and/or bulk and deliver the cargo on being paid freight at the rate of 81s. per ton for wheat and/or maize and/or rye. The charterparty contained the following clause: "(6) Charterer has the option of shipping other lawful merchandise . . . in which case freight to be paid on steamer's dead-weight capacity for wheat in bags on this voyage at the rate above agreed on for heavy grain, but steamer not to earn more freight than she would if loaded with a full cargo of wheat in bags . . . All extra expenses in loading and discharging such merchandise over heavy grain to be paid by charterer." The steamer was to be loaded at the rate of 500 tons per running day and, at the destination, cargo was to be received at an average of not less than 1,000 tons per weather working day for bulk cargo and not less than 750 tons for bagged cargo, otherwise demurrage was to be paid at the rate of 8d. per G.R.T. per day or *pro rata* for part of a day. Exercising his option under cl. (6) the charterer loaded the ship to capacity with specified cargo of maize in bulk, and optional cargo of linseed in bags and pollards, a total of 8,858 tons, or 579 tons short of the vessel's dead-weight capacity for wheat in bags of 9,437 tons.

F HELD: (i) the freight should be calculated, not on the dead-weight capacity of the ship for wheat in bags, less an allowance for shrinkage, but on the actual delivered weights of the cargo weighed on discharge and the estimated delivered weights of cargo not weighed on discharge, plus the 579 tons by which the tonnage fell short of dead-weight capacity for wheat in bags, less an allowance for the saving in discharging expenses through such cargo not having been shipped.

G *A. & C. Mazarakis v. Bunge Y. Bord, Ltd.* (1926) (26 Lloyd L.R. 169), applied; *Red "R" S.S. Co. v. Allatini Brothers* (1910) (103 L.T. 86), distinguished.

(ii) in arriving at the amount of demurrage the lay days should be calculated on the cargo actually loaded and discharged respectively.

H [AS TO RATE OF PAYMENT OF FREIGHT, see HALSBURY, Hailsham Edn., Vol. 30, pp. 583-588, paras. 741-745; and FOR CASES, see DIGEST, Vol. 41, pp. 654-658, Nos. 4867-4892.]

AS TO COMPUTATION OF DEMURRAGE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 344-349, paras. 524-528; and FOR CASES, see DIGEST, Vol. 41, pp. 566-576, Nos. 3910-3998.]

Cases referred to:

- (1) *Red "R" S.S. Co. v. Allatini Brothers*, (1909), 100 L.T. 268; 11 Asp. M.L.C. 192; 14 Com. Cas. 82, K.B.D.; 101 L.T. 510; 11 Asp. M.L.C. 317, C.A.; (1910) 103 L.T. 86; 11 Asp. M.L.C. 434; 15 Com. Cas. 290, H.L.; 41 Digest 656, 4882.

- (2) *Mazarakis (A. & C.) v. Bunge Y. Bord, Ltd.*, (1925), 23 Lloyd L.R. 275, K.B.D. ; (1926) 24 Lloyd L.R. 244, C.A. ; 26 Lloyd L.R. 169, H.L.
 (3) *Robinson v. Knights*, (1873), L.R. 8 C.P. 465 ; 42 L.J.C.P. 211 ; 28 L.T. 820 ; 41 Digest 620, 4512.

SPECIAL CASE stated by an arbitrator in respect of freight and demurrage payable by the charterer. The arbitrator accepted the shipowners' computation for both claims. The court reversed the arbitrator's finding in respect of freight and affirmed his finding in respect of demurrage. The facts appear in the judgment. A

Sir Robert Aske, K.C., and *Mocatta* for the shipowners.

Sir William McNair, K.C., and *H. L. Parker* for the charterer.

SELLERS, J. : This Special Case raises questions of the construction of the terms of the "Centrocon" form of charterparty, and, in particular, of cl. 6. This clause was described in 1909, by BRAY, J., in *Red "R" S.S. Co. v. Allatini Brothers* (1) (100 L.T. 268, 269) and again in 1925, by ROWLATT, J., in *Mazarakis (A. & C.) v. Bunge Y. Bord, Ltd.* (2) (23 Lloyd L.R. 275), as puzzling and difficult to construe. It has remained unchanged to the present time and again comes up for consideration in a different set of circumstances. B

The owners of "Trevoze" claim freight and demurrage against the charterer, the Minister of Food, under a charterparty dated Oct. 18, 1946, in the form of the Chamber of Shipping (River Plate) Charterparty, 1914, Homewards, the code name of which is "Centrocon." The relevant clauses of the charterparty are as follows : C

2. That the said steamer . . . shall . . . proceed as ordered by the charterer or his agents to the undermentioned ports or places and there receive from them a full and complete cargo of wheat and/or maize and/or rye in bags and/or bulk. 3. The steamer shall load as follows, *viz.*, at one or two safe loading ports or places in the River Parana . . . and the balance of the cargo in the Port of Buenos Ayres, La Plata or Montevideo at charterer's option . . . 4. Being so loaded the steamer shall . . . proceed . . . to discharge at a safe port in the United Kingdom including Northern Ireland . . . and deliver the cargo . . . on being paid freight at the rates hereinafter mentioned. 5. 81s. per ton for wheat and/or maize and/or rye . . . all per ton of 2,240 lbs. English or 1,016 kilos (gross weight delivered) . . . 6. Charterer has the option of shipping other lawful merchandise, cotton, sugar, Quebracho wood, Quebracho extract and distillery residue excluded, in which case freight to be paid on steamer's dead-weight capacity for wheat in bags on this voyage at the rate above agreed on for heavy grain, but steamer not to earn more freight than she would if loaded with a full cargo of wheat in bags. This option can only be used if the quantity of other lawful merchandise as above shall amount to not less than 200 tons. All extra expenses in loading and discharging such merchandise over heavy grain to be paid by charterer. The charterer is to have the full reach and burthen of the steamer including tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and/or stores). 13. The steamer shall be loaded at the rate of 500 tons per running day, Saturdays after 1 p.m. and Sundays and holidays excepted, otherwise demurrage shall be paid by the charterers as per cl. No. 48 . . . 20. The freight shall be paid as follows *viz.* : on the right and true delivery of the cargo, in cash. 25. At destination cargo to be received at the average rate of not less than 1,000 tons per weather working day (Sundays and holidays excepted) for bulk cargo, and at the average rate of not less than 750 tons per weather working day (Sundays and holidays excepted) for bagged cargo . . . 41. Charterers have the option of ordering the vessel to discharge at two safe ports in the United Kingdom including Northern Ireland, as follows :—Two ports on the west coast of United Kingdom . . . at 2s. 6d. per ton extra on the entire cargo . . . 48. Demurrage in loading and/or discharging to be at the rate of 8d. per G.R.T. per day, or *pro rata* for part of a day. D E F G

The "Trevoze" arrived at Buenos Aires on Nov. 13, 1946, and between then and Dec. 15, 1946, loaded 8,858 tons made up of four parcels, *viz.*, maize in bulk, linseed in bags (two parcels), and pollards in bags. The out-turn weight of maize at Liverpool was just over 2,213 tons. That was the only specified cargo shipped and carried, the linseed and pollards being shipped under the option granted to the charterer by cl. 6. The total cargo loaded filled the carrying space of the ship, but its total weight was 579 tons short of the ship's dead-weight capacity for wheat in bags, which the learned arbitrator found to be 9,437 tons. The shipowners did not allege any breach of the charter-party and there was no claim for dead-freight. The first issue between the H

parties is what is the freight payable in the circumstances under the charter-party. The shipowners take the dead-weight capacity of the ship for wheat in bags as 9,437 tons, translate that into a delivered weight by making an allowance of 0.75 per cent. for shrinkage or shortage, which gives just over 9,366 tons delivered, and claim 83s. 6d. per ton on that. The cargo was discharged at Liverpool and Avonmouth and the 2s. 6d. per ton extra provided by cl. 41 has been added to the 81s. per ton under cl. 5 to make the 83s. 6d. The charterer, on the other hand, makes his assessment of freight due by taking the actual delivered weights of the parcel of maize and one parcel of linseed at Liverpool and the estimated delivered weights of the remaining two parcels at Avonmouth where the cargo was not weighed on discharge, which total just over 8,796 tons and by charging this at 83s. 6d. a ton. The charterer agrees an additional liability in respect of the 579 tons which were short of the ship's dead-weight capacity for wheat in bags, but claims to deduct from the freight on this amount at 83s. 6d. a ton the discharging expenses which the shipowner has been saved by the cargo not, in fact, having been shipped, and, therefore, not handled in discharge. The difference between the two sums so calculated is £41 7s. 9d. and the charterer has paid all the freight claimed except that balance.

The shipowners relied on the construction given to the clause in *Red "R" Steamship Co., Ltd. v. Allatini and Others* (1). In that case the specified cargoes were wheat, maize, linseed and rapeseed in bags or bulk and none of these was shipped. A part cargo—about half—of oats and barley was shipped, and the shipowner claimed against three receivers of the cargo under bills of lading that they were liable for the sums of money which the receivers had respectively deposited to release their goods from the lien which the shipowner asserted he had for the balance of freight and for dead-freight. The charterparty gave a lien for dead-freight. BRAY, J., held that as other lawful merchandise had been shipped the clause dealing with that (comparable to cl. 6 here) applied as between shipowner and charterer, that it provided for a lump sum freight, that it mattered not what amount of cargo was carried, and that the freight was a fixed sum and there could be no dead-freight. I quote that brief passage in BRAY, J.'s judgment where he says (100 L.T. 268, 270):

As between them it seems to me there was no dead-freight. The shipowner was entitled to his lump sum, neither more nor less, however much or little he carried. The charterer would not be entitled to say that the shipowner should receive less, because he might have reduced the loss by taking in other cargo for other persons. It would not be a question of reducing damages, because it is not a question of damages . . .

This view was upheld by the Court of Appeal and the House of Lords and expressed conveniently by FLETCHER MOULTON, L.J., in the Court of Appeal in a passage where he says (101 L.T. 510, 513):

We have seen that the charter-party primarily contemplates a cargo based on wheat and/or maize and/or linseed and/or rapeseed. But clause 16 gives to the charterer the option of shipping other merchandise—i.e., of turning the ship into a general ship, with no restriction on the kind of cargo it may carry, except that it must not contain Quebracho wood or sugar. But if the charterer avails himself of this privilege, the terms of an affreightment are wholly changed. The freight to be paid to the shipowner is no longer so much per ton, but it is a lump sum calculated on the facts of the vessel, and not on the facts of the cargo which she may ultimately be required to carry. It is the same whether much or little cargo is carried and whatever nature it may be.

The shipowners in the present case based their claim on such a lump sum freight on delivered and not shipped weights. The charterer relied, at least in part, on *A. & C. Mazarakis v. Bunge Y. Bord, Ltd.* (2). In that case part of the cargo was of the specified heavy grains and part of optional cargo, and the total cargo filled the ship and gave the same dead-weight as a cargo of wheat in bags would have done. The shipowners claimed that the freight earned was a lump sum for the whole of the cargo fixed, by reason of cl. 6, by taking the dead-weight capacity of the ship for wheat in bags and multiplying it by the rate of freight for heavy grain with the limitation that the ship was not to earn more freight than she would if loaded with a full cargo of wheat in bags. This claim was rejected by all the courts and by the learned arbitrator. LORD SUMNER, who expressed the view of all the members of the House of Lords, said (26 Lloyd L.R. 169, 172):

The preferable construction of cl. 6 is, that in the event of a due exercise of the option given by that clause, freight, earned by right delivery and calculated on the delivered weights of the several sorts of cargo delivered, is to be paid at the rate agreed above for heavy grain, but so that, either the steamer shall have been loaded to her marks, or, if not, the total freight paid shall not be less than the agreed rate for wheat in bags on a full and complete cargo, duly delivered. The expression "lump sum charter," so much relied on in argument, is, I think, for present purposes misleading. It may well be that the freight payable under cl. 6 is such as to preclude any claim for dead-freight if the ship had not been loaded to her marks at her final port of loading. Such a case arose in *Red "R" Steamship Co. v. Allatini* (1), but it is not the case here, and I therefore think that the expressions there used about a "lump sum" do not apply now. In no other respect does this term fit the present charter. Nothing that was said in *Allatini's* case (1) is a binding authority to determine how the calculation of the charterparty freight is to be made when a full cargo has been both shipped and delivered but has lost weight by evaporation during the voyage. There is no true lump sum, but only the result of a particular calculation by multiplying rates of freight with tons of cargo. It is a "weight and rate" freight in every sense, dead-freight alone excepted. Viewing the charter in this way, nothing happens on the exercise of the option given by cl. 6 except the necessity for applying the rates, named and measured as in cl. 5, to any unnamed cargo not within cl. 2. In other respects the calculation and payment of freight takes place as if the option had not been exercised.

The learned arbitrator has accepted the shipowners' contention and held that their calculation of freight is correct. The conclusion so reached does not, as I see it, fully deal with or exhaust the charterer's submissions before this court. Neither of the two cases cited deals with the position which arises here where part of the cargo consists of specified and part of optional cargo and the two together do not reach the dead-weight capacity of the ship of wheat in bags, but, as *Mazarakis* (2) is the later case and as it deals with parcels of specified and optional cargo, I am of opinion that it should be applied to the present case and that the charterer is right in making his calculation of freight on the several sorts of cargo delivered. Whichever view is taken, however, the argument on behalf of the charterer still subsists that, in assessing the freight, whether on a notional cargo of wheat in bags to cover the shortage in dead-weight or to cover freight on the entire cargo, an allowance must be made to the charterer for the discharging expenses saved by the shipowners. This argument was not advanced in either of the cases to which I have just referred. Before the arbitrator the claim seems to have been based on a liability for dead-freight or damages. If that were correct, I think the estimated discharging expenses would be deductible from the freight attributable to the shortage, but the two cases cited establish clearly that the liability arising under cl. 6 is not for dead-freight but is for freight due under the contract—not for breach of it. The argument was not so put or restricted before me.

Cause 6 provides that the steamer is not to earn more freight than she would if loaded with a full cargo of wheat in bags. It places on the charterer all expenses in loading and discharging optional cargo in excess of those incurred with heavy grain. The provision restricting the option to amounts not less than 200 tons does not seem to help in the construction of the clause on the point in issue. It is, perhaps, inserted because it would not be thought worth while to deal with less than 200 tons of cargo which might well involve moving the ship for loading or discharging to another berth as grain berths are frequently specially equipped for handling grain and are, or are sometimes, restricted to such purposes. If the clause were to be construed as one providing for a true lump sum freight here, it may well be that there would be no scope for the charterer's contention: *Robinson v. Knights* (3); but it is not, on any contention before me, a true lump sum freight. To make cl. 6 come into operation, optional cargo must be shipped, and it is conceded that freight is only payable on delivered weights.

I think the charterparty should be looked at as a whole, especially as cl. 6 has been described more than once as ambiguous and puzzling. The charterparty is essentially one for the carriage of grain, and where the option is given to ship any other lawful merchandise, except a few specified commodities, the freight on such merchandise is based on the carriage of wheat in bags at the rate for heavy grain fixed by the charterparty—i.e., it keeps the ship, so far as earnings are concerned, on the same basis as for one of the specified grain

cargoes. There is nothing to indicate that the ship should gain by this. The indications are that she should be in the same position, neither better nor worse, whether grain is loaded or not. All extra expenses are for the charterer. The steamer is not to earn more freight. If wheat in bags only were shipped and the cargo failed to reach the dead-weight then dead-freight or damages would be recoverable from the charterer and any saving to the ship would be taken into consideration. If a full cargo were shipped, then the ship would recover freight on the out-turn weights and would have the expense of discharging the full cargo in order to earn the freight. In my opinion, the charter-party (and cl. 6 in particular) should be so interpreted that the shipowner is placed in no better position than if he, in fact, carried wheat in bags instead of the optional cargo and that the charterer's contention is right. There has to be a calculation on the basis of a notional cargo in order to assess the freight under cl. 6. In that calculation an allowance has to be made for the shrinkage or shortage on delivery of a hypothetical cargo and there seems to me to be no difficulty in inserting in that calculation an allowance for the expenses of the shipowners which would have been incurred if the goods had in fact been shipped. This assessment can as readily be made before the ship finally sails for her destination as after discharge.

I have, therefore, come to a conclusion contrary to that of the learned arbitrator, and I hold that the charterer's calculation for freight is correct. The second issue between the parties is in respect of demurrage. The shipowners contend "that the lay days must be calculated on the actual quantities, viz., 8,858 tons and 8,796½ tons, loaded and discharged, respectively." The charterer contends "that at the loading port the calculation must be based on the deadweight capacity of the vessel for wheat in bags, viz., 9,437 tons, and, at the discharging ports, on the aggregate out-turn weight at Liverpool, the bill of lading weights (with no allowance for shrinkage) of the cargo discharged at Avonmouth and the weight on which . . . dead-freight is payable which aggregate amounts to 9,399½ tons."

The learned arbitrator has found as follows :

Clauses 13 and 25 (which provide for the lay days at ports of loading and discharge respectively) are wholly independent of the clauses which provide for the calculation and payment of freight, and, on their true construction, provide that the lay days shall be calculated on the weights of cargo actually loaded and discharged respectively. Accordingly I hold that the shipowners' calculation of demurrage are also correct.

On this issue I agree with the learned arbitrator. The charterer has loaded cargo to the full capacity of the ship and if he had loaded and discharged at the agreed rate the shipowners would have been free to employ their vessel elsewhere during the time for which they now claim demurrage. The clauses provide for demurrage on a tonnage rate and draw no distinction between specified and optional cargo which may vary very considerably in the rate of loading or discharging. In the result, therefore, I find against the award in respect of freight calculation and in favour of the award in respect of demurrage calculation.

Order accordingly. Charterer to have half the costs of the hearing. Shipowners to have the costs of setting down the case for argument.

Solicitors: *Holman, Fenwick & Willan* (for the shipowners); *Treasury Solicitor* (for the charterer).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL.

Ex parte BEDROCK INVESTMENTS, LTD.

[COURT OF APPEAL (Scott and Asquith, L.JJ., and Romer, J.), June 22, 23, 24, July 16, 1948.]

Rent Control—Furnished house—Reduction of rent—Reduction below amount of standard rent—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 7.

The Furnished Houses (Rent Control) Act, 1946, s. 7, provides: "Sections 9 and 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, (which relate respectively to limitation on rent of houses let furnished and to penalty for excessive charges for furnished lettings), shall not apply as regards the rent charged for any house or part of a house entered in the register under the provisions of this Act in respect of any period subsequent to registration, but save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939."

In 1946 the landlords let unfurnished certain premises which were within the Rent Restrictions Acts, but they provided various services and it was accepted that the premises were within the Act of 1946. The letting was a "first letting" and the Rent and Mortgage Interest Restrictions Act, 1939, was applicable thereto, so that the contractual rent was the standard rent. The tenant applied to a rent tribunal under the Act of 1946, and the contractual rent was ordered to be reduced.

HELD: the reduction "affected" provisions of the Rent Restrictions Acts within the meaning of s. 7 of the Act of 1946, namely, those under which the standard rent was determined, and, if need be, apportioned, and under which it might, in certain circumstances, be increased, and, therefore, the tribunal had exceeded its jurisdiction.

Decision of the Divisional Court ([1947] 2 All E.R. 15), affirmed.

Per curiam: In a loose sense it is not incorrect to say that a lessor is authorised by the Rent Restrictions Acts to receive the standard rent, because those Acts impliedly recognise and leave undisturbed his right to exact that rent by contract while eliminating his common law right to contract effectively for anything more. Strictly, however, a lessor's right to receive, and, if necessary, enforce, payment of the standard rent is in no way conferred by the Acts. It arises only out of the contractual relations into which he enters with his tenant.

[FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 7, see HALSBURY'S STATUTES, Vol. 39, p. 233.]

APPEAL by the Rent Tribunal for Paddington and St. Marylebone from a decision of the Divisional Court of the King's Bench Division ([1947] 2 All E.R. 15) granting, on the application of the landlords, Bedrock Investments, Ltd., orders of *certiorari* to bring up and quash orders made by the tribunal under the Furnished Houses (Rent Control) Act, 1946, whereby the rents of certain flats were reduced. The appeal was dismissed. The facts appear in the judgment of the court.

The Attorney-General (Sir Hartley Shawcross, K.C.), and H. L. Parker for the Paddington and St. Marylebone Rent Tribunal.

Paull, K.C., P. Lamb and J. D. Purcell for the landlords.

Cur. adv. vult.

JULY 16. ROMER, J., read the following judgment of the court. This is an appeal from an order made by the Divisional Court on May 13, 1947, on an application to bring up for review certain orders made under the Furnished Houses (Rent Control) Act, 1946, by the Rent Tribunal for Paddington and St. Marylebone. That application succeeded, and the Divisional Court quashed the orders of the rent tribunal. Those orders related to the following accommodation or apartments in No. 6, Craven Hill Gardens, London, W.2: (i) a flat comprising rooms 1, 2 and 3: this flat was let by an agreement dated Jan. 17, 1946, for a term expiring on Jan. 31, 1949, at a rent of £240 per annum; (ii) a flat comprising rooms 4 and 5: this was let by an agreement made in March, 1946, for a term expiring on Mar. 24, 1949, at a rent of £169 per annum; (iii) room 6 which was let at a rent of £85 per annum from May 1, 1946, for

a term expiring on Mar. 24, 1947; (iv) a flat comprising rooms 7 and 8 which was let from June 24, 1946, for a term expiring on Mar. 25, 1948, at a rent of £156 per annum; (v) room 9 which was let on Oct. 1, 1946, for a term expiring on Mar. 31, 1947, at a rent of £80 per annum; and (vi) a flat comprising rooms 15 and 16: this flat was let by an agreement dated Jan. 21, 1946, for a term expiring on a date which we do not know at a rent of £144 per annum. On the applications of the various tenants the tribunal made orders on Dec. 9, 1946, reducing these rents as follows: the rent for rooms 1, 2 and 3 was reduced to £140 per annum, that for 4 and 5 to £120 per annum, that for 6 to £66 per annum, that for 7 and 8 to £102 per annum, that for 9 to £70 per annum, and that for 15 and 16 to £110 8s. 0d. per annum. The period in respect of which each of these reduced rents was fixed by the said orders was expressed to be "until the expiration of the Act." The orders stated that all these rooms and flats were let unfurnished, but that services, specified in the orders, were provided by the lessor. In January, 1947, on application made to the Marylebone County Court, the following apportionments to the rooms in question were made of the rateable value (£155) of the premises 6, Craven Hill Gardens as on Apr. 6, 1939:—£32 to the rooms 1, 2 and 3, £22 to 4 and 5, £8 to 6, and £16 to 14 and 15. We do not know what amount was apportioned to room 9. These apportionments were effected pursuant to the Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3).

All the lettings above referred to were first lettings, and the premises were accordingly "new control" premises and are controlled by the Rent and Mortgage Interest Restrictions Act, 1939. It follows that the contractual rents of the various flats and rooms are the standard rents for the purposes of the Rent Restrictions Acts, and the point in issue on this appeal is whether the tribunal had power, by virtue of the Act of 1946, to reduce them. When the matter was before the Divisional Court there was some question whether the rooms and flats in No. 6, Craven Hill Gardens and in the premises which were the subject of the other appeals before the court were within the Act of 1946 at all, but before us counsel for the respondents (the landlords), disclaimed any such point, and invited us to approach the present appeal on the footing that all the premises in question do fall within the Act of 1946. It is conceded that they all come also within the general provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

Before considering the arguments which were addressed to us, it would be convenient to refer to the relevant provisions of the Furnished Houses (Rent Control) Act, 1946, which received the Royal Assent on Mar. 26 of that year. The Act only operates in districts to which it has been applied by order of the Minister of Health (s. 1 (1)). Such an order has been made by the Minister in relation to London. Section 1 (2) provides for the constitution of a tribunal for each district in which the Act is in force, and the provisions of the schedule to the Act are to apply to each such tribunal. A reference to the schedule shows that a tribunal is to consist of a chairman and two other members, all appointed by the Minister, and it may be noted in passing that there is no requirement that the chairman or any member of the tribunal shall have any legal qualifications. Section 2 (1) provides that where a contract has, whether before or after the passing of the Act, been entered into whereby one person grants to another person the right to occupy as a residence a house or part of a house situated in a district in which the Act is in force in consideration of a rent which includes payment for the use of furniture or for services, it shall be lawful for either party to the contract, or for the local authority, to refer the contract to the tribunal of the district, who may thereupon require the lessor by notice to give them certain information. On any such reference the tribunal concerned (by s. 2 (2)):

... shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable, or may, if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision in each case.

By s. 2 (3) either party or the local authority may refer a case again to the tribunal for re-consideration of the rent fixed by its decision and entered in the register, on the ground of change of circumstances, and on such reference the provisions of sub-s. (2) shall apply, subject to the modification that the tribunal

shall have power to increase the rent payable. Section 2 (4) provides that where the rent under a referred contract includes payment for services and the tribunal are of opinion that it would be proper that the rent payable for the premises should include an amount in respect of increase since Sept. 3, 1939, in the cost of providing such services, and are also of opinion that in all the circumstances a rent higher than the rent payable under the contract might properly be chargeable for the premises in order to include an amount in respect of such increase, they may approve a rent higher by not more than such amount as they think reasonable in that respect. By sub-s. (5) an approval, reduction or increase under s. 2 may be limited to rent payable in respect of a particular period. We would here observe that the tribunal suggest (and we think rightly) that, in the case of premises which are within the Acts of 1920 to 1939, a tribunal cannot exercise the powers of increasing rents conferred by sub-ss. (3) and (4) of s. 2 so as to raise the contractual rent above the amount of the standard rent (if any). Section 3 requires the local authority to prepare and keep up to date a register in which shall be entered certain particulars with regard to any contract under which a rent is payable that has been approved, reduced or increased under s. 2. Where the rent payable for any premises is entered in the register it shall not be lawful to require or receive (a) on account of rent for those premises in respect of any period subsequent to the date of such entry (or, in a case in which a particular period is specified, in respect of that period) payment of any sum in excess of the rent so entered, or (b) as a condition of the grant, renewal or continuance of a contract to which the Act applies relating to such premises, payment of any fine, premium or other like sum, or any consideration, in addition to the rent (s. 4). Section 5 contains certain provisions for the protection of tenants in the event of notices to quit being served on them after a contract has been referred to a tribunal. Section 7 is of considerable importance and is in the following terms :

Sections 9 and 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, (which relate respectively to limitation on rent of houses let furnished and to penalty for excessive charges for furnished lettings), shall not apply as regards the rent charged for any house or part of a house entered in the register under the provisions of this Act in respect of any period subsequent to such registration, but save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

Section 8 empowers the Minister to make regulations as to the matters therein mentioned. Section 12 (1) defines "services" as including attendance, the provision of heating or lighting, the supply of hot water and any other privilege or facility connected with the occupancy of a house or part of a house, not being a privilege or facility requisite for the purposes of access, cold water supply or sanitary accommodation. Section 12 (2) provides for aggregation in cases where separate sums are payable by a lessee in respect of occupation of the premises, use of furniture and services respectively; and sub-s. (3) excludes from the Act a house or part of a house let at a rent which includes payment in respect of board provided that the value of such board to the lessee forms a substantial proportion of the whole rent. Section 13 provides that the Act should continue in force until Dec. 31, 1947, but its operation has in fact been extended.

Having regard to the provisions of the Act of 1946 as outlined above, it is clear that certain premises come both within the provisions of this Act and within the provisions of the Acts of 1920 to 1939 (for convenience referred to hereafter as "the Rent Restrictions Acts"), and we agree with what ATKINSON, J., said on the point in the court below ([1947] 2 All E.R. 18) :

Lettings seem to fall into three classes. There are lettings in which there is no furniture and no attendance included; secondly, lettings in which a substantial portion of the rent is fairly attributable to the use of furniture or to attendance; thirdly, lettings in which part of the rent not amounting to a substantial portion is attributable to the use of furniture or to attendance. As to the first, the Act of 1946 can have no application; as to the second, the Rent Restrictions Acts can have no application; as to the third, on the face of it they may be within both Acts . . . Which set of provisions is to prevail?

One criticism by the rent tribunal of the decision of the Divisional Court that the Rent Restrictions Acts are to prevail in the sense that a tribunal cannot reduce a contractual rent below the amount of the standard rent is that it was founded on the view that a statutory right to the standard rent is conferred on a lessor by those Acts. Although passages are to be found which might suggest that the court did hold that view, we do not think that the learned judges were in reality intending to convey anything of the kind. As part of his argument counsel for the landlords did, indeed, suggest that the view is a sound one, and he pointed to (among other provisions) the definition of "recoverable rent" in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16. In a loose sense it is not incorrect to say that a lessor is authorised by the Rent Restrictions Acts to receive the standard rent, because those Acts impliedly recognise and leave undisturbed his right to exact that rent by contract while eliminating his common law right to contract effectively for anything more. Strictly, however, a lessor's right to receive, and, if necessary, enforce, payment of the standard rent is in no way conferred by the Acts. It arises, and arises only, out of the contractual relations into which he enters with his tenant. We are, accordingly, unable to accept the argument that a tribunal which reduces a contractual rent below the standard rent is *pro tanto* depriving the lessor of rent to which he has a statutory right. That, however, is by no means the end of the matter, for the question involved is of much wider scope and was, as we think, accurately formulated by counsel for the landlords as follows: Does an order of a tribunal under the Act of 1946 reducing the contractual or registered rent below the standard rent of a dwelling-house affect any provision of any Rent Restrictions Act? The tribunal's contention is that this question should be answered in the negative and their argument before us may be summarised as follows: Statutory tenancies are outside the scope of the Act of 1946 and the only tenancies with which the tribunals can deal are those which are created by, and depend on, contract. The Rent Restrictions Acts do not operate during the subsistence of a contractual tenancy and, accordingly, during the contractual term, no conflict can arise between those Acts, on the one hand, and any order that may be made by a tribunal under the Act of 1946, on the other. If, therefore, a tribunal reduces a contractual rent below the standard rent, but limits the duration of its order to the duration of the contractual term, then that order in no way conflicts with or affects any provision of the Rent Restrictions Acts. If, however, the tribunal's order is not so limited and *ex facie* continues to operate after the contractual tenancy has become a statutory tenancy, again no conflict arises, and for the reason that, on this change occurring, the rent which will be properly chargeable thereafter against the statutory tenant will be the standard rent, to which, in view of s. 7 of the Act of 1946, the registered rent must then give way. As to this section the rent tribunal argued that the words "but save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939" mean that nothing in the Act shall repeal or modify any such provisions excepting only (to a limited extent) ss. 9 and 10 of the Act of 1920. The object of the section was, it is said, to make it clear that, notwithstanding the Act, tenants were not to be deprived of their existing rights (for example, the right of applying to a county court judge) under the Acts of 1920 to 1939.

In our judgment, the question involved does, in fact, depend on the true construction of s. 7 of the Act of 1946, and, in particular, on the meaning which is to be attributed to the word "affects" as it appears in the section. As to this it is to be borne in mind that complicated and, in some ways, intricate machinery had been devised through the medium of the Acts of 1920 to 1939 for the purpose of protecting tenants from the actual or potential avarice of landlords. Security from dispossession had also to be achieved, but with this we are not immediately concerned. The legislative provisions which are relevant for present purposes are those which were evolved over a considerable period, by a process of trial and error, with the object of imposing a "ceiling" on the rent which a landlord could legitimately require his tenants to pay for the occupation of premises that came within the Acts. In our judgment, those provisions are included among the provisions which are to remain unaffected by the Act of 1946. Counsel for the landlords argued that some of those

provisions are not only affected, but are overruled if the tribunals set up under the Act of 1946 purport to reduce the contractual or registered rent of premises which are within the Act to a level below the standard rent. He supported his argument by certain illustrations, to which it is convenient to refer. First, he assumed the case of a house which, on Sept. 1, 1939, was let as a whole at £200 per annum, including rates, the rateable value of the house, on Apr. 1, 1939, being £100. Such a house is within the Rent Restrictions Acts. The landlord divides the house into three flats, A, B and C. Flat A has no furniture, and no services are provided to the tenant. Flats B and C have no furniture, but the landlord agrees to supply central heating. The landlord lets each flat at £100 per annum (to include rates) on tenancies which may be determined by a month's notice on either side. The result of this is that each flat is within the Rent Restrictions Acts and that flats B and C are also within the Act of 1946. An application is made by the tenants to the appropriate county court for apportionment under s. 12 (3) of the Act of 1920. The judge apportions the September, 1939, rent as follows: flat A £70, flat B £70, flat C £60. Under the express provisions of s. 12 (3) this apportionment is "final and conclusive." The tenants of flats B and C then apply to a tribunal under the Act of 1946, which assumes jurisdiction to entertain the applications. On the ground that flat C is a better or more attractive flat than flat B, the tribunal reduces the rent of flat B to £50, but confirms the rent of flat C. These rents are then registered. On this sequence of assumptions it seems to us that the provisions of s. 12 (3) of the Act of 1920 have been very gravely affected, for the "final and conclusive" apportionment by the county court judge has not only been brought up for review before the tribunal, but has been overruled by its decision. It is also to be observed (although this, perhaps, is only a matter for comment) that, inasmuch as the rent tribunal has no power to interfere in the matter of flat A, the landlord continues to get a higher rent from the tenant of that flat (to whom he renders no services) than he does from the tenant of flat B (possibly identical in accommodation, position and outlook) to whom he is bound to render services in accordance with his contractual obligations.

Secondly, counsel assumed that between Sept. 1, 1939, and the date of application to the rent tribunal (a) the rates on the whole house were increased by £20, (b) the landlord spent £200 by way of re-construction on each flat, and (c) notices of increase had been duly served on former tenants of the flats. The result of these hypotheses is that the "ceiling" rents for the flats became as follows:—flat A, £70, plus £7, plus £16, equals £93; flat B, £70, plus £7, plus £16, equals £93; flat C, £60, plus £6, plus £16, equals £82. If, on the application of the tenants of flats B and C, the tribunal reduces those rents, we cannot but think that their decision "affects" the provisions of s. 2 (1) of the Act of 1920 and sched. I to the Act of 1939.

It is then, thirdly, assumed that, after the tribunal has given its decision, (a) the rates on the whole house are further increased by £20 and (b) the landlord spends a further £200 on structural alterations to each of the flats. In order to obtain the increase referable to these considerations the landlord must, under s. 3 (1) of the Act of 1920, give his tenants a month's notice to quit, whereupon they become statutory tenants, and also give notices of increase (s. 3 (2) of the Act of 1920). The landlord, accordingly, gives these notices with the result that the permitted rent "ceilings" under the Rent Restrictions Acts are as follows:—flat A, £93, plus £7, plus £8, equals £108; flat B, £93, plus £7, plus £8, equals £108; flat C, £82, plus £6, plus £8, equals £96. The rents for flats B and C, however, having been decided by the tribunal and registered, it is unlawful for the landlord to receive anything in excess of those rents including, presumably, the increases permitted by the Act of 1920. Surely once again a "provision" of one of the Rent Restrictions Acts has been "affected," and none the less because the landlord might apply for the exercise of the tribunal's discretion on the ground of change of circumstances.

Finally, counsel assumed that, after the rent of flat B or C had been reduced by the tribunal and registered, the tenant of one of the flats leaves and the landlord re-lets without agreeing to provide any services. The result of this would be that the flat in question was no longer within the scope of the Act of 1946 at all. It would appear, however, that the registered rent remains as the "ceiling" rent by reason of the embargo imposed by s. 4 of the Act.

There is at all events no express provision to be found in the Act for expunging the entry in the register, or lifting the embargo, to meet this change of circumstances. On this view, again, a conflict would arise between the rent registered by the tribunal, on the one hand, and the provisions of the Rent Restrictions Acts for determining the standard rent, on the other.

- Other illustrations similar to those mentioned could doubtless be found. The rent tribunal's answer to them is that they are merely directed to results. That they show results is true, but the results are the legitimate offspring of the relevant statutory provisions. All these considerations can lead only to the conclusion that a reduction by a tribunal of a contractual rent to a level below that of the standard rent does affect the provisions of the Rent Restrictions Acts, namely, the provisions under which the standard rent is determined, and, if need be, apportioned, and under which it may, in certain circumstances, be increased. Those provisions are "affected" in the sense that they would be disturbed, and even over-ridden, if the rent tribunal is right. If the tribunal's argument is sound, the simple decision of the rent tribunals could substitute a lower "ceiling" of rent for the "standard" rent permitted by the Rent Restrictions Acts. The latter, as we have already said, is the subject of careful and elaborate legislation which, although drastically restrictive of landlords' rights, is not unmindful of them altogether, and the standard rent, with the permitted increases, presumably represents the return which the legislature regarded, and still regards, as proper for a landlord of controlled premises to receive. We cannot but think that, if Parliament had intended by the Act of 1946 to authorise the tribunals set up thereunder, in their discretion and by their unappealable decision, to reduce the standard rent and to override the permitted increases, they would have expressed that intention in clear and definite terms, and it is to be supposed that they would, moreover, have provided that one member at least of each tribunal should be a person having legal qualifications. We are, however, satisfied that the language of s. 7 of the Act sufficiently shows that such was not the intention of the legislature, which was, on the contrary, that the Act should be supplementary to, but (except as to ss. 9 and 10 of the Act of 1920) in no way destructive of, the Rent Restrictions Acts of 1920 to 1939. We are of opinion, accordingly, that the rent tribunal exceeded its jurisdiction in making the orders now in question and that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Solicitor, Ministry of Health* (for the rent tribunal); *Thompson & Co.* (for the landlords).

Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.

firm. H.L. *Sub nom.* THEOPHILE
SOLICITOR-GENERAL. [1950] 1 All
R. 405.

Re A DEBTOR (No. 335 OF 1947).

Ex parte H.M. THE KING v. THE DEBTOR.

[COURT OF APPEAL (Lord Greene, M.R., Asquith and Evershed, L.JJ.), July 12, 13, 14, 16, 1948.]

- Bankruptcy—Petition—Service—Service out of the jurisdiction—Foreigner—“Act of bankruptcy”—“Carrying on business”—Bankruptcy Act, 1914 (c. 59), s. 1 (1) (d), (2) (c).*

By the Bankruptcy Act, 1914, s. 1: “(1) A debtor commits an act of bankruptcy in each of the following cases . . . (d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England . . . (2) In this Act, the expression ‘a debtor,’ unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him . . . (c) was carrying on business in England, personally, or by means of an agent or manager . . .”

A Rumanian citizen, who lived in England and carried on a business here, appealed against assessments in respect of unpaid excess profits tax, and, on the day on which the assessments were confirmed, he left England for Eire. He had not returned to England since, but had sent to his wife a

power of attorney, in exercise of which she had sold his business. On an application by the Crown to serve out of the jurisdiction a petition in bankruptcy to which the debtor was respondent, the alleged act of bankruptcy being that defined in s. 1 (1) (d) of the Act of 1914, *viz.*, that, with intent to defeat or delay his creditors, the debtor, being out of England, remained out of England:—

HELD: (i) since the debtor had left debts unpaid in England, he was carrying on business in England, within the meaning of s. 1 (2) (c) of the Act of 1914, notwithstanding that he had ceased actual trading.

Re Dagnall, Ex p. Soan & Morley ([1896] 2 Q.B. 407) and *Re Clark, Ex p. Pope & Owles* ([1914] 3 K.B. 1095), *applied*.

(ii) in view of the express words of s. 1 (2) of the Act that “ ‘ a debtor ’ . . . includes any person, whether a British subject or not,” a foreigner committed an “act of bankruptcy” when he did any of the acts set out in s. 1 (1), and, accordingly, on the *prima facie* evidence, there was jurisdiction to make an order to serve the bankruptcy petition out of the jurisdiction.

Cooke v. Vogeler (Charles A.) Co. ([1901] A.C. 102) and *Re Debtors (No. 836 of 1935)* ([1936] Ch. 622), *distinguished*.

[AS TO BANKRUPTCY JURISDICTION IN THE CASE OF FOREIGNERS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 9, 10, para. 10; and FOR CASES, see DIGEST, Vol. 4, pp. 24-26, Nos. 193-207.]

Cases referred to:

- (1) *Re Dagnall, Ex p. Soan & Morley*, [1896] 2 Q.B. 407; 65 L.J.Q.B. 666; 75 L.T. 142; 4 Digest 32, 267.
- (2) *Re Clark, Ex p. Pope & Owles*, [1914] 3 K.B. 1095; 84 L.J.K.B. 89; 112 L.T. 873; 4 Digest 33, 271.
- (3) *Re Savers, Ex p. Blain*, (1879), 12 Ch.D. 522; 41 L.T. 46; 4 Digest 25, 197.
- (4) *Re Crispin, Ex p. Crispin*, (1873), 8 Ch. App. 374; 42 L.J. Bey. 65; 28 L.T. 483; 37 J.P. 391; 4 Digest 25, 196.
- (5) *Re Debtors (No. 836 of 1935)*, [1936] Ch. 622; 105 L.J.Ch. 265; *sub nom. Re Debtors (No. 836 of 1935), Petitioning Creditor v. Debtors*, [1936] 1 All E.R. 875; 154 L.T. 592; Digest Supp.
- (6) *Cooke v. Vogeler (Charles A.) Co.*, [1901] A.C. 102; 70 L.J.K.B. 181; 84 L.T. 10; 4 Digest 25, 199.

APPEAL by the Crown from an order of MR. REGISTRAR PARTON, made on Apr. 7, 1948, discharging an order giving leave to serve a bankruptcy petition out of the jurisdiction, on the ground that, as the debtor was a foreigner, there was no jurisdiction to give leave to serve out of the jurisdiction. The Court of Appeal now held that there was jurisdiction to make an order to serve the petition out of the jurisdiction and allowed the appeal. The facts appear in the judgments of LORD GREENE, M.R., and EVERSHER, L.J.

Sir Andrew Clark, K.C., *J. H. Stamp* and *Maurice Berkeley* for the Crown.
Caplan for the debtor.

LORD GREENE, M.R.: On Dec. 23, 1947, the appellant, the Crown, obtained leave to serve out of the jurisdiction a petition in bankruptcy filed on Nov. 14, 1947, to which the debtor, the present respondent, was respondent. At the time he was living in Eire. By the order now under appeal, which is dated Apr. 7, 1948, MR. REGISTRAR PARTON discharged that order giving leave to serve the petition out of the jurisdiction. He did so, not on the ground that, if it existed, the power to give leave to serve out of the jurisdiction had not been properly exercised, but on the ground that there was no power to make such an order, for reasons which will appear. It is not suggested before us that the discretion, if it existed, was improperly exercised, and the only argument put forward in support of the order now under appeal was to the effect that the original order giving leave to serve out of the jurisdiction was made without there being any jurisdiction to make it.

The debt in question was a debt owing to the Crown in respect of certain assessments—three, I think, in number—in the sum of £10,000 each for excess profits tax unpaid. The debtor was, and is, a Rumanian citizen and he carried on in this country a business connected with leather. The assessments were made in respect of profits of that business. He appealed against all three assessments, but he did not find it convenient to attend at the hearing of his

appeals before the general commissioners; and by what, according to his evidence, appears to have been an odd but fortunate coincidence, he happened to find it possible to leave this country for Eire on the day on which the assessments were confirmed.

A It is said by the Crown that the debtor was a person who, within the meaning of the Bankruptcy Act, 1914, s. 1 (2) (c), was carrying on business in England at the time of the alleged act of bankruptcy. The alleged act of bankruptcy is the act defined in s. 1 (1) (d), *viz.*, that, with intent to defeat or delay his creditors, being out of England, he remained out of England. The act of departing out of England with that intent, which is also provided for by s. 1 (1) (d), was not open to the Crown in view of delay in the presentation of the petition. The case, therefore, rests on the allegation that, being out of England, he has remained out of England with intent to defeat or delay his creditors, and thereby committed an act of bankruptcy. Whether the facts B necessary to support that alleged act of bankruptcy are or are not established is, of course, a matter which will only fall to be dealt with at the hearing of the petition, but it is sufficient, in my opinion, that the petition and the facts given in support of it should raise, as they do raise—and it is not contended that they do not—a strong *prima facie* case on the basis of which leave to serve the petition out of the jurisdiction under the Bankruptcy Rules, 1915, r. 158, could properly be granted. Rule 158 is this :

C Where a debtor petitioned against is not in England, the court may order service to be made . . . in such manner and form as it shall think fit.

It is quite clear that that must cover a case where the question whether or not an act of bankruptcy has been committed will fall to be decided one way or the other when the petition is heard, and the discretion arises under that rule, as it seems to me, in any case where the petition presents a case which D is not, so to speak, demurrable.

The actual language which is relevant to the present controversy is to be found in s. 1 (1) (d) of the Act of 1914, read in combination with s. 1 (2) of the Act. Section 1 (1) is as follows :

E A debtor commits an act of bankruptcy in each of the following cases . . . (d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England . . .

Section 1 (2) contains a statement of certain persons whom the expression “debtor” is to include in the absence of a context implying the contrary. It runs as follows :

F In this Act, the expression “a debtor,” unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him . . . (c) was carrying on business in England, personally, or by means of an agent or manager.

It appears to me that, if these provisions are read in their ordinary common meaning in the English language, they do quite clearly provide that in regard to this particular act of bankruptcy—of being out of the jurisdiction and remaining out with intent to defeat creditors—the act can be committed by a person who is not a British subject.

G It is argued on behalf of the debtor that, by virtue of the fact that he is not a British subject and that the act of bankruptcy relied on was committed when he was not in this country, the bankruptcy jurisdiction does not extend to him, and that he was entitled in the circumstances to remain out of this country and so escape the arm of the bankruptcy law. The grounds on which that contention rests I will deal with in a moment, but I am first concerned, without reference to alleged rules of presumption on the construction of statutes H and without reference to authority, merely to read the language of the legislature directed to this point.

An act of bankruptcy, to be effective, must of course be committed by a debtor. Before the Bankruptcy and Deeds of Arrangement Act, 1913, the word “debtor” was not defined in the Acts and the precise limitation to be placed on the general expression “a debtor” was the subject-matter of a number of decisions. In 1913 the present definition of “a debtor” was first introduced [Bankruptcy and Deeds of Arrangement Act, 1913, s. 8]. I call it “definition” for convenience, although I will assume that counsel for the

debtor is right in saying that this is not strictly a definition clause. The effect of this "definition clause," as I will call it, is that, in construing the word "debtor" in s. 1 (1) of the Act of 1914, it must be read as inclusive of the persons described in s. 1 (2) of the Act. Let me so read it and see how the section will run in relation to the particular act of bankruptcy which we are considering. Before I do so, I call attention to the fact which, to my mind, is of cardinal and decisive importance, that the particular act of bankruptcy of being out of the country and remaining out of the country is an act which can only be committed out of this country. By its very character it is not capable of being committed elsewhere.

Bearing that in mind, let me see how s. 1 (1) (d) will run. In place of the words "a debtor," reading the extended meaning given to the words "a debtor" by sub-s. (2), it will run as follows: "Any person, whether a British subject or not, who, at the time when the act of bankruptcy was done or suffered by him, was carrying on business in England, commits an act of bankruptcy if, with intent to defeat or delay his creditors, being out of England, he remains out of England." The argument of counsel for the debtor, put in a nutshell, is that no foreigner can commit that particular act of bankruptcy for the simple reason that he is a foreigner. But be it observed that the section says that he can, because it provides: "a person whether a British subject or not, who, being out of England, remains out of England . . .", and that is an act which can only be done by a person who is abroad. Therefore, in my opinion, the plain meaning of the language used is to make it impossible to argue that that particular act of bankruptcy cannot be committed by a foreigner. It was interesting to see how counsel for the debtor said that the section ought to be expanded in order to convey the meaning which he argued ought to be given to it. He would read it as though at the end there was inserted a proviso that no person other than a British subject was capable of committing that particular act of bankruptcy. If, however, you have a section saying that any person, whether a British subject or not, commits an act of bankruptcy if he is out of the jurisdiction and remains out of the jurisdiction, and then put a proviso at the end saying that this does not apply to a person who is not a British subject, you make complete nonsense of the section. It is a complete contradiction; and if there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used.

If it were not for the fact that the question is mixed up with a good deal of old authority and with an alleged rule of law applicable to the construction of statutes, I should have felt no difficulty whatever about this case. Before I come, however, to the main point of the argument of counsel for the debtor, there is one matter to which I should refer which lies, so to speak, on the edge of it. It will be observed that the particular case alleged in the present proceedings was that the debtor was carrying on a business in England at the time when the alleged act of bankruptcy, *viz.*, the act of being and remaining out of England, was committed. He had not, in fact, put up the shutters of his business, but he had apparently assigned it to his wife, and he says: "While I am remaining in Eire I am not carrying on business in England." The Crown's answer to that is that, on the true meaning of the phrase "was carrying on business in England," the debtor was carrying on business in England by reason of the fact that debts concerned with his business remained unpaid, *viz.*, the excess profits tax due to the Crown. That has been described not inconveniently, and for the sake of brevity, as "constructive carrying on of business," and I have no particular objection in the present context and for that purpose to using that phrase. The Crown says that the fact that these debts were unpaid meant that the debtor was carrying on business in England. That allegation is based on a series of authorities dealing in particular with the case of married women carrying on business, and in the relevant provision relating to a married woman trader, the phrases used first in the Married Women's Property Act, 1882, were for all practical purposes the same as this.

The Married Women's Property Act, 1882, s. 1 (5), provides as follows:

Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.

In *Re Dagnall, Ex p. Soan & Morley* (1) a married woman had ceased to carry on business, but it was held that she was still carrying on business for the purpose of the bankruptcy laws owing to the fact that she had unpaid debts. That principle has been confirmed over and over again in relation to the position of married women traders. Counsel for the debtor said that those decisions were decisions, not under the Bankruptcy Acts, but under the Married Women's Property Act, 1882. Unfortunately for that argument—and quite apart from the fact that this section relating to married women was part of the bankruptcy code, and, therefore, one would have expected that it was in the mind of the legislature when they passed the amending definition of "a debtor" in the Act of 1913—that particular provision relating to married women is now part of the Bankruptcy Act itself. In the Bankruptcy and Deeds of Arrangement Act, 1913, the very Act which introduced this new definition of "a debtor," s. 12 (1), is :

Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a *feme sole*. Therefore, in the bankruptcy legislation you have side by side the definition clause, s. 8 (c), as it was in the Act of 1913, with regard to a person carrying on business in England, and the reference to a married woman who carries on a trade or business ; and the legislature made those enactments in a Bankruptcy Act, with that phrase in the Married Women's Property Act, 1882, before its eyes. In the Act of 1914, in s. 125, the same provision with regard to married women appears, and the original section, s. 1 (5) of the Married Women's Property Act, 1882, is repealed. In the Bankruptcy Act, 1914, therefore, we have the phrase in relation to married women carrying on business (a phrase interpreted over and over again in the courts as inclusive of the case where, having put up the shutters, so to speak, she still has unpaid debts) standing side by side with the definition of "a debtor" as a person carrying on business in this country. On that footing I find it quite impossible to take the view that the reference to carrying on business in the definition of "a debtor" is to be construed in a different way from the corresponding reference in relation to married women. And, in point of fact, there has been at any rate one case—and, I think, two cases—under the Act of 1913 itself in relation to married women. *Re Clark, Ex p. Pope & Owles* (2) was a decision of this court. There a married woman, having had a business which had come to an end, but having unpaid debts remaining, was held to be carrying on business within the meaning of the Bankruptcy and Deeds of Arrangement Act, 1913, s. 12. Therefore, there is that authority that, on the construction of what is now a provision of the Bankruptcy Act itself, a married woman is still carrying on a trade or business (although she has ceased to carry it on in the sense of actual trading) provided that she has unpaid debts.

The argument which claims a limited construction of the relevant sections here is based on two propositions taken together or separately. It is said, first, that there is a presumption of law that an English statute must not be construed as extending to foreigners or to acts done in a foreign country unless the contrary is expressly provided. So to legislate, it is said, would be contrary to the comity of nations, and, accordingly, there must be the very clearest language before one can treat an English statute as intended to apply to a foreigner or an act done by a foreigner out of the jurisdiction. So, it is said, these provisions of the Bankruptcy Act cannot apply to this act of bankruptcy because it was an act by a foreigner out of the jurisdiction. I have already pointed out that, in my opinion, the section, if properly construed, expressly provides for that very case, because it says in terms that this particular act of bankruptcy, which can only be committed out of the jurisdiction, is committed by a person whether he be a British subject or not. Nevertheless, it is said, the presumption is so strong as to make it proper and right to construe the Act in a limited sense so as to exclude the present case.

I think I can state the effect of this branch of the argument as clearly as it can be stated by quoting a paragraph from the judgment of JAMES, L.J., in *Re Sawers, Ex p. Blain* (3). This puts in a nutshell the argument of counsel for the debtor. JAMES, L.J., said (12 Ch.D. 522, 526) :

It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly

implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction.

Now, as I have said, in the present bankruptcy legislation, quite apart from what it was in the earlier legislation, which raised altogether different considerations, it is expressly enacted, or, to put it at the lowest, plainly implied, that a foreigner is comprised within the provisions of the statute and that this particular act of bankruptcy can be committed by a foreigner. I find that this alleged principle of construction does not produce the result that counsel for the debtor says it produces, because to apply it would, as I have already said, mean introducing into the section something completely inconsistent with the language used. I do not propose to say anything more about that particular branch of the argument except that on one point I must make special reference to it. It is a point connected with what I have just described as the constructive carrying on of business. Now, says counsel for the debtor, however one construes the words "carrying on business," in however extended or constructive the sense one expands those words in the case of a British subject, when dealing with a foreigner one must read them in a much more restricted way, and one is not entitled to put that extended meaning on them when applying them to the case of a foreigner. In other words, a foreigner must be actually carrying on business, and once he has put up the shutters and ceased actually to carry on business, he is not carrying on business within the meaning of s. 1 (2) (c) of the Act of 1914. I cannot for a moment accept that argument. It would mean putting on the phrase "carrying on business" a construction limited in the case of foreigners to a class of activity, *viz.*, the actual carrying on of business with the shop open, so to speak, which is not necessary in the case of a person not a foreigner. The phrase was used by the legislature with full knowledge of the construction which the courts had placed on similar words, and it seems to me that to insert a qualification in the case of a foreigner that he must be carrying on business, not in the sense understood by the courts, but in some more limited sense, would be doing violence to the sub-section which I am not prepared to do. I think that the sub-section must be read in its ordinary straightforward meaning, bearing in mind the construction which has been put on similar words in the past.

Apart from that general proposition about the construction of an English statute, counsel for the debtor relies on certain authorities, and I must say one short word on the older authorities. In construing the older Bankruptcy Acts, *i.e.*, the Acts earlier than the Act of 1913, which introduced the modern definition of "a debtor," the courts were confronted with a problem, the nature of which will at once appear if I read the relevant words of the Bankruptcy Act, 1883 (which were very similar to those of s. 6 (3) of the Bankruptcy Act, 1869). Section 4 (1) of the Act of 1883 is :

A debtor commits an act of bankruptcy in each of the following cases . . .

Paragraph (d) of that sub-section is the same as para. (d) of s. 1 (1) of the Act of 1914. Now, in the absence of any definition of the words "a debtor," the problem with which the courts were confronted was this : Are those words to mean any debtor anywhere, taking the word "debtor" in the ordinary common meaning of the word, or are they to be construed in some limited sense ? The problem is expressed in the clearest possible language by MELLISH, L.J., delivering the judgment of himself and LORD SELBORNE, L.C., in the early case of *Re Crispin, Ex p. Crispin* (4). That was a case in which a non-trader who was a Portuguese domiciled in Portugal was temporarily resident in England and contracted a debt. He was served with a writ, but he left for Portugal before the action could be tried. It was held there that there was no sufficient evidence that he left England in order to defeat or delay his creditors. But MELLISH, L.J., said (8 Ch. App. 374, 378, 379) :

The first question to be considered is, had the court jurisdiction to adjudicate the appellant a bankrupt ? And this depends upon the question whether a foreigner, who is not a trader, and who comes to England for a temporary purpose, and who quits England before a petition in bankruptcy is presented against him, can be adjudicated a bankrupt, either upon an act of bankruptcy alleged to have been committed while he was in England, or upon an act of bankruptcy alleged to have

been committed after he had left England. It is obvious that some limitation must be put on the general words "creditor" and "debtor" in s. 6 of the Bankruptcy Act, 1869. They cannot apply to every creditor and every debtor throughout the world. It was argued on the part of the appellant that the word "debtor" must be confined to debtors subject to the laws of England, and that as the appellant was a foreigner, and had left England before a petition was presented against him, he had ceased to be subject to the laws of England, and no petition could be presented against him. We agree that the word "debtor" must be construed to mean "debtor properly subject to the laws of England"; but we are of opinion that it is the act of bankruptcy, and not the petition, which gives jurisdiction to the Court of Bankruptcy, and that if a foreigner comes to England, and contracts debts in England, and commits an act of bankruptcy in England, he thereby gives the Court of Bankruptcy jurisdiction over him.

It will be observed that the problem was to place some limit on the meaning of the word "debtor" which would be in accordance with what I agree is a *prima facie* view that British legislation ought not to extend to other than British subjects in respect of matters done out of the jurisdiction; and, confronted with the dilemma that it must either give the word "debtor" a wide significance or a limited significance, the court gave to it a limited significance.

In 1913 the word "debtor" was, as I have said, defined by a new section and it was defined so as to include a person whether he was a British subject or not. The cases in which a person may be made liable to the bankruptcy laws and those in which he is capable of committing an act of bankruptcy are strictly limited, and, speaking for myself, I see no ground for thinking that a jurisdiction over foreigners of the very limited kind which results from the application of the limitations in the bankruptcy law could in any way be construed as a violation of the comity of nations. It clearly would have been a violation of the comity of nations to have construed the simple word "debtor" as applying to any debtor in any country of the world; but for British legislation to claim for English courts jurisdiction over foreigners, which can only operate in the very limited class of cases which brings them within the definition of a "debtor," seems to me to be not only not contrary to any conception of the comity of nations, but to be extremely sensible and reasonable. In my opinion, the insertion of that definition clause, and, in particular, the insertion of the words "whether a British subject or not," makes it impossible now to say of a foreigner that he is not subject to the bankruptcy laws merely because he is not a British subject. The section deals with the commission of acts of bankruptcy, therefore, by a person even though he is a foreigner.

Counsel for the debtor, while feeling, I think, the stress of the argument against him that the word "debtor" must now extend to his case so far as the personality and nationality of his client are concerned, now takes up a second line of defence by saying that, even if his client is within the definition of a debtor, the act alleged against him as an act of bankruptcy is not an act of bankruptcy, because not only must a person be a debtor, but he must be committing an act of bankruptcy. Counsel for the debtor says "What is it that he is said to have done? He is said to have done something out of the jurisdiction which is an act of bankruptcy." That brings him back to the argument, which I indicated at the commencement of this judgment, that there must be implied somewhere in the relevant words a restriction of the operation of these provisions in the case of a person being out of England who is not a British subject. I have already said that, in my opinion, it is quite impossible to make any such implication, and the argument that there is a presumption that a British statute does not apply to an act done by a foreigner out of this country seems to me to be entirely displaced, because in this case the British legislature has said that it shall apply. I do not wish to say anything more about that broad argument, but counsel for the debtor reinforces it by reference to certain more recent cases, one of which, *Re Debtors* (No. 836 of 1935) was decided since the introduction of this new definition clause into the Bankruptcy Act. That was a case in this court and it is the case on which the learned registrar relied. Before I refer to that case, I must mention *Cooke v. Charles A. Vogeler Co.* (6), an earlier case in the House of Lords under the old statutes which *Re Debtors* (5) in the Court of Appeal followed. The act of bankruptcy which was in question in both those cases was the one described in s. 1 (1) (a) of the Bankruptcy Act, 1914, as follows:

If in England or elsewhere he makes a conveyance or assignment of his property to a trustee . . . for the benefit of his creditors generally.

It will be observed that in order to fall under that provision what is necessary is the making of a conveyance. In *Cooke v. Charles A. Vogeler Co.* (6) two American citizens, who had a branch business in England but never resided in England, but resided at Baltimore in the United States, executed in Baltimore a deed of assignment of all their property to a trustee in trust to pay their debts. The question was whether or not that constituted an act of bankruptcy. As I understand the opinions, what was decided was this—at any rate it was the decision of LORD DAVEY—that the conveyance there in question was not such a conveyance as s. 1 (1) (a) of the Act of 1914 [s. 4 (1) (a) of the Act of 1883] contemplates, for the reason that para. (a) contemplates a conveyance intended to operate under English law. The conveyance in that case was by foreigners who had quite clearly no connection with this country other than through the business. They were not domiciled here. When they executed the conveyance in the United States, they were domiciled United States citizens. Such a conveyance, being a conveyance of personal estate and not of immovables, would operate, *prima facie*, not under the laws of this country, but under the laws of the United States, with the result that that particular conveyance was not such a conveyance as was contemplated by para. (a), the word “conveyance” there requiring that a limitation be put on it as being a conveyance intended to operate in accordance with English law.

I must say, with regard to some of the observations in this case, that there does not seem to have been a very clear statement of the importance of domicile in such a case. What I mean is this. If a foreigner domiciled abroad executes abroad an assignment of his personal property, then, on the broad principle that *mobilia sequuntur personam*, the conveyance would operate, not under the laws of this country, but under the laws of his domicile. On that footing nationality would be by no means the test. The point can be put in another way. Supposing the property that he assigns is immovable property in this country, then an assignment by a foreigner of immovable property in this country must be taken to operate under the laws of this country. If the case is one of an assignment of movable property, the question which has to be discussed is whether it was the sort of assignment contemplated by para. (a). I cannot myself see any possible ground for saying that in the case of such an assignment executed by a foreigner domiciled here, who, let me say, goes across to Calais for the purpose of executing it, it would not be an assignment amounting to an act of bankruptcy, although committed by a foreign national out of the jurisdiction. The effect of the decision in *Cooke v. Charles A. Vogeler Co.* (6) appears to me to be now confined to the particular case of an assignment which, in order to be an act of bankruptcy under para. (a), must be an assignment intended to operate by the laws of England, and I add to that, whether the person executing it is a foreigner or not. He may or may not be. In other words, nationality is not the crucial test whether such an assignment would or would not be intended to operate by the laws of England. If it were an assignment of personal property executed abroad by a domiciled foreigner, the law intended to be applied would obviously be the law of his own country and not the law of England. However, there were undoubtedly phrases used in *Cooke v. Charles A. Vogeler Co.* (6) which were relevant under the then existing law, namely, that the expression “debtor” was to be limited in the way that I have mentioned, *i.e.*, to a person who had brought himself under the British law of bankruptcy by the actions referred to (8 Ch. App. 374, 379) in the judgment of MELLISH, L.J. [in *Re Crispin* (4)], which really is the *locus classicus* on which the whole of the old jurisprudence is founded. He comes to England; he contracts debts in England; and commits an act of bankruptcy in England.

The decision and observations in *Cooke v. Charles A. Vogeler Co.* (6), in so far as they go beyond or are in conflict with the provisions of the new definition of a debtor, must, of course, be regarded as no longer in force; but in *Re Debtors* (5) in this court in which the *Vogeler* case (6) came up for consideration, the headnote is this:

A foreigner resident abroad but trading in England does not commit an act of bankruptcy within the meaning of the Bankruptcy Act, 1914, s. 1 (1) (a), (2), by

executing abroad a deed of assignment of his property for the benefit of his creditors generally, and intended to operate according to the law of that foreigner's domicile.

Now, be it observed there that domicile is quite properly introduced. There the debtors were American citizens carrying on business in a number of places on the Continent and in New York. They were living in Paris. They had a branch business in England carried on by an Englishman. They went to New York and there executed an assignment or a conveyance of their property to trustees for the benefit of their creditors. That was alleged to be an act of bankruptcy. It was said that here were foreigners who were committing an act of bankruptcy by executing a conveyance. The learned registrar in that case, having held that the limitation I have mentioned must now be based on the operation of the decision in the *Vogeler* case (6), took the view that the conveyance in that case was not a conveyance within the meaning of the subsection. The matter came before this court and there are passages in the judgments in this court which are particularly relied on, but which, in my opinion, when properly understood, in their context and in relation to the subject-matter then before the court, do not help counsel for the debtor at all.

In *Re Debtors* (5) the precise problem was stated by LORD WRIGHT, M.R. ([1936] Ch. 622, 629) :

In these circumstances, the question has to be determined whether the conveyance of Aug. 5, 1935, constitutes an act of bankruptcy within s. 1 (1) (a), of the Bankruptcy Act, 1914.

He repeated that, saying (*ibid.*, 630) :

The material question still remains—namely, whether the conveyance in this case is a conveyance or assignment of the debtor's property within the meaning of s. 1 (1) (a) . . .

He held that he was clearly bound by the decision in the House of Lords in the *Vogeler* case (6). He pointed out (*ibid.*, 631) that the judgment of the House of Lords was based on two grounds, one of which (he said) was that, under the Bankruptcy Act, 1883, the then operative Act, the alleged debtors were not debtors within the meaning of the Act. That, of course, was due to the limited construction which the court had been compelled to place on the word "debtor" under the old Acts. LORD WRIGHT, M.R., then said (*ibid.*, 631) :

. . . as I read the opinions in the House of Lords, I think they also decided the matter on an entirely different ground, which was that the conveyance or assignment was not an act of bankruptcy.

On the point as to the definition of "debtor," LORD WRIGHT, M.R., referred (*ibid.*) to the effect of the extended definition, and again stated that the decision in the *Vogeler* case (6) was still binding and effective (*ibid.*, 632) :

. . . I think that, on what was said in *Vogeler's* case (6), it is impossible to say in this Court that it did constitute an act of bankruptcy, because on this particular point I think what *Vogeler's* case (6) laid down was that a deed of assignment or conveyance executed by a domiciled foreigner in his own country is not an act of bankruptcy within the meaning of the Bankruptcy Acts if it is to operate according to the law of the foreign country in which it is made.

LORD WRIGHT, M.R., pointed out that the EARL OF HALSBURY, L.C., dealt with the question of foreigners generally and then in the particular circumstances of that case. He said of LORD HALSBURY's speech in the *Vogeler* case (6) (*ibid.*, 632) :

Then he deals specifically with the first of the two points and then quite separately, as I think, with the question of what constitutes, in circumstances of this nature, an act of bankruptcy.

I read that as referring to the circumstances which were the particular act of bankruptcy alleged in that case. Then, after quoting from LORD DAVEY's speech in the *Vogeler* case (6), LORD WRIGHT, M.R., said (*ibid.*, 633) :

That is, as I understand it, saying that you cannot have an act of bankruptcy constituted by a conveyance executed abroad by a foreigner not domiciled in this country and intended to operate according to the law of the foreigner's domicile, which in this case before the House of Lords was the place where the conveyance was executed.

That appears to me to be language most carefully chosen in order to show the limitations which this court put on the operation of the decision in *Vogeler's*

case (6). I am, of course, bound by it, and I think it will not be disrespectful if I say that it is a most happily worded definition. I say "happily," because it introduces what, to my mind, is the important question of domicile as affecting the law under which the particular conveyance is intended to operate. LORD WRIGHT, M.R., said (*ibid.*, 634):

As I have pointed out, the language material to this particular matter, namely, the definition of an act of bankruptcy, stands the same in every one of these three Acts.

The particular matter was the particular matter of a conveyance, and I cannot read those words, or, indeed, any words in either the judgment of LORD WRIGHT, M.R., or that of ROMER, L.J., as meaning that this court was basing its decision, not on the limited construction of the word "conveyance" in s. 1 (1) (a) of the Act of 1914, but on some broader principle that any act committed by a foreigner in order to be an act of bankruptcy must be committed in this country. I read the judgments as quite properly limited to the particular question which was before the court. I think LORD WRIGHT, M.R., made that even more clear where he said (*ibid.*):

But I do not think, for the reasons I have stated, that that is a matter which is material here, because nothing in the language of the Act of 1914 in my judgment renders inapplicable the decision of the House of Lords defining for this purpose an act of bankruptcy.

Now, "this purpose" was the purpose of the meaning of the word "conveyance." ROMER, L.J., quoted what MELLISH, L.J., said in the *Crispin* case (4) about the particular case of a conveyance. In relation to the corresponding provision of the Act of 1869, MELLISH, L.J., had said (8 Ch. App. 374, 380):

This seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of England, may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think it was never intended that such a conveyance should be an act of bankruptcy.

There, in the very origin of this particular piece of jurisprudence, we find the question formulated as being a question of the meaning of the word "conveyance" in that particular paragraph. After referring to the *Vogeler* case (6), ROMER, L.J., said ([1936] Ch. 622, 636):

The House of Lords held, first of all, that he was not a debtor within the meaning of the Act. That was the ground upon which LORD HALSBURY and, I think, LORD BRAMPTON, decided the case; but LORD DAVEY decided the case on this ground, that even if he were a debtor within the meaning of the Act, it was essential that the act of bankruptcy relied on should be an act of bankruptcy committed in this country . . .

Now, with the greatest possible respect to ROMER, L.J., that is not a complete statement of what LORD DAVEY had said, but it is, in any case, limited to the act of bankruptcy relied on which was the execution of a conveyance. ROMER, L.J., then said (*ibid.*):

. . . and, following *Ex parte Crispin* (4) [LORD DAVEY] held that inasmuch as in that case the assignment of all the debtor's property had been executed abroad and was intended to operate according to the foreign law, it was not such an act of bankruptcy as was described by the Act of 1883 . . .

That is again quite clearly limiting his interpretation of the decision to the particular question of what is or is not a conveyance within the meaning of para. (a) of s. 4 (1) of the Act of 1883 and s. 1 (1) of the Act of 1914. The respectful criticism I would make of the observations of ROMER, L.J., is that he omits the question of domicile, which appears to me to be important, and appears to rely too much, and more than the *Vogeler* case (6) justifies, on the fact of the act of bankruptcy being committed out of this country. In the case of that particular act of bankruptcy, the crucial matter, to my mind, is not where the document was executed, although that may help to answer the question: By what law was it intended to operate? The crucial question is not where it was executed, nor what was the nationality of the person executing it. The question is: What was the law by which the conveyance was intended to operate? In deciding that question, the nationality may be of importance, although it is not nearly of so much importance as the question of domicile. The place where the document was executed may assist the court

in answering the question, but the conclusive thing is what is the law under which the document was intended to operate? By "intention," I mean not some spurious or ostensible intention, but the intention that the law will impute, whether he wishes it or not, to the person executing the conveyance.

In my opinion, the argument of counsel for the debtor does not in any way displace what appears to me to be the quite clear meaning of the statutory provisions applicable to the act of bankruptcy alleged in this case. The result is that the language of the statute must have its normal and natural effect, and that this appeal must be allowed.

ASQUITH, L.J. : I entirely agree. The appeal narrows down to two short points:—under s. 1 (2) of the Bankruptcy Act, 1914, what is meant (i) by "act of bankruptcy" in line 3, and, (ii) by "carrying on business" in para. (c). On the second of these questions I do not desire to add anything to what has fallen from my Lord. As regards the first, I would, at the risk of repetition, like to add two or three observations. The approach of counsel for the debtor to the construction of this sub-section seemed to me altogether too atomistic. He sought to construe the various limbs of the sub-section in isolation from each other, and without making due allowance for their necessary interaction. The limbs are not mere *disjecta membra*; they are members one of another. The phrase, "any person, whether a British subject or not," is clearly intended to assimilate British subjects and foreigners. If you ask in what respect, you must read on. What follows?—the words "who at the time when any act of bankruptcy was done or suffered by him." Read together, as they ought to be, the two phrases or limbs seem clearly to mean that British subjects and foreigners are being assimilated in respect (*inter alia*) of the acts of bankruptcy which these two are capable of doing or suffering, a matter in which their assimilation was previously imperfect, amounting to a broad overlap and not a complete coincidence. A British subject could then commit some acts of bankruptcy of which a foreigner, as such, was incapable. The effect, and, indeed, the object, of inserting the words, "whether a British subject or not," must be to abolish that margin of difference and to substitute a complete coincidence between the two. This seems to me to result from the language used, not as a subtle inference, but as a matter of plain grammar. To put it a little differently, a British subject commits an act of bankruptcy when he does or suffers any of the acts set out and enumerated in s. 1 (1). The insertion in s. 1 (2) of the words, "whether a British subject or not," must surely mean that a foreigner also commits an act of bankruptcy when he does any of the acts so set out and enumerated. This seems the plain and natural construction. On the other hand, the construction contended for on behalf of the debtor would compel us to read in after the words "act of bankruptcy" some such words as "not being, in the case of a person who is not a British subject, an act done or suffered by that person outside England." Can the legislature possibly have intended that such a qualification should be read in? And if it did, what becomes of the assimilation of British subjects and foreigners at which the sub-section so obviously aims? This is manifestly a case in which express words in a statute displace any special or narrow meaning which, in the absence of those express words, regard to the comity of nations might have imposed on the expression "act of bankruptcy." I agree with my Lord that the appeal should be allowed.

EVERSHED, L.J. : I also agree. As we are differing from the view of Mr. REGISTRAR PARTON, and the case is one of some novelty, I will add a few observations of my own. The question raised in the appeal is this. Is the debtor, not being a British subject, a debtor who has committed an act of bankruptcy within the meaning of s. 1 (1) of the Act of 1914? The act of bankruptcy alleged is that he, having left England, remained out of England for the purpose of defeating or delaying his creditors. It must also be shown that at that time he was a person carrying on business in England.

As regards the last point, there has been a number of decisions in which the terms "carrying on trade" or "carrying on trade or business," as applicable to married women under the Married Women's Property Act, 1882, and the Bankruptcy and Deeds of Arrangement Act, 1913, have been construed thus, by this court, among others—that a person does not cease to carry on business by the operation of what has been called shutting up shop, so long as he remains

indebted in respect of debts incurred while he, in the strict meaning of the words, was carrying on business. In my judgment, the statutes referred to must be treated as *in pari materia* with the Bankruptcy Act, 1914, and I cannot see that anything in the language of the Act of 1914 makes inapplicable the decisions on the earlier Acts, to which I have referred. In my judgment, it is impossible to say that the words "personally, or by means of an agent or manager," in s. 1 (2) (c) have the effect of limiting the effect of the previous words "carrying on business." As regards the question of fact—whether the activity relied on was one to defeat or to delay creditors—at this stage that is a matter merely of *prima facie* evidence. Whether in truth that was the intention of the debtor will have to be determined hereafter. But I certainly have no difficulty in concluding that, *prima facie*, the Crown (the petitioning creditor) has made out its case. As my Lord has pointed out, on the day when the assessments were made final, the debtor found it possible and convenient to exchange the amenities of Chelmsford, where he left his wife, for those of Connemara. A letter written by the Crown nine days afterwards elicited the reply that the debtor was away for seven to ten days. But, fourteen days later again, he appears to have entered into a document which, I understand, is described, rather surprisingly, as a deed of separation; for part of the transaction consisted of giving to his wife in Chelmsford a power of attorney, and in exercise of that power she proceeded to sell the business, which the debtor had carried on with considerable profit in Goswell Road, to a company called Goswell Leather Co., Ltd.

Now, that being so, the only question that remains is: Is the debtor a debtor who has committed this act of bankruptcy, seeing that he is a foreigner? For reasons which I do not desire to repeat, if the Act is read according to the ordinary acceptation of the words used, and bearing in mind that the word "debtor" includes both British subjects and non-British subjects, it seems to me that, as a matter of language and unembarrassed by any previous decisions, the argument for the debtor would really be wholly untenable. But it is said that the older decisions produce the result that, notwithstanding the addition in s. 1 (2) of the Act of 1914 of the phrase "whether a British subject or not," still, in the case of a non-British subject who is not domiciled in England, the act of bankruptcy must either be one committed in England or be an act intended to operate according to the laws of England. It seems to me that to put that gloss on s. 1 (2) would require very careful and elaborate formulation and I do not myself attempt it; for, in my judgment, the cases relied on do not in the circumstances produce the result claimed. Those cases, beginning with *Re Crispin* (4), and subject to one observation that I would wish to make about *Re Debtors* (5), were cases which arose out of different language—different in the material respect that, under the bankruptcy legislation then in question, the words, "whether a British subject or not," did not find any part as a qualification or description of the word "debtor," and in the absence of those words, *prima facie*, the word "debtor" would include every person who owed a debt. That being so, the courts thought that some limitation must be placed on the word, and, as I follow the limitation, it may be formulated thus. Since, in the absence of express terms to the contrary, English statutes only affect English subjects or foreigners who either permanently or temporarily come within the allegiance of the English Crown, a debtor who is a foreigner and not within the allegiance of the Crown is not a debtor within the intentment of the bankruptcy laws and not subject to the jurisdiction of the English Bankruptcy Court, unless the act of bankruptcy alleged is either committed in this country or is intended to operate according to the laws of this country.

It seems to me that, once you add to the word "debtor" the descriptive phrase "whether a British subject or not," the whole premiss on which that conclusion rested is, so to speak, knocked away, and it, therefore, seems to me to follow that a decision such as in *Re Sawers* (3) could not now be regarded as good law. On the other hand, it has been decided by this court that, where the act of bankruptcy alleged is that of a conveyance for the benefit of the creditors, then, following the decision of the House of Lords in *Cooke v. Charles A. Vogeler Co.* (6), it must still be shown that the conveyance is one intended to operate according to the laws of England. I think it might have been argued that the foundation of *Cooke v. Charles A. Vogeler Co.* (6), no less than that of the other

cases, having been destroyed by the addition of the words "whether a British subject or not," that qualification to the word "conveyance" in s. 1 (1) (a) equally had departed with the Bankruptcy Act, 1914; and it was, indeed, so argued by counsel for the petitioning creditor in *Re Debtors* (5) in this court in 1936. But, as LORD WRIGHT, M.R., pointed out, notwithstanding that argument, the decision of the House of Lords as regards the word "conveyance" must still be regarded as binding and as good law. If *Re Debtors* (5) is looked at, there are, no doubt, phrases in it which at first sight might appear to give some support to the view that the old general proposition still remained applicable to some undefined extent, at any rate. But when the case is analysed, it is, in my judgment, plain that all that that case decided was that, for the purpose of s. 1 (1) (a), it is still true to say that a conveyance must mean a conveyance intended to operate according to the law of England. As LORD WRIGHT, M.R., observed ([1936] Ch. 622, 630):

The material question still remains—namely, whether the conveyance in this case is a conveyance or assignment of the debtor's property within the meaning of s. 1 (1) (a), and whatever view I might have been disposed to take if the matter had been free from authority, I am of opinion that I am clearly bound by the decision of the House of Lords in *Cooke v. Charles A. Vogeler Co.* (6).

That being so, and the decision being confined to that point, the view that it also, so to speak, sanctions the continued application of the wider proposition to a case such as the present would, in any case, be *obiter*, and, for my part, having regard to the plain terms of the section as I read them, it would need the very clearest expression to satisfy me that one must now so construe the word "debtor" or the words "act of bankruptcy" as to produce—as one would—a direct conflict between the opening words of s. 1 (1) and the language of s. 1 (1) (d). In particular, as counsel for the Crown pointed out, during his reply, if "conveyance," in s. 1 (1) (a) is construed as meaning "conveyance which operates according to the laws of England," no conflict is introduced by the addition of the words "whether a British subject or not" as a description of the word "debtor," and, therefore, no change in the law as it had been declared was required by the terms of s. 1 (2). But if one tries to apply the same principle to s. 1 (1) (d), so great a conflict is at once produced as makes it, I think, impossible sensibly to read para. (d) together with the opening sentence of s. 1 (1). It seems to me, therefore, that *Re Debtors* (5) must be confined to the construction put on s. 1 (1) (a) and cannot affect such a case as we are concerned with here, namely, one arising under s. 1 (1) (d). For these reasons, as well as those stated, I agree that the appeal succeeds.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *William Fowx & Co.* (for the debtor).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

EVERITT v. EVERITT.

[COURT OF APPEAL (Lord Merriman, P., Bucknill, L.J., and Lewis, J.), May 3, 4, 5, 6, 10, 11, June 7, 8, July 26, 1948.]

Divorce—Appeal—Decree absolute—Jurisdiction of Court of Appeal—No error of court of trial—No opportunity to appeal against decree nisi—Petition not served on appellant—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (e)—Matrimonial Causes Rules 1944, r. 36.

A wife petitioned for a divorce on the ground of desertion. The husband did not enter an appearance. At the hearing evidence of service of the petition was given and, therefore, no error of the court of trial was alleged. A decree *nisi* was pronounced which was made absolute in due course. The husband applied to the Court of Appeal for leave to appeal against the decree absolute notwithstanding the time for appeal had expired, the ground on which he based the application being that the petition had never been served on him.

HELD: the husband not having appealed from the decree *nisi* because he had not had the time and opportunity to do so, the Court of Appeal had

jurisdiction to entertain his appeal under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (e).

[AS TO APPEAL FROM DECREE ABSOLUTE, see HALSBURY, Hailsham Edn., Vol. 10, p. 776, para. 1226.]

Cases referred to :

- (1) *Craig v. Kanssen*, [1943] 1 All E.R. 108 ; [1943] K.B. 256 ; 112 L.J.K.B. 228 ; 168 L.T. 38 ; 2nd Digest Supp.
- (2) *Marsh v. Marsh*, [1945] A.C. 271 ; 2nd Digest Supp.
- (3) *Manners v. Manners and Fortescue*, [1936] 1 All E.R. 41 ; [1936] P. 117 ; 105 L.J.P. 26 ; 154 L.T. 271 ; Digest Supp.
- (4) *Petty v. Petty*, [1943] 2 All E.R. 511 ; [1943] P. 101 ; 112 L.J.P. 97 ; 169 L.T. 224 ; 2nd Digest Supp.
- (5) *Peek v. Peek*, [1948] 2 All E.R. 297 ; [1948] P. 46.
- (6) *Smith v. Smith*, [1897] P. 293 ; 66 L.J.P. 151 ; 77 L.T. 206 ; 27 Digest 490, 5221.
- (7) *Re Giles, Real & Personal Advance Co. v. Michell*, (1890), 43 Ch.D. 391, 398 ; 59 L.J.Ch. 226 ; 62 L.T. 375 ; Digest, Practice, 731, 3153.
- (8) *Boyd v. Bischoffsheim*, (1895) 1 Ch. 1 ; 64 L.J.Ch. 148 ; 71 L.T. 531 ; Digest, Practice, 763, 3293.
- (9) *Harman v. Official Receiver, Petitioning Creditors & Trustee*, [1934] A.C. 245 ; 103 L.J.Ch. 158 ; 150 L.T. 501 ; Digest Supp.
- (10) *Woolfenden v. Woolfenden*, [1947] 2 All E.R. 653 ; [1948] P. 27.

MOTION by the husband for leave to appeal against a decree absolute notwithstanding that the time for appeal had expired.

The hearing of the motion was by consent treated as the hearing of the appeal. On July 8, 1948, the court, being satisfied that the husband had not been served with the petition in the suit, and, therefore, had had no time and opportunity to appeal against the decree *nisi*, gave him leave to appeal out of time, allowed the appeal, ordered that both the decree *nisi* and the decree absolute be set aside, and directed a new trial. Having regard to the importance to the parties to the issues of fact and the general interest of the questions of law involved, their Lordships thought it advisable to put the reasons for their decision into writing.

Geoffrey Lawrence for the King's Proctor.

Hanlon for the husband.

R. L. Bayne Powell for the wife.

Cur. adv. vult.

July 26. **LORD MERRIMAN, P. :** I am asked by **LEWIS, J.**, to say that he has read the judgment which I am about to deliver and agrees with it.

This was a motion by a husband for leave to appeal out of time against a decree absolute made against him on his wife's petition on the ground of desertion. The decree *nisi* was pronounced by Mr. Commissioner Gannon at Durham on May 19, 1947, and was made absolute on July 8, 1947. The husband bases his application on the ground that he was never served with the petition. This raises a difficult question of jurisdiction. The motion has already come before two other divisions of the Court of Appeal. On the second occasion, because of a doubt whether the Court of Appeal had jurisdiction to entertain such a motion, it was decided to invoke the assistance of the King's Proctor. The motion then came before us for decision, and we have had the advantage of hearing very helpful arguments by counsel not only for the respective spouses, but also on behalf of the King's Proctor, to all of whom we wish to express our obligation for their assistance. In the result, it became apparent that we could not come to a decision without hearing evidence on the question, which was the subject of acute controversy, whether the husband had or had not been served with the petition. We have already held that the court has jurisdiction and that the husband should have leave to appeal, and, it being agreed that the motion should be treated as the hearing of the appeal, have allowed the appeal, set aside the decree absolute, and given the necessary directions for a re-hearing of the wife's petition. But because of the importance to the parties of the issues of fact and the general interest of the questions of law involved, we thought it advisable to put the reasons for our decision into writing. Meanwhile, the petition has been re-heard, the wife has obtained a decree *nisi*, and the cross-charge of the husband has been dismissed.

It is well settled that a judgment obtained against a party in his absence owing to his not having been served with the process is not merely voidable

for irregularity but is void as a nullity : see *Craig v. Kanssen* (1), and the cases there cited. Manifestly, this general principle applies with full force to a judgment affecting the status of the party : *Marsh v. Marsh* (2). It is argued that in such a case the judgment is not the subject of an appeal at all, but that the proper method of getting rid of it is to apply to the court by which it was given to set it aside under its inherent jurisdiction as a nullity. This principle is said to be of universal application, but it is further argued that, in the case of a

A decree of divorce or nullity of marriage, whether it be a decree *nisi* or a decree absolute, the Rules of Court governing appeals provide, in a case such as this, that the application may be made only to a Divisional Court of the Probate, Divorce and Admiralty Division to the exclusion of the Court of Appeal, although it is conceded that this may not necessarily exclude recourse, by virtue of the court's inherent jurisdiction, to a judge of the High Court or to any commissioner deemed to constitute a court of the High Court in accordance with s. 70 of the Supreme Court of Judicature (Consolidation) Act, 1925, having power to determine and try a matrimonial cause. This point arises as follows, remembering always, that appeal is a creature of statute. The jurisdiction of the Court of Appeal is defined by s. 26 of the Judicature Act, 1925. It is unnecessary to quote the section at length. Suffice it to say that the terms of the section are wide enough to cover this case if it can properly be described as an appeal at all. If so, R.S.C., Ord. 58, r. 15, and Ord. 44, r. 7, enable this court to

C extend the time for appeal, although the application was not made until after the expiry of the time allowed, but by s. 27 (1) of the Judicature Act, 1925, the jurisdiction of the Court of Appeal to hear and determine appeals from any judgment or order of the High Court is expressed to be "subject as otherwise provided in this Act and to Rules of Court." By s. 99 of that Act Rules of Court may be made for :

D . . . the following purposes : (a) For regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Court of Appeal and the High Court respectively in all causes and matters whatsoever in or with respect to which those courts respectively have for the time being jurisdiction . . . and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which under this or any other Act are to be made

E to the Court of Appeal or to the High Court shall be made ; (b) for regulating and prescribing the procedure on appeals from any court or person to the Court of Appeal or the High Court . . .

Rule 36 of the Matrimonial Causes Rules, 1944, reads as follows :

Rehearing. (1) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division. The application shall be by notice of motion, stating the grounds

F on which it is based, filed in the Divorce Registry and served upon the opposite parties within six weeks after judgment. The notice shall be a fourteen days' notice and may be amended at any time by leave of the judge. (2) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal.

It is said that, subject to a point to be mentioned in a moment, this is clearly a case in which no error of the court at the hearing is alleged in the sense in which

G those words have been interpreted by the Divisional Court of the Probate, Divorce and Admiralty Division. It is, undoubtedly, the case that the Divisional Court has regarded cases in which the judge has been deceived by evidence of service, the falsity of which he has no means of detecting or in which, although the process may actually have been served, it did not, albeit unintentionally, come to the notice of the party that what was being served was a petition for divorce, as coming within r. 36 of the Matrimonial Causes Rules, 1944 : see

H *Manners v. Manners* (3) and *Petty v. Petty* (4). Our attention, however, was called to the fact that, although the process server affixed to the affidavit of service what purported to be an acknowledgment by the husband of the receipt of the petition and a photograph of the husband as the person on whom the process was served, the transcript of the shorthand note of the hearing does not show that any evidence was received by the learned commissioner from the wife or any other witness identifying either the signature or the photograph as being that of the husband. Had the matter stood thus, it would have been necessary to consider very carefully whether it was possible to assert that no

error of the court at the hearing was alleged, seeing that the Divisional Court has laid down that the question whether error is or is not alleged is one of substance and not of form: *Peek v. Peek* (5), recently decided by the Court of Appeal. It is, however, apparent on the face of the transcript that the short-hand note is not complete, and the wife gave evidence before us, which was not challenged, that she did, in fact, identify both the photograph and the signature at the hearing. In these circumstances we were able to proceed on the footing that service appeared to be strictly proved at the hearing and that no error in this fundamental respect could be attributed to the learned commissioner. In dealing with cases under r. 36 the Divisional Court has always been careful to avoid any semblance of trespassing on the exclusive jurisdiction of the Court of Appeal: *Petty v. Petty* (4) and *Peek v. Peek* (5); although, if the Divisional Court is satisfied that a case comes within the rule it is bound, as I pointed out in *Peek v. Peek* (5), to deal with it because no other court can do so: see also *Smith v. Smith* (6), decided in the Court of Appeal under r. 62 of the Matrimonial Causes Rules, 1865, as amended in 1885.

On the face of it, therefore, it might seem that r. 36 of the Matrimonial Causes Rules, 1944, covers this case, but there are two further points for consideration. First, whether, after a decree has been made absolute it is appropriate to describe an application to set it aside as an application for a re-hearing, or, in other words, whether r. 36 applies at all after a decree has been made absolute; and, secondly, however that may be, whether s. 31 (1) (e) of the Judicature Act, 1925, does not give a substantive right to appeal to the Court of Appeal from a decree absolute. As regards the first point, it is obvious that an application to the Divisional Court under r. 36 and an application to the Court of Appeal for a new trial have this much in common, that in both it is being asserted that a wrong conclusion has been reached and that the judgment must be set aside in order that the matter may be heard afresh: see *Petty v. Petty* (4). The distinction between the two depends on whether error of the court at the hearing is or is not alleged. This distinction may be paraphrased by using synonyms for the word "error." Thus in a typical application for a re-hearing under r. 36 based on non-service the applicant is asserting that the judgment is wrong, both because he has not committed the matrimonial offence of which he was found guilty and because, not having been served, he has had no opportunity of being heard, but, although the judge was mistaken in believing both that he had been served and that he had committed the matrimonial offence, the applicant does not assert that it was the judge's fault that he went wrong, whereas in an appeal to the Court of Appeal he is asserting that the judge went wrong either by misdirecting himself, or by deciding against the weight of the evidence, or as the case may be.

Little guidance, in my opinion, is to be derived from cases such as *Re Giles* (7), which was decided under s. 52 of the Judicature Act, 1873, and contrasts with an appeal a motion in the Chancery Division to set aside or vary an order made in chambers to a judge who has expressed a desire to hear the matter more fully in court: see also *Boyd v. Bischoffsheim* (8), decided under s. 52 of the same Act, or *Harman v. Official Receiver* (9), where LORD TOMLIN, with reference to an appeal from an order of the Court of Appeal restoring an earlier adjudication of bankruptcy which had been discharged by the Court of Appeal, poses the dilemma that the appeal must either be from an order "in bankruptcy matters," in which case it was incompetent for lack of leave by the Court of Appeal, or it was a complete nullity in the sense that it was an appeal against an order made by a court which had no jurisdiction, in which case it was difficult to see how the House of Lords had jurisdiction to deal with it.

This brings me to a consideration of s. 31 of the Judicature Act, 1925, restricting appeals to the Court of Appeal. By sub-s. (1) (e):

No appeal shall lie . . . (e) from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree *nisi* on which the order was founded, has not appealed from that decree.

This provision, read positively, must mean that an appeal will lie from an order absolute for the dissolution of marriage in favour of a party who has not appealed from the decree *nisi* because he has not had the time and opportunity to do so. Manifestly, the lack of time and opportunity to appeal from the decree *nisi*

may be due to a failure to serve the petition, so that the decree itself is a nullity : *Craig v. Kanssen* (1) ; but this need not be so. For example, a respondent who has been served may not have received notice of the hearing to which he is entitled if he has entered an appearance, and this, in turn, may be due either to a failure to give notice or to some accidental miscarriage. Or a respondent who has actually defended the suit may meet with an accident or be stricken with illness before he has been able to appeal. It is unnecessary to multiply examples. It seems to me that the legislature, in imposing this condition on the right to appeal against a decree absolute, cannot have intended to qualify it with reference to the nature of the particular circumstances in which the lack of time and opportunity to appeal against the decree *nisi* arose. In my opinion, this appeal from the decree absolute is placed by the legislature in a class by itself and is permitted whenever the statutory condition is fulfilled and not otherwise.

This view of the matter makes it unnecessary to resolve the question left open by the MASTER OF THE ROLLS in *Craig v. Kanssen* (1), where, in relation to an order giving leave under the Courts (Emergency Powers) Act, 1939, to proceed to the enforcement of a judgment, he says ([1943] K.B. 256, 262) :

Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiæ* to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it. I say nothing on the question whether or not an appeal from the order, assuming it to be made in proper time, would be competent.

In this connection reference must be made to the provisions of s. 184 (1) of the Judicature Act, 1925. By that section, as soon as any decree for divorce is made absolute either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death, or, if there is such a right of appeal, may so marry again if no appeal is presented against the decree, as soon as the time for appealing has expired, or, if an appeal is so presented, as soon as the appeal has been dismissed. It may be that the legislature intended that a decree absolute could only be set aside by appeal to the Court of Appeal, and that to avoid uncertainty in connection with re-marriage, a motion to a judge under the inherent jurisdiction of the court and an application to the Divisional Court under r. 36 are alike ruled out.

For a motion to a judge after decree absolute, and, indeed, after re-marriage, there is a precedent in *Woolfenden v. Woolfenden* ([1948] P. 27), but, as has already been seen, no precedent has been found for an application under r. 36 after decree absolute. In my view, it is unnecessary for the purposes of this case to decide whether either of these alternative methods of setting aside this decree absolute would have been open to the husband, and any opinion on the point would, therefore, be *obiter*. If the husband was not served with the petition it is not suggested that there are any other circumstances from which it should be inferred that he had time and opportunity to appeal from the decree *nisi*, and so, on that assumption, this motion is well founded.

The point at issue, therefore, being whether this petition was ever served upon the husband, it becomes necessary to examine the evidence given before us. [HIS LORDSHIP examined the evidence and concluded :—] On a careful consideration of the whole of this evidence I have come to the conclusion that the husband did not sign the acknowledgment of service. I do not feel that I am in a position to draw any certain conclusion as to how the purported signature comes to be on that document, but, in my opinion, this does not prevent me from finding, as I do, that it is established to my satisfaction that it is not the husband's signature.

BUCKNILL, L.J. : I agree with the reasons which have been read by the learned PRESIDENT for the decision of the court given on an earlier occasion.

Solicitors : *Treasury Solicitor* (for the King's Proctor) ; *S. & C. Lambert*, Sunderland (for the husband) ; *Seton Pollock*, Services Divorce Department, agent for *Gregory-Jones*, Newcastle (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CARLISH v. EAST HAM CORPORATION AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), July 15, 21, 1948.]

Requisition—House—Delegation of powers—Sufficiency of letter from Minister—Requisition of part of premises—Need for part to be specified in delegation—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927 (as amended)), reg. 51 (1), (5)—Emergency Powers (Defence) Act, 1939 (c. 62), s. 7.

The Minister of Health by letter delegated to the clerk of a local authority his "functions under reg. 51 of the Defence (General) Regulations, 1939, for the purpose of requisitioning part of [specified] premises for re-housing purposes." In pursuance of the powers so conferred the clerk served on the owner notice of requisition of the premises "excluding shop and shop parlour."

HELD: (i) under the Emergency Powers (Defence) Act, 1939, s. 7, production of the letter was sufficient proof of the delegation.

(ii) the Minister having power to requisition part of the premises under reg. 51 could delegate power to requisition a part thereof without specifying which part, but leaving it to his delegate to requisition so much of the premises as he thought fit.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939 (S.R. & O., 1939, No. 927 (as amended)), reg. 51, see HALSBURY'S STATUTES, Vol. 39, pp. 971, 972.

FOR THE EMERGENCY POWERS (DEFENCE) ACT, 1939, s. 7, see HALSBURY'S STATUTES, Vol. 32, p. 936.]

ACTION for a declaration and an injunction.

The plaintiff had received a notice of the requisitioning of part of his premises from the town clerk of East Ham, acting in pursuance of delegated powers conferred on him by letter by the Minister of Health. He claimed a declaration that the purported requisitioning was void and an injunction restraining the clerk and/or the East Ham corporation from taking possession of the property, his grounds being that the production of the letter was not sufficient proof of the delegation by the Minister of his powers and that the delegation was *ultra vires* or void because it authorised the requisitioning of part of the premises without specifying which part. The court dismissed the action with costs.

L. A. Blundell for the plaintiff.
Squibb for the defendants.

Cur. adv. vult.

July 21. LORD GODDARD, C.J., read the following judgment. The plaintiff claims a declaration that the purported requisitioning by the defendants on Sept. 3, 1947, of the premises (excluding shop and shop parlour) known as 124, Barking Road, in the county borough of East Ham, is void, and also an injunction restraining the defendants from taking possession of the premises.

It appears that on Sept. 3, 1947, a requisition notice was served by the town clerk on the plaintiff in the following terms:

Take notice that in exercise of the powers delegated to me by the Minister of Health under and by virtue of reg. 51 of the Defence Regulations, 1939, I have this day taken possession of the premises known as 124, Barking Road in the county borough of East Ham excluding shop and shop parlour.

It also appears that on Sept. 1, 1947, a letter from the Ministry of Health was sent to the town clerk of the borough in these terms:—

Sir,

Defence (General) Regulations, 1939.
124, Barking Road.

I am directed by the Minister of Health to refer to the telephone conversation between officers of the Council and this Ministry and to say that he hereby delegates to you, as clerk, his functions under reg. 51 of the Defence (General) Regulations, 1939, for the purpose of requisitioning part of the above-mentioned premises for re-housing purposes, and consent is hereby given to such requisitioning.

If requisitioning action is taken the dates of requisition should be notified to this department.

I am, Sir,

Your obedient Servant,

A. W. KENT.

By reg. 51 of the Defence (General) Regulations, 1939, a competent authority, which includes the Minister of Health, is authorised to take possession of any land, which by the regulation includes houses, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land, and by para. (5) of the regulation it is provided that a competent authority may, to such extent and subject to such restrictions as it thinks proper, delegate all or any of its functions under paras. (1) to (3) of the regulation to any specified persons or class of persons.

A It is, I think, well-known that for the purpose of providing accommodation for people without homes or who are unsatisfactorily housed, the Minister of Health has delegated his powers under this regulation to local authorities and, indeed, as proved in this case, on July 20, 1945, there was a general delegation by the Minister of his power to requisition unoccupied houses to the local authority or one of their officers giving power to take possession of houses, but subject to certain conditions which it is unnecessary, I think, more particularly to specify, and these conditions have been varied from time to time. By the letter to which I have referred the Minister has purported to delegate his powers to the town clerk of East Ham in respect of the premises therein mentioned without any conditions. It is in effect an *ad hoc* delegation and the questions that have been argued are whether or not there has been proved a delegation by the Minister and whether the delegation is *intra vires* or void as being too vague.

C Counsel for the plaintiff contended that mere production of the letter is not enough to prove delegation, but, in my opinion, this point is concluded by s. 7 of the Emergency Powers (Defence) Act, 1939, which is the Act giving statutory authority to the regulations. That section provides that every document purporting to be an instrument made or issued by any Minister or other authority or person in pursuance of any provision contained in, or having effect under, Defence Regulations, and to be signed by or on behalf of the said Minister, authority or person, shall be received in evidence, and shall, until the contrary is proved, be deemed to be an instrument made or issued by that Minister, authority or person. The regulation does not require the delegation of his authority to be made in any particular form, and, in my opinion, this letter, which purports to be written on behalf of the Minister of Health, is an instrument whereby he delegates his functions to the town clerk for the purposes mentioned therein.

E It was, however, contended that this delegation is invalid because it refers to the requisitioning of part of the premises mentioned in the letter and does not say which part. In my opinion, it is clear that the Minister himself could requisition part of a house, and I can find nothing in any regulation, nor has my attention been brought to anything, which would indicate that only a complete house can be requisitioned. If, therefore, the Minister can himself requisition part of a house, it seems to me clear that he can delegate that power to a local authority or an officer of theirs. If the delegation had been for the requisitioning of the whole or any part of the house, I do not think any question could have arisen as to its validity. It seems to me, therefore, that, if he delegates his power to requisition part only, he leaves it to the person whom he has appointed as his delegate to requisition as much or as little of the house as he thinks fit. In my opinion, a valid delegation has been proved, and it was, therefore, in the power of the town clerk to issue the notice in question, and in consequence this action fails and must be dismissed with costs.

Judgment for the defendants with costs.

Solicitors: *Spiro & Steele* (for the plaintiff); *Pritchard, Englefield & Co.*, agents for *R. H. Buckley*, deputy town clerk, East Ham (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. WINCHESTER AREA ASSESSMENT COMMITTEE.

Ex parte WRIGHT.

[COURT OF APPEAL (Scott and Asquith, L.J.J., and Romer, J.), June 9, 10, 11, July 19, 1948.]

Rates and Rating—Valuation list—Amendment—Proposal—Specification of grounds for proposed amendment—Rating and Valuation Act, 1925 (c. 90). A
s. 37 (2) (b).

The Rating and Valuation Act, 1925, s. 37 provides: “(1) Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force . . . may make in manner provided by this section a proposal for the amendment of the list (in this section referred to as ‘a proposal’) . . . (2) Every proposal made under this section must—(a) be made in writing . . . (b) specify the grounds on which the proposed amendment is supported.” B

A rating authority made a written proposal for the consideration of the assessment committee, sending a copy to the occupier of the two hereditaments with which the proposal was concerned. The proposal stated that the rating authority was “aggrieved by the incorrectness or unfairness of the valuation and assessment of each hereditament in the valuation list.” The schedule stated the amounts of the existing and the proposed valuations, and opposite the words “Grounds of proposal” on the form used were the words “Revised assessments.” It was contended that the proposal was invalid under s. 37 (2) because it did not specify the grounds on which the proposed amendments were supported. C

Held: the schedule made clear the respect and extent to which it was alleged that the existing valuations were incorrect or unfair and, therefore, the proposal satisfied s. 37 (2) (b). D

Upper Agbrigg Assessment Committee v. Gartsides (Brookside Brewery), Ltd. and Bents Brewery Co., Ltd., ([1945] 1 All E.R. 338), distinguished.

Per cur.: the authorities establish that the proposal must give sufficient information to enable the assessment committee to know (1) whether an increase or a decrease is asked for, it not being necessary for the producer to state in his proposal the precise figure to which the relevant valuation should be increased or reduced; (2) to which of the existing valuations in the rate book the proposal refers; and (3) what is the ground of complaint as to the existing valuation on that head. It is enough to state “incorrect or unfair” unless there is some unusual ground, in which case it ought to be specified. E

[AS TO PROPOSALS FOR THE AMENDMENT OF THE VALUATION LIST, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484-488, para. 913; and FOR CASES, see DIGEST, Vol. 38, p. 585, and Supp.] F

Cases referred to:

- (1) *Upper Agbrigg Assessment Committee v. Gartsides (Brookside Brewery), Ltd. and Bents Brewery Co., Ltd.*, [1945] 1 All E.R. 338; 114 L.J.K.B. 257; 172 L.T. 166; *sub nom.* *Upper Agbrigg Assessment Committee v. Bents Brewery Co., Ltd.*, [1945] 1 K.B. 196; *sub nom.* *Bents Brewery Co., Ltd. v. Upper Agbrigg Assessment Committee*, 109 J.P. 84; C.A. *revsg.*, [1944] 2 All E.R. 37; [1944] K.B. 524; 2nd Digest Supp.
- (2) *R. v. West Norfolk Assessment Committee, Ex Parte Ward (F. B.)*, (1930), 94 J.P. 201; Digest Supp.
- (3) *Gateshead Assessment Committee v. Redheugh Colliery, Ltd.*, [1925] A.C. 309; 94 L.J.K.B. 258; 132 L.T. 583; 89 J.P. 53; 38 Digest 604, 1309.
- (4) *R. v. Thanet and District Assessment Area Assessment Committee and Kent County Valuation Committee, Ex parte Isle of Thanet Gas Light and Coke Co.*, [1939] 2 All E.R. 489; [1939] 2 K.B. 640; 108 L.J.K.B. 515; 160 L.T. 509; 103 J.P. 186; Digest Supp.
- (5) *R. v. Heston and Isleworth Rating Authority, Ex parte Conti*, [1941] 2 All E.R. 116; [1941] 2 K.B. 146; 110 L.J.K.B. 545; 165 L.T. 283; 105 J.P. 288; 2nd Digest Supp.
- (6) *R. v. Reading Assessment Committee and Another, Ex parte McCarthy E. Fitt, Ltd.*, [1948] 1 All E.R. 194.

(7) *R. v. Surrey (Mid-Eastern Area) Assessment Committee, Ex parte Merton and Morden Urban District Council and Another*, [1948] 1 All E.R. 856.

APPEAL by the Winchester Area Assessment Committee from a decision of the Divisional Court of the King's Bench Division that an order of *certiorari* should issue to quash a proposal for the amendment of certain rating valuations made by the rating authority for the borough of Eastleigh. The Court of Appeal allowed the appeal. The facts appear in the judgment of SCOTT, L.J., and in the headnote.

Scott Henderson, K.C., and *J. R. Willis* for the Winchester Area Assessment Committee.

H. B. Williams, K.C., and *Squibb* for the applicant, Wright.

Cur. adv. vult.

July 19. SCOTT, L.J., read the following judgment. This appeal turns on the Rating and Valuation Act, 1925, s. 37 (2), but to appreciate the full meaning of that sub-section it is necessary to consider the relevant part of the first sub-section; I will read both:

(1) Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, . . . may make in manner provided by this section a proposal for the amendment of the list (in this section referred to as "a proposal"), and where a rating authority in pursuance of the provisions of this Act make any amendment in a rate other than the correction of a clerical or arithmetical error, or the correction of an erroneous insertion, omission, or misdescription, the authority shall forthwith make a proposal for any necessary amendment of the list. (2) Every proposal made under this section must—(a) be made in writing and, except where it is made by the rating authority, be served on the rating authority; (b) specify the grounds on which the proposed amendment is supported.

The rating authority for the borough of Eastleigh in the Winchester Assessment area made a written proposal for consideration at the meeting of the assessment committee at Winchester fixed for May 7, 1947, and caused a copy to be transmitted to Mr. G. A. Wright, the occupier of the two cinemas mentioned in the notice. He took the view that the proposal was bad in law because it did not "specify the grounds on which the proposed amendment was supported," and obtained from the King's Bench Division an order by way of a *certiorari* quashing the proposal. The appeal is from that order. The first judgment of that court was delivered by LORD GODDARD, C.J., and, as the court, without discussing the legal merits of the argument addressed to it by the applicant, were of opinion that the facts of the case before it were indistinguishable from those of *Bents Brewery Co., Ltd. v. Upper Agbrigg Assessment Committee* (1), they made the order, LORD GODDARD, C.J., saying that, as he could not distinguish the present proposal from the proposal in that case, which was a King's Bench decision binding on them, he refrained from expressing any opinion of his own and hoped the case would be taken to this court.

It has been judicially recognised that, in passing the Act, it was the intention of Parliament that aggrieved persons should be able to act on many of its provisions, including s. 37, without legal assistance: see *R. v. West Norfolk Assessment Committee* (2) *per* GREER, L.J. (94 J.P. 203):

. . . it is not intended by the statute that his difficulties should be such that he would have to go to an expert or to a lawyer to draw up his proposal.

The language of proposals, by whomsoever made, should, therefore, be read without too much legal strictness. None the less, the requirements of sub-ss. (1) and (2) must be substantially satisfied if the "proposal" is to be effective and valid. Some sort of "specification" of grounds of the proposal is demanded, e.g., it must be clear whether it is an increase or a decrease of the assessment that is proposed. The actual figures need not be stated, but the grounds for proposing a change must be "specified"—and that means clearly stated and stated with some definiteness or particularity. On the one hand, if an increase or decrease is plainly proposed, it is not necessary to quantify it, as the opposer must be presumed ready to justify before the assessment committee his resistance to change. On the other hand, the proposer must give a reason of sufficient legal validity and relevance to constitute a good ground in law for some increase or decrease, as the case may be, and under that head I think the trend of the decisions is that it will suffice if the proposal makes it clear that, unless the change

is made of the valuation of the hereditament with which the proposal is concerned, it will be either "incorrect" or "unfair," *i.e.*, within the meaning of those words in rating law.

In *Bents'* case (1) the insufficiency of the statement of grounds seemed to the court to be obvious, first, because it gave no indication at all of the reasons why an alteration was proposed, the only stated ground being "annual revision," which was meaningless since the Act of 1925 only called for general revision every five years, and, secondly, because there was in the proposal no allegation of unfairness or incorrectness. In my view, therefore, that case was rightly decided, but the present case differs from it in two respects. The schedule shows that an increase is proposed and also what exact increases of both gross and rateable valuations are proposed. It begins with the statement that the rating authority is "aggrieved by the incorrectness or unfairness of the valuation and assessment of each hereditament in the valuation list," *i.e.*, alternative grounds are there stated, and in the space on the form used, opposite the words "Grounds of proposal," there appear the words "Revised assessments." LORD GODDARD, C.J., thought those words were synonymous with, or contained no more information than, the words "annual revision" put forward as the "specification of grounds" in *Bents'* case (1), but, with diffidence, I incline to the view that, even by themselves, they mean rather more than that, as they seem to me to import an intention to ask, at the then prospective meeting of the assessment committee, for revision, and the schedule makes it clear that it is an upward revision which is proposed, but, even if that is too kind a reading of the words, taken alone, the charge of "incorrectness" or "unfairness," predicated in the earlier part of the proposal, must be read into the ungrammatical phrase "Revised assessments." For these reasons, apart from authorities, I think that this proposal does satisfy s. 37 (2) (b).

It is not necessary to discuss all the cases cited to us, but we have considered them. In *R. v. West Norfolk Assessment Committee* (2) the Court of Appeal, consisting of SCRUTTON, GREER and SLESSER, L.JJ., expressed opinions about s. 37 which (although not all of them were the basis of the decision) are entitled to great respect, and the case did decide that a quantitative statement in the proposal of the figure of increase or decrease is unnecessary. The opinion was expressed that the old practice about objections, so far as their reasons were concerned, was, so to speak, carried forward into the new provisions about proposals. GREER, L.J., took the view (*ibid.*), which I have already quoted, that because "objections of this sort most frequently have to be made by the occupier, who is paying a rent for premises" strict requirements about the form in which the proposal was to be expressed could not have been intended by Parliament. That view was, I think, a mere application of the principles relevant to objections under the old practice as affirmed by the House of Lords in *Gateshead Assessment Committee v. Redheugh Colliery, Ltd.* (3): see *per* VISCOUNT CAVE, L.C. ([1925] A.C. 317); *per* VISCOUNT FINLAY (*ibid.*, 325), and *per* LORD SHAW (*ibid.*, 329). It should be borne in mind that "unfairness or incorrectness" constituted *prima facie* a sufficient specification of grounds for objection under the Union Assessment Committee Act, 1862, s. 18.

In *R. v. Thanet and District Assessment Committee* (4), a Divisional Court case, the proposal of the valuation committee was in these terms ([1939] 2 K.B. 640):

I, the undersigned, on behalf of the Kent County Valuation Committee, which is aggrieved by the incorrectness of the valuation list of your rating area, hereby make a proposal for amendment of such list in respect of the property shown in the schedule hereunder written, on the ground that the present assessments are unfair and incorrect.

Then followed a description of the applicants' property and its then assessed value, and at the foot of the proposal, under the heading "amendment proposed," appeared the words:

To such an amount as may be determined on an approved apportionment of the cumulo value of the undertaking having regard to the accounts relating thereto in respect of the year ended Dec. 31, 1937.

The court held that the last four lines of the proposal made it impossible to discover what was proposed: see *per* HUMPHREYS, J. (*ibid.*, 648):

When I look at this document which is called a proposal for the amendment of the list, I find that it gives no information at all as to what is the answer to the natural question which would be put by a person to whom such a document was addressed: "What is your proposed amendment?" It appears to me the answer is: "We are not going to tell you for the very good reason that we do not know, but, that some proposed amendment is desirable, we maintain." In my view, that is quite contrary to the requirement of sub-s. (2) (b) of s. 37, and to the plain meaning and the whole intention of this statute.

A In the present case the schedule is quite explicit as it states precisely the respect and extent in which it is alleged that the existing valuations are incorrect or unfair. In *R. v. Heston and Isleworth Rating Authority* (5) a Divisional Court considered the *West Norfolk* case (2) and the *Thanet* case (4) and followed the view expressed by the Court of Appeal in the former, *viz.*, that it is not necessary for the proposer to state in his proposal the precise figure to which the relevant valuation should be reduced or—as the case may be—increased.

B Then came the *Bents Brewery* case (1) with which I have already dealt. The litigation between the parties in that case came before the Court of Appeal in 1945, but it was on a totally different point and has no bearing on the present appeal. The next case cited to us was *R. v. Reading Assessment Committee* (6), another decision of a Divisional Court. There the proposal stated the grounds as "existing assessment unfair incorrect and insufficient";

C but in a column headed "proposed assessment" there appeared opposite the details of the existing valuations only the words "to be amended." The hereditament in that case was partly industrial and partly non-industrial, each rated separately. The court held that the added words did not give sufficiently definite information, and, treating the case as governed by the *Thanet* decision (4), disallowed the proposal. In *R. v. Surrey Assessment Committee* (7), before a Divisional Court consisting of LORD GODDARD, C.J.,

D HUMPHREYS and PRITCHARD, JJ., the proposal form gave as grounds "insufficient incorrect and unfair"; and, while stating the existing assessment, added "The precise assessment desired will be notified at a later date." The court held that the proposal was sufficient on the ground that an increase was being asked for and that the other particulars gave sufficient information.

E I find it difficult to harmonise all these decisions, but state my conclusions thus: The proposal must give sufficient information to enable the assessment committee to know (1) whether an increase or a decrease is asked for; (2) to which of the existing valuations in the rate book the proposal refers; (3) what is the ground of complaint as to the existing valuation on that head; and it is enough to state "incorrect or unfair" unless there is some unusual ground, in which case it ought to be specified. The proposal before us satisfies those criteria. There must be judgment accordingly; the appeal will be allowed; and the order of *certiorari* made by the Divisional Court rescinded with costs.

F to the applicant here and below.

ASQUITH, L.J.: I agree with the judgment delivered by my Lord. It is true that the only words appearing in the proposal in the space opposite the words "Grounds of proposal" is "Revised assessments." If the actual grounds had to be sought in this space exclusively, the words "Revised assessments" would, in my view, have been plainly insufficient. To say: "My assessments ought to be revised because they ought to be revised," is not to state any ground for their revision, but it has been laid down emphatically that a proposal need not be a strict or formal document, and I think statements contained in parts of the proposal other than the space opposite "Grounds of proposal" can be prayed in aid to eke out insufficiency at that point. With these supplementary materials admitted, I agree with SCOTT, L.J., that the rather unexact criteria laid down in the cases are satisfied, and that

H the appeal should be allowed.

SCOTT, L.J.: My brother ROMER, J., says he agrees with the two judgments delivered.

Appeal allowed with costs.

Solicitors: J. J. McIntyre, agent for G. H. Gardner, Winchester, and J. C. Gardner, Eastleigh (for the assessment committee); Lovell, Son & Pitfield, agents for Paris, Smith & Randall, Southampton (for the applicant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

CHAPMAN v. KIRKE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Singleton and Denning, JJ.), July 29, 1948.]

Stage Carriage—Electric tramway car—"Injuring property of owner"—Negligence not amounting to "wanton and furious driving"—Stage Carriages Act, 1832 (c. 120), s. 48.

The appellant was driving an electric tramway car, the property of his employers. Owing to lack of care and skill amounting to negligence, but not to wanton and furious driving, the car collided with a lorry and was damaged. The appellant was found guilty of the offence, under s. 48 of the Stage Carriages Act, 1832, of injuring the property of the owner of a stage carriage.

HELD : (i) an electric tramcar, being a vehicle which proceeds from stage to stage at regular, or more or less regular, intervals, and carries passengers who pay separate fares, was a stage carriage.

(ii) it was sufficient to render the appellant liable to conviction under s. 48 of the Act, if he was proved through negligence to have caused injury to the property of the owner of the vehicle, it not being necessary to prove that he had been guilty of wanton and furious driving.

[AS TO STAGE CARRIAGES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 702, 703, paras. 1051, 1052; and FOR CASES, see DIGEST, Vol. 42, p. 851, Nos. 56-58.]

Case referred to :

(1) *R. v. Ruscoe*, (1838), 8 Ad. & El. 386; 3 Nev. & P.K.B. 428; 1 Will. Woll. & H. 435; 7 L.J.M.C. 94; 42 Digest 851, 56.

CASE STATED by stipendiary magistrate of Bradford.

On Apr. 6, 1948, the appellant, Albert Chapman, was convicted by the stipendiary magistrate on an information, preferred by the respondent, Police-sergeant Kirke, charging that on or about Jan. 31, 1948, he being the driver of a certain stage carriage, to wit, tramway car No. 255, on a certain street there called Leeds Road did through negligence unlawfully injure the property of the owners of the said carriage, contrary to s. 48 of the Stage Carriages Act, 1832. The magistrate imposed a fine of £1 on the appellant who now appealed. The Divisional Court dismissed the appeal.

M. R. Nicholas for the appellant.

G. Norman Black for the respondent.

LORD GODDARD, C.J. : It appears that the learned magistrate came to the conclusion that the appellant had been guilty of negligence in not applying his brakes soon enough to prevent a collision with a lorry which was in front of him. We are not concerned with whether or not there was negligence. That was entirely for the magistrate. The two points which have been argued are (i) whether or not the tramway car was a stage carriage, and (ii) whether, before the appellant could be convicted in connection with the driving of the car, his conduct must amount to wanton and furious driving.

The Stage Carriages Act, 1832, under which the appellant was charged contains, in s. 5, the following definition of a stage carriage :

Every carriage used or employed for the purpose of conveying passengers for hire to or from any place in Great Britain, and which when passing along any highway or other road shall travel at the rate of three miles or more in the hour, shall, without regard to the form or construction thereof, be deemed and taken to be a stage carriage within the meaning of this Act; provided the passengers, or any one or more of them, thereby conveyed, shall be charged or shall pay separate and distinct fares or a separate and distinct fare, or shall be charged or pay at the rate of separate and distinct fares, for their respective places or seats or his place or seat therein or conveyance thereby; and in all proceedings at law or otherwise, and upon all occasions whatsoever, it shall be sufficient to describe any carriage used or employed as aforesaid by the term "stage carriage" without further or otherwise describing the same: Provided always, that the said term "stage carriage" shall not be deemed to extend to or to include any carriage used or employed as aforesaid wholly upon any railway, nor to any carriage drawn or impelled by the power of steam or otherwise than by animal power.

- That definition was repealed by s. 39 of the Customs and Inland Revenue Act, 1869, but s. 48 was not repealed, and it remains an offence to this day if the driver of a stage carriage does certain things which are set out in that section. It is said that, the definition being repealed, a man cannot be prosecuted as the driver of a stage carriage because there is no means of showing what a stage carriage is. The phrase, it is argued, must be confined to those things which were stage carriages in 1832, and, of course, an electric tramway car was not invented then. I do not think that is a sound argument. In my view, while it is true that the court has to approach the interpretation of s. 48 without the assistance of the definition in s. 5, it seems clear from *R. v. Ruscoe* (1) that the courts in those days (1838) knew perfectly well what a stage carriage was. The judgments all show that the court did not want any assistance in defining the expression "stage carriage." The court knew what a stage carriage was just as it is taken to know any other ordinary expression in the English language.
- It is not uninteresting to see that in the argument in that case the definition of "stage carriage" given in *DR. JOHNSON'S DICTIONARY* was cited. Dr. Johnson died a good many years before 1832. In my opinion, there is no doubt that a vehicle which proceeds from stage to stage at regular, or more or less regular, intervals, and carries passengers who pay separate fares, is a stage coach or a stage carriage, whichever expression you like to use. Therefore, it was for the magistrate to decide whether the vehicle which the appellant was driving was one which could properly be described as a stage carriage. Without going into the great research and discussion which the learned magistrate went into, I think the case is concluded by *R. v. Ruscoe* (1), which shows that "stage carriage" is an expression known to the common law.

- Then it was said that as wanton and furious driving is expressly mentioned in s. 48, a man cannot be convicted of anything in relation to the driving of a stage carriage unless his driving amounts to wanton or furious driving. The words of the section, however, seem to me to be perfectly clear. They are :

- If the driver or conductor or guard of any stage carriage . . . shall through intoxication or negligence, or by wanton and furious driving, or by or through any other misconduct, endanger the safety of any passenger or other person, or shall injure or endanger the property of the owner or proprietor of such stage carriage or of any other person, every such person so offending shall forfeit £5.
- If it is found that the driver injured the property of his master through negligence, and there is evidence on which the magistrate could so find, we cannot say that wanton or furious driving must be proved before he can be convicted. For these reasons, I think the magistrate came to a correct determination in point of law and this appeal must be dismissed.

- SINGLETON, J. :** I agree.

- DENNING, J. :** I do not wish it to be supposed that when a section of an Act is repealed it cannot thereafter be considered when other provisions in the Act fall to be interpreted, but in this particular instance I regard s. 5 of the Act of 1832 as putting artificial limitations on what would otherwise be a stage carriage. The effect of the Act of 1869 was to remove those artificial limitations, leaving the term "stage carriage" in its full scope, which is sufficiently wide to cover this case. I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Pattinson & Brewer*, agents for *A. V. Hammond & Co.*, Bradford (for the appellant) ; *Torr & Co.*, agents for town clerk, Bradford (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

JACKSON STANSFIELD AND SONS v. BUTTERWORTH.

[COURT OF APPEAL (Scott and Asquith, L.JJ., and Jenkins, J.), May 7, June 14, 22, July 19, 1948.]

Building—Control—Licence—Need to be in writing—Permitted cost of work exceeded—Oral permission covering excess—Retrospective effect of licence—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927 (as amended)), reg. 56A (2), (6).

By the Defence (General) Regulations, 1939, reg. 56A (2), the carrying out of any building specified in sched. VI, pt. III, to the regulations "shall be unlawful except in so far as there is in force in respect thereof a licence granted by" the Minister of Works. By para. (6): "If any . . . work is carried out in contravention of" *inter alia* para. (2) "the person at whose expense . . . the work is carried out, and . . . the person undertaking . . . the carrying out of the work . . . shall each be guilty of an offence against this regulation." Paragraph (6A) imposes a fine and imprisonment for a contravention of the regulation.

On May 10, 1946, the plaintiffs, a firm of builders, obtained a licence under reg. 56A (2), on behalf of the defendant, for work (described as "repairs to garages") to be carried out at a total cost not exceeding £35. The licence was in writing, in the form prescribed by the Minister of Works, and was granted by the borough surveyor on behalf of the local authority which was empowered to act for the Minister in the matter. While carrying out the work, the plaintiffs found that the total cost would exceed £35 and they obtained oral permission from the borough surveyor to complete the work, provided that the total cost did not exceed £100. The work was, accordingly, completed, the total cost amounting to £69 18s. 2d. Some months later, in response to a written application by the plaintiffs, the borough surveyor issued a written licence, expressed to be supplementary to the licence of May 10, 1946, for "further repairs to garages" at a total cost not exceeding £34 18s. In an action by the plaintiffs to recover the cost of the work, the defendant contended that the plaintiffs were debarred from recovering the excess over the £35 as there was no licence in force in respect thereof as required by reg. 56A (2), and the additional work, was, therefore, illegal.

HELD: (i) the "supplementary" licence was of no effect, because the wording of reg. 56A (2) prevented a licence having any retrospective effect and required the licence to precede the work.

(ii) [JENKINS, J., *dissenting*]: in view of the fact that persons contravening reg. 56A were liable to prosecution and that the effective enforcement of the licensing system could not be achieved except by means of written licences, the licence contemplated by reg. 56A (2) must be a written document, and, accordingly, the oral permission given to the plaintiffs did not amount to a licence within the meaning of the regulation.

(iii) therefore, the additional work was illegal and the plaintiffs were debarred from claiming payment for it.

Per SCOTT, L.J.: *Observations* on (a) the desirability of publicity in regard to anything that amounts in law to sub-delegated legislation, and (b) the validity of the practice of delegating to the Minister of Health or to local authorities the powers given to the Minister of Works.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 56A, see HALSBURY'S STATUTES, Vol. 39, pp. 1001-1004.]

Cases referred to:

- (1) *Blackpool Corpn. v. Locker*, [1948] 1 All E.R. 85; [1948] K.B. 349.
- (2) *Bostel Brothers, Ltd. v. Hurlock*, [1948] 2 All E.R. 312.

APPEAL by the defendant from an order of His Honour JUDGE BATT, made at Todmorden County Court on Sept. 23, 1947, allowing the plaintiffs' claim for the cost of building work done by them for the defendant. While carrying out the work under a written licence, issued under the Defence (General) Regulations, 1939, reg. 56A (2), the plaintiffs found that the total cost of the work would exceed the amount covered by the licence. They obtained oral permission from the local authority to proceed with the work and later, after

the work was completed, they obtained a written licence in respect of the additional work. In an action by the plaintiffs to recover the cost of the work done, the defendant claimed that the plaintiffs were debarred from recovering the cost of the additional work as there was no licence in respect of it, and, therefore, it was illegal. The Court of Appeal (JENKINS, J., *dissenting*) now allowed the appeal by the defendant from the judgment of the county court judge in favour of the plaintiffs. The facts appear in the judgment of

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SCOTT, L.J.

Beaton for the defendant.

W. K. Carter for the plaintiffs.

The Attorney-General (Sir Hartley Shawcross, K.C.) and Colin Pearson as amici curiae on behalf of the Minister of Works.

Cur. adv. vult.

July 19. The following judgments were read.

B

SCOTT, L.J. : This is an appeal by the defendant from a judgment of His Honour JUDGE BATT sitting in the Todmorden county court in which he gave judgment in favour of the plaintiffs for £69 18s. 2d. and costs in respect of work done for the defendant during a fortnight ending July 11, 1946, on alterations or repairs to his garage. That work fell within the category of the Defence (General) Regulations, 1939, reg. 56A (2), and sched. VI, pt. III, of the then current Defence Regulations. The paragraph provides that such work :

C

... shall be unlawful except in so far as there is in force in respect thereof a licence granted by the Minister.

Under para. (1) (c) of that regulation the Minister was identified as the Minister of Works. On May 10, 1946, a licence in respect of the work then proposed to be done, described as "repairs to garages," was issued by one S. Greenwood, the borough surveyor of Todmorden, purporting to sign on behalf of the Minister of Works, at a "total cost not exceeding £35." The licence was addressed on its face to the defendant "per" the plaintiffs. The work done and sued for amounted to £69 18s. 2d., exceeding the licence limit by £34 18s. 2d. and was, therefore, made unlawful by the express provision of reg. 56A. There were certain other issues raised below, but they turned on questions of fact, were decided in favour of the plaintiffs, and are now not open before us. The only issue we have to decide is the defence of illegality. For the defendant, I gather, it was contended below that the provision I have quoted made the whole work unlawful, and, therefore, debarred the plaintiffs from recovering even up to £35, but before us the defendant was content to limit his contention to the excess over £35. Regulation 56A (6) provides :

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If any . . . work is carried out in contravention of any of the first three paragraphs of this regulation the person at whose expense . . . the work is carried out, and (where he is not the same person) the person undertaking . . . the carrying out of the work, and . . . any architect, engineer or other person employed in an advisory or supervisory capacity in connection with . . . the carrying out of the work shall each be guilty of an offence against this regulation . . .

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Paragraph (6A) imposes liability to fine and imprisonment. On Jan. 16, 1946, the Minister of Works, in exercise of his sub-delegated powers to legislate by order conferred by reg. 56A, para. (2), made the Control of Building Operations (No. 6) Order, 1946 (S.R. & O., 1946, No. 86), which permitted such work to be carried out without a licence during the period running from Feb. 1 to July 31, 1946, up to £2 per month, and, in addition, allowed unlicensed work up to a further £10. The whole of the work was carried out in a fortnight, it being finished by July 11, 1946. The limit for unlicensed work was, therefore, £12, but there is no provision, either in that order or in the regulation which authorised the addition, of any amount for such unlicensed work to the licensed limit. I read the regulation and order together as meaning that, when the figure for work proposed exceeds the limit allowed by the order, the whole has to be licensed. That order, therefore, has no relevance. At some stage during the carrying out of the work, after it was clear that the total was going to exceed £35, the plaintiffs saw the borough surveyor and received an unwritten assurance from him that "if the work did not exceed £100 they might carry it out." I suspect that this assurance was due to a misreading by him of a circular by the Minister of Health, to which I shall refer presently, but his

G

H

reason is irrelevant. It was contended for the plaintiffs (i) that this assurance amounted to an oral licence, and (ii) that there was nothing in the delegated legislation to require the licence to be in writing. For reasons which I will state later, I think the licence contemplated in the regulation must be a written document. I, therefore, reject the second contention, but I accept the first.

Finally, on Apr. 25, 1947, long after the work had all been carried out, the plaintiffs obtained from the same surveyor a further licence, *viz.*, for £34 18s. 2d., the unlicensed balance over the £35. It was marked "supplementary to" the earlier licence. The wording, however, of reg. 56A, para. (2), prevents any such licence having any retrospective effect, because it makes the doing of the work unlawful "except in so far as there is in force" the necessary licence, and that obviously means "there then is." The licence must precede the work.

The appeal, therefore, resolves itself into the one question whether the oral permission given by the borough surveyor had the legal effect of a licence issued by or on behalf of the Minister of Works. The regulation contains no express provision on the point, but it makes four different persons standing in different relationships to the work guilty of a criminal offence, punishable by fine and imprisonment, if there is not, while the work is being done, in existence a valid licence. That provision seems to me necessarily to pre-suppose the absence of any difficulty in ascertaining from the licence itself exactly what the work was in respect of which each of those persons is liable to be prosecuted. In addition, it must be borne in mind that the work may be very extensive. If the licence were merely an unrecorded oral permission, the certainty needed for a criminal prosecution would not be a practical possibility. Finally, the expression, "a licence," contemplates a concrete thing, *i.e.*, a document. Had oral permission been the intended condition, different language would have been used. For these reasons I think that the only reasonable construction to put on the words in the regulation is that the licence must be written.

That a written licence was called for by reg. 56A was, I think, certainly assumed by the Minister of Works when making the orders under it. I do not, of course, suggest that the mere fact that he construed the words "a licence" in a particular way has any legal relevance to the problem of interpretation which we have to determine, but the literature issued to the local authorities of the country on the subject by the Minister of Health, evidently acting in co-operation with the Minister of Works, and also by the Minister of Works, may have a bearing on that problem, if, as I think is plainly the case, the contents of that literature throw light on the nature of the mischief to which the legislation contained in the regulations and order was addressed. As I have already said, I see personally no ambiguity in their language in regard to the point at issue, but my brother JENKINS does, and he solves the problem in the opposite way to mine. That being so, I recognise at once that I may be wrong in thinking the phrase unambiguous, and, if it is ambiguous, the contents of that literature, put before us by the parties as showing the way in which the legislation was being administered, may properly be looked at if it throws light on the nature of the mischief to which the licensing system was directed. That, in my view, is, in fact, the position. I, therefore, turn to it as an aid in the interpretation of the words, which, for that purpose, I will assume are ambiguous. I am satisfied that the method of administering reg. 56A through the local authorities, in fact adopted by the government, was satisfactory in itself—indeed, I think it was the best and, possibly, the only practicable way of doing it. Its relevance to the single issue in the appeal lies in the one fact which emerges from my detailed examination of it, namely, that the effective enforcement of the licensing system could never be achieved except by means of written licences. The description of the work licensed and the prosecution of offenders who departed from the specification of the work described were essential if the system was to achieve the purpose of controlling the use of materials and labour as intended by the regulation. That is my answer to the view taken by my brother JENKINS. I regret the length of my judgment, but I hope that the few incidental comments which I feel bound to make may be of public use.

Our attention was called to the many orders made by the Minister of Works.

They are all mentioned in BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE. In BUTTERWORTH'S note to the Control of Building Operations (No. 10) Order, 1947, (which appears to have been the eighth successive order issued under reg. 56A and the second following on the revocation of the Control of Building Operations (No. 6) Order, 1946), immediately after the epitome of orders by the Minister of Works there appear, under the title of "Licensing by Local Authorities," references to "circulars" issued by the Minister of

A Health. At the hearing we were puzzled as to how the Minister of Health came into the statutory picture of sub-delegated legislation under reg. 56A, and as to how local authorities were empowered to act as licensing authorities. We, therefore, adjourned the hearing for the parties to obtain the necessary information and copies of the relevant documents, including that Minister's "circulars." As a result, we have gradually received from the solicitors to the parties, with the courteous assistance of the Treasury Solicitor, a sufficiently complete set of documents. It includes the actual licence of 1946 and the belated one of 1947. In the collection are a series of successive circulars issued by the Minister of Health to all local authorities, starting with No. 123 of July 5, 1945, and ending with No. 8 of Jan. 20, 1947. Of these, circular No. 50/1946 is the one directly applicable to work done in June and July, 1946. In addition, we have been supplied with two printed forms issued by the Minister of Works, whether directly or through the Minister of Health, to all local authorities, one being entitled "Application for a Building Licence," and the other being the form of the licence itself. These two forms were, I infer, used universally in connection with the directions and instructions contained in the circulars. We have also received three printed booklets, issued by the Minister of Works to local authorities, either direct or through the Minister of Health, the first two entitled "Notes for Guidance of Local Authorities" and "Notes for Guidance of Applicants." Like the Minister of Health's "circulars," the "Notes for Guidance of Local Authorities" were issued from time to time by the Minister of Works and given serial numbers "C.L.A.1 to 5," No. 3 being the one in force in June, 1946, and No. 5 having been issued in April, 1947. No. 5 is headed "Confidential: for circulation to local authorities only." The "Notes for Guidance of Applicants" appear not to have been issued till September, 1946, and, therefore, do not throw any light on this appeal. It would seem, therefore, that at the time material for our consideration there was nothing published for the information of the public. The copies of the "circulars" supplied to us were type-written, so, perhaps, they were never printed. Circular 123 of 1945 makes it clear beyond all doubt that the Minister of Health understood reg. 56A as requiring a written licence, and I take it for granted, as the Minister of Health had no statutory powers entrusted to him by the regulation, that his circulars purporting to relate to reg. 56A were drafted by the Minister of Works, or, at least, in direct collaboration with his department and with his approval, so that this court may assume complete knowledge by him of their contents. The circulars are so important, especially in the information they contain about the machinery of licensing (which was, apparently, withheld from the public) that I think I ought to cite illustrative passages. I begin with No. 123/45 which, though cancelled, led up to No. 50 of 1946:

1. I am directed by the Minister of Health to say that, as local authorities generally will be aware, the licensing limit prescribed under Defence Regulation 56A has already been reduced by statutory orders from £100 to £10 in the London Civil Defence Region and in certain other specified districts in the Home Counties. The reductions were made primarily with a view to concentrating all available labour in the hands of the local authorities concerned for the urgent repair of war damage to houses. 2. When the reductions were made the local authorities agreed to undertake the licensing of work generally between the limits of £10 and £100 per year in their respective areas. 3. Apart from the repair of war damage, there are other essential needs, especially those of housing, which have to be met throughout the whole country, and it is necessary to make building and civil engineering labour available for these to the utmost practicable extent. It has been decided, therefore, to extend the reduction (subject to what is said below) throughout England and Wales, and, after consultation with the Association of Local Authorities, to invite all local authorities to undertake the necessary licensing of work up to £100 in the same way as it is now undertaken by local authorities in the London Civil Defence Region and the other districts referred

to in para. 1 above. Local authorities, because of their knowledge of local needs, are in the best position to judge to what extent licences can be allowed from time to time without prejudice to housing and other essential work; and their handling of licensing applications will give them the power themselves to ensure the necessary concentration of local labour on such work. 4. The arrangements set out in this circular will relate to the period from Aug. 1, 1945, to Jan. 31, 1946. They will be subject to review in respect of subsequent periods . . . 7. The Minister feels sure that the local authorities whose districts are now being affected by the reduction for the first time will be willing to undertake the licensing of work up to £100 per annum, in the same way as the local authorities referred to in para. 1 above have undertaken the task. The Minister of Works accordingly authorises the clerk of the council or other officer properly appointed by the council to issue licences on his behalf for building and civil engineering work on any property, whether residential or not, situated within the area of the council, the cost of which exceeds the "free allowances" as set out in para. 5 above, and does not exceed £100. 8. All applications to carry out building, etc., work the cost of which exceeds £100, will be dealt with as heretofore by the Ministry of Works. 9. It is anticipated that in practice the local authorities will deal with the vast majority of applications up to £100, but it will be necessary for the Minister of Works to retain, at least for the present, his right to issue licences up to that sum concurrently with the council, for example, in cases where work must be done at the request of a government department . . . 11. The broad policy in regard to licensing is that the amount of work allowed in each area should be related to the labour available after the needs of all works of higher priority have been met, in such a way as to ensure that all the available labour in the district is absorbed and that unemployment is prevented. Local authorities are requested to keep in close touch with the local officers of the Ministry of Works and the Ministry of Labour so far as necessary to secure that this object is attained. In conformity with this principle the works to which local authorities should grant priority for licences would include the urgent repair of war damage to both houses and other property, the provision of other immediate housing needs, including maintenance, repair and conversion, the safeguarding of health, the prevention of danger to the public, and for dealing with emergencies arising in connection with building structures.

The next document in order of date is "Notes to Local Authorities," No. C.L.A.3, issued in July, 1945. It contains the following references to licences:

8. Issue of Licences. The circumstances to be applied in the issue of licences are given in the Ministry of Health circular No. 123/45. The licence is a legal document, and in the event of failure to observe its provisions, it will be used as the basis of proceedings. The licence must therefore describe clearly the work to which it relates, and impose a limit on the cost thereof. It must always be made out to the building owner and, where any other person has signed the application form on behalf of the owner, c/o that person. Licences should be signed "on behalf of the Minister of Works" by the duly authorised officer of the council and should be rubber stamped to indicate the name of the local authority. Licences should not bear facsimile or "*per pro*" signatures . . . 15. Returns. It is not desired that local authorities should keep elaborate records of applications they receive for licences, but it is suggested that a separate reference number shall be allocated to each case and that an alphabetical record of addresses should be kept so that the position in regard to the building work on the properties concerned can be readily ascertained. Each licence should show in bold letters in the top right-hand corner whichever of the following symbols is appropriate: [indicating class of work]. Two carbon copies of the licence should be taken.

The "C.L.A." series emanated direct from the Ministry of Works.

We get further light thrown retrospectively on the reasons why a written licence was essential, even at the time when reg. 56A was passed, from para. 8 ("Issue of Licences") and para. 9 ("Issue of Supplementary Licences") contained in C.L.A.5, issued in April, 1947. That edition of "Notes to Local Authorities" was for some curious reason headed: "Confidential (for circulation to local authorities only)."

8. In the event of failure to observe the provisions of a licence, the licence may be required to be used as the basis for proceedings. It is, therefore, vital for the exact work that is permitted by the licence to be described in detail in the licence itself or in a schedule or specification expressly referred to in the licence. In describing the work the use of vague expressions such as "etc." must be avoided. Licences should be signed "on behalf of the Minister of Works" by the duly authorised officer of the council, and should be rubber stamped with the name of the local authority. Licences should not bear facsimile or "*per pro*" signatures. 9. If, through unforeseen circumstances, it is found that additional work is necessary during the progress of the job, or that the cost will exceed the expenditure authorised by the licence, a supplementary licence will be needed. In order to avoid the excuse frequently put forward in prosecu-

tion cases in the past that work in excess of the licence was carried out because, it is alleged, verbal permission was obtained from the licensing authority, the public has been informed that provided application for a supplementary licence is made by registered post work may continue pending the decision of the licensing authority (see paras. 26 and 27 of the Notes for Guidance of Applicants (P.L.49)).

I now come to the directly relevant circular 50 of 1946. It is addressed to "All Local Authorities," and begins thus :

A I am directed by the Minister of Health to say that following the extension for a further period of their licensing functions referred to in circular 237/45, local authorities continue to be responsible for the licensing of the following classes of civil building work—(a) all work costing not more than £100 whether connected with new houses or not, provided of course that such work is not within the "free" limits of £10 and £2 per month.

B Between paras. 10 and 11 appears a sub-heading "Licences for Maintenance and Repairs." Paragraph 11 ends with this sub-paragraph :

The Minister's attention has been drawn to the fact that many licences have been issued for vague unspecified work. It is imperative that the nature of the work should be described on the licence in sufficient detail to enable the contractor and the licensee to appreciate the extent of the approved work.

C The three italicised words of themselves prove for certain that on that date the Minister of Health and the Minister of Works both understood the regulations and orders to require a written licence.

D The bundle supplied to us also contains a third circular—8/47 of Jan. 20, 1947, presumably included in the bundle because of the so-called licence issued, in the present case *ex post facto*, on Apr. 25, 1947. That circular emphasises still further the impossibility of reg. 56A curing the mischief without a written licence. The first paragraph of appendix A attached to that circular begins thus :

E All local authorities—especially now they have prosecution duties—will appreciate the necessity for ensuring that building licences are carefully worded. Building licences are legal documents which may at any time become the subject of judicial scrutiny. It is, therefore, important that the licence should clearly state the work which it covers and that it should not contain any ambiguity of expression. The following points may afford guidance to local authorities in the issue of licences : 1. The licence should be made out in the name of the building owner (*i.e.*, the person paying the cost of the work) and care should be taken that it is properly completed. A copy of the licence should be sent to the builder indicated on the application form and the original licence should be sent to the building owner. An exact copy of the licence should be retained in the local authority's file of the case and a copy should be sent to the regional licensing officer of the Ministry of Works in the usual way. 2. The work intended to be covered by the licence should be described in detail on the licence itself or on a schedule or specification annexed to, and expressly referred to in the licence . . . 4. Loose or ambiguous wording of a licence may completely stop the possibility of proceedings in the event of failure to observe its provisions.

The bundle of circulars supplied to the court ends with a letter dated May 24, 1948, written on behalf of the Treasury Solicitor to the solicitor to the defendant. It contains this passage (referring to the Minister of Works) :

G Local authorities do not grant building licences and the Minister has not delegated authority to them to do so. Building licences are granted by the Minister, but he has authorised officers appointed for this purpose by local authorities to signify his granting of the licences. Such officers sign licences on behalf and in the name of the Minister and s. 7 of the Emergency Powers (Defence) Act, 1939, would apply.

H There are important further matters for consideration about the position both of the Minister of Health and of the local authorities in relation to licensing. ✓ The circulars are, in character, mainly administrative, but I think that in some aspects they go beyond administration and become legislative. If I am right in so thinking, whence did either Minister derive the latter power ? A somewhat similar question about legislative circulars of the Ministry of Health came before this court for consideration in *Blackpool Corporation v. Locker* (1) where the defendant, a private individual, was told by the local authority and by the regional officer of the Ministry of Health that the circular of the Minister of Health (which, in fact, contained the sub-delegated legislation) was confidential and not open to his inspection as of right. Indeed, in the corporation's affidavit of documents privilege was claimed for the Minister of

Health's circular to local authorities as mere "professional communications." The "circulars" of the Minister of Health in the present case have been withheld from publication by His Majesty's Stationery Office as Statutory Rules and Orders, presumably because they are merely administrative in character, or, where legislative, because they constitute sub-delegated legislation falling outside the purview of the Statutory Instruments Act, 1946, and previous practice. It is to be observed that not one of the three circulars contains any reference to any legislation, Parliamentary or delegated, conferring on the Minister of Health power to play any part at all in operating reg. 56A, nor have we been told of any enactment allowing the Minister of Works to transfer or delegate his powers to the Minister of Health. A

The position seemed to us so confused that we invited the assistance of the Law Officers, and the Attorney-General kindly himself appeared, and in his address to us as *amicus curiae* submitted his interpretation. I think I do no injustice to his exposition if I say that it amounted to the broad contention (i) that the Minister of Works is entitled to choose his agents for the office of licensing as he likes: (ii) that he used the existing organisation of local authorities, and the existing constitutional relationship between them and the Minister of Health, as a channel of communication by which he selected as his agents persons in the employment of the local authorities and selected by them at his request. In a broad sense I think that does represent the actual practice, and I concede without hesitation or qualification that it is on the whole the most convenient and the most practical system for the government and the public alike, but subject to two qualifications—(A) its secrecy and (B) its doubtful validity. C

(A) *Its secrecy.* At the date material to the present proceedings, namely, June, 1946, there were no means at all open to the public affected by which a private owner whether an individual or a company, even with the assistance of his lawyer, could, as of right, ascertain what the detailed provisions were which in practice governed and limited his right or effective power to get a licence, nor whether they were legislative or merely administrative. In that respect the position is similar to that exposed in the *Blackpool* case (1). The truth is that, as emphasised in the Report of the Committee on Ministers' Powers (Cmd. 4060 of 1932), while in our modern constitutional practice delegated legislation is both necessary, convenient and desirable—for the reasons there mentioned—safeguards are essential, especially that its content should always be within public knowledge. In my view, compulsory publicity is the only preventive of many of those evils which most people have in mind when they speak of "bureaucracy" with an accent of censure. And where—as, in my opinion, is, in certain respects, the case as to parts of the official literature now before the court—administration is mixed up with sub-delegated legislation and none of the mixture is made public, it is really unfair and, indeed, unjust to the public. D

(B) *Its doubtful validity.* Regulation 56A is delegated legislation, but it, in turn, delegates, within certain narrow limits, power to the Minister of Works to make sub-delegated legislation by order. Parenthetically I observe that such orders, being sub-delegation, do not call for publication under the Statutory Instruments Act, 1946, but the Minister of Works very properly had them so published, though not bound to do so, thus recognising the interest of the public in publication. But I regard the Minister of Health's "circulars" and the Minister of Works' "notes for guidance of local authorities" as also containing sub-delegated legislation in two respects—(i) in the elaboration of the instructions about licences (a) in the circulars and (b) in the "notes" for guidance, and (ii) in the effective delegation of power and discretion to the local authorities to perform the function of licensing which the regulation had entrusted to the Minister of Works, and to no other authority. As to (i) it is patent that the licensing instructions in the circulars and "notes" were intended to be enforced—in other words, to bind the public, and that means legislation. As to (ii) the position is this. The regulation authorised the Minister of Works and no one else to operate its provisions. Those provisions, of course, authorised him to choose his own servants for the detailed tasks involved, but they did not authorise him to transfer his own functions either to the Minister of Health or to the local authorities, and it is interesting to observe in the E F G H

letter from the Treasury Solicitor's office, which I have quoted, that a denial appears of any such transfer to local authorities. But, in my opinion, both the "circulars" to the local authorities from the Minister of Health and the "notes" for their guidance from the Minister of Works in fact do that; for they confer a very wide discretion on the local authorities themselves, and in the circulars and "notes," throughout the series, and especially in those of 1947, the function of prosecuting is plainly entrusted to the local authorities. For these reasons I am satisfied, in spite of the argument of the Attorney-General, that some of the directions there contained were intended to have legislative effect, although I accept the Attorney-General's contention that the regulation contained no such power of delegation. If it be argued that the Minister of Works could choose his licensing officers, I reply that he could have, but did not purport to do so. The delegation to another Minister or to local authorities of powers of administration and discretion was not within the authority of the Minister of Works. *Delegatus delegare non potest*, but the intention to delegate power and discretion to the local authorities is clear. The method chosen was convenient and desirable, but the power so to legislate was, unfortunately, not there.

I have discussed these aspects at length, because, if the legislative language of the circulars had, under sub-delegated powers, possessed legislative force, the one issue in the appeal (of written *versus* oral licence) would have been decided forthwith by that language in favour of the defendant. As it is, I have prayed in aid the facts which appear in the circulars and "notes" in order to establish the real nature of the process and requirements of licensing, and thereby to demonstrate the mischief to which the regulation by His Majesty in Council was addressed. The remedy for that mischief, in my view, necessitated a written licence, and, therefore, if, contrary to my own view, the phrase "a licence" does not, in its context, unambiguously demand a written licence, I pray in aid the mischief to solve its ambiguity and so arrive at the same result.

I have said all that is necessary to decide the appeal in the defendant's favour, but there is a public aspect on which I feel bound to add a few observations. Both the circulars of the Minister of Health and the "notes" of the Minister of Works are largely mandatory in character, and they purpose to sub-delegate to the local authorities the whole statutory function of licensing, including the right to choose any servant of their own to act as licensing officer as long as he signs in the name of the Minister of Works. Whether and where the contents pass from the administrative to the legislative it may not always be easy to say, but the whole of the procedure was in practice obligatory from the point of view of the uninformed public, who could not lawfully do any building work without first getting a licence, and till September, 1946, that public had no access to published information beyond reg. 56A and the laudably concise orders thereunder of the Minister of Works. That position of enforced ignorance was very hard and, I venture to think, constitutionally improper. The official of the local authority who issued the licence purported to sign as agent for the Minister of Works, but except for that nominal observance of reg. 56A, the whole elaborate system of compulsory control was handed over to the discretion of the Minister of Health, who had no statutory position whatever, though that disability would not be guessed by the local authorities. Indeed, how could Parliament itself hold the Minister of Health responsible for the misdeeds of a local authority under reg. 56A? And *a fortiori* how could Parliament hold the Minister of Works responsible for the misdeeds of a local authority whose responsibility to the central government under our constitution is purely statutory, and owed only to the Minister of Health, the successor of the old Local Government Board? The basic theory of the English constitution seems, on the face of those inter-departmental arrangements, to have been disregarded.

The Attorney-General urged that the Minister of Works could appoint what servants or agents he liked to act as licensing officers. That is no doubt correct, but the facts seem to show that he did not do anything of the kind. He seems to have told the Minister of Health that he authorised him to hand over the licensing of the minor building work (below £100) lock, stock and barrel to the local authorities, for that is what the Minister of Health's circulars,

if not the Minister of Works' "notes," in fact say. The *gravamen* of these criticisms is that when, especially in times of crisis, the government has to seek a solution of its difficulties in an elaborate system of delegated and sub-delegated legislation, it is essential that there should always be publicity. I do not think there is much to criticise in the expediency or reasonableness of the secret instructions sent out by the Minister of Works or the Minister of Health to the local authorities beyond their doubtful validity under the two heads I have mentioned, but secrecy is wrong, for there seems to me to be a strong case for saying that the system of the Statutory Instruments Act, 1946, should be extended to cover anything that in law amounts to sub-delegated legislation. The appeal must be allowed with costs here and below in regard to the excess beyond the £35 of the valid licence.

ASQUITH, L.J. : I have come to the same conclusion as my Lord. Excluding from consideration anything outside the four corners of reg. 56A, and looking merely at the language it employs and the nature of the mischief at which (judging from such language) it is aimed, it seems to me that a written licence is contemplated, and that for the following reasons. The expression "a licence granted by the Minister" seems to me plainly to envisage a physical object—a written instrument—like a motor licence, a gun licence, or a dog licence. The case might have been different if the regulation had said work beyond a certain value should not proceed without "leave or licence" of the Minister, a phrase which has far less physical connotation. In the second place, the mischief struck at by the regulation is by plain implication the uneconomic use of building materials and labour at a time of war scarcity. It cannot be reasonably construed as requiring a type of licence which would be wholly unsuitable for the purpose where, as in multitudes of cases, permission is sought for elaborate and complex building operations—a type of licence which would make proof of offences, such as the regulation creates, in such cases almost impracticable. I do not underrate the importance of the presumption (on which my brother JENKINS lays stress in a dissenting judgment, which I have had the advantage of reading) that, if a provision creates an offence and its language is ambiguous, the ambiguity should be resolved in favour of the subject, but in the present case the factors I have referred to appear to me to outweigh this consideration. Like SCOTT, L.J., I would allow the appeal.

JENKINS, J., [having stated the facts] : The sole question in the appeal is whether this defence of illegality is well founded or not. If the matter rested on the written licence of May 10, 1946, alone, it would, I think, be plain that the defence of illegality would be unanswerable as regards this excess. In support of this conclusion it is only necessary to refer to the recent decision of the Court of Appeal in *Bostel Brothers, Ltd. v. Hurlock* (2) which is precisely in point. But at the material time the plaintiffs, in addition to the written licence of May 10, 1946, had in the form of the oral permission obtained from the borough surveyor what, in my view, clearly amounted to an oral licence covering the excess. The defence of illegality must, therefore, fail unless it can be shown that reg. 56A (2) not merely makes the carrying out of the work of the specified kinds "unlawful except in so far as there is in force in respect thereof a licence granted by the Minister," but makes the carrying out of such work unlawful except in so far as there is in force in respect thereof a licence in writing granted by the Minister.

On this question we have had the assistance of the Attorney-General who has submitted that the regulation does not require the licence to be in writing, and, accordingly, that an oral licence is sufficient to prevent the work in respect of which it is given from being unlawful under the regulation, although, no doubt, as a matter of administrative practice, writing would normally be used, and the administrative instructions issued by the Minister are framed on the footing that licences are, as a general rule, at all events, to be in writing. For my part, I accept this submission. I can find nothing in reg. 56A which either expressly or by necessary implication constrains me to construe para. (2) as demanding that the licence from the Minister required in order to prevent the carrying out of the work of the specified kinds from being unlawful should be in writing. The regulation creates a wholly new offence punishable by fine

and imprisonment, and I think it should be construed strictly in favour of the subject. No doubt anyone who relies on an oral licence does so at his peril, owing to the difficulty which may arise of proving that what was said did, in fact, amount to a licence, or of proving that the work, in fact, done was covered by the terms of the licence orally given, but where it is proved that at the time when the work in question was being carried out an oral licence from the Minister (or his authorised agent) covering it was, in fact, in force, it seems to me that to hold that the person doing the work on the faith of and within the terms of that licence has committed an offence punishable by fine and imprisonment, merely because the licence granted by the Minister in respect of the work, and admittedly in force at the material time, was not expressed or recorded in writing, would involve an extension of this penal regulation beyond what is either warranted by its terms or demanded by the nature of the mischief at which it is aimed.

I do not think the desirability, or, indeed, the necessity, from an administrative point of view, of expressing or recording such a licence in writing suffices to displace the conclusion indicated above. That seems to me to be a matter for the Minister and those operating the control on his behalf. I see no reason why a person who, in fact, obtains an oral licence and, therefore, does all that the regulation literally requires him to do, should be held to have broken the law because the Minister, or those acting for him, have departed from the principles of sound administration in failing to express or record the licence in writing. In the present case there is no doubt that an oral licence to cover work on the garages in excess of £35, provided the total cost did not exceed £100, was in fact given, and although the terms of reg. 56A (2) prevent the supplementary licence of Apr. 25, 1947, from having any retrospective effect, I think at all events it can be taken as confirmation of the fact that the oral licence did relate to the particular work as actually carried through to completion.

On any view, the defence of illegality in the circumstances of the present case is reduced to a pure question of form. The plaintiffs did nothing against the public interest, since it must be assumed that the borough surveyor, before granting the oral licence, had satisfied himself that the case was one in which work up to a maximum of £100 ought to be allowed on the principles laid down by the Minister for the guidance of local authorities, and this is, I think, confirmed by the formal supplementary licence. Bearing in mind the fact that the defendant has had the benefit of the work done, and the desirability in the public interest that contracts should be observed, I ask myself whether the court should regard a purely technical breach of the regulation, involving nothing against the public interest, as sufficient ground for absolving the defendant from his otherwise undoubted obligation to pay for work done on his property and at his request. It is, however, unnecessary for me to attempt an answer to this question, as, for the reasons I have endeavoured to state, I do not think there was any breach of the regulation in this case. I am, accordingly, of opinion that the defence of illegality fails, and, therefore, for my part I would dismiss the appeal.

Appeal allowed with costs, the plaintiffs to have their costs in the court below.

Solicitors: *Lake & Son*, agents for *G. M. C. Thompson*, Hipperholme, Halifax (for the defendant); *Williamson, Hill & Co.*, agents for *Eastwoods, Sutcliffe, Sager and Gledhill*, Todmorden (for the plaintiffs); *Treasury Solicitor* (for the Minister of Works).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

Re No. 12, REGENT STREET, OXFORD.

[CHANCERY DIVISION (Jenkins, J.), July 14, 1948.]

Charities—Educational charity—Assurance to charity exempt from law of mortmain—Assurance or copy not sent to Minister of Education—Whether void after six months from taking effect—Education Act, 1944 (c. 31), s. 87 (1) (2).

The Education Act, 1944, s. 87, provides: “(1) The Mortmain and Charitable Uses Act, 1888, the Mortmain and Charitable Uses Act, 1891, and the Mortmain and Charitable Uses Act Amendment Act, 1892, (which impose restrictions upon assurances of land and personal estate to corporations and to charitable uses) shall not have effect with respect to any assurance of land or of personal estate to be laid out in the purchase of land if the land or the income thereof is to be used for educational purposes. (2) Every assurance of land or of personal estate to be laid out in the purchase of land, including every assurance of land to any local education authority, shall, if the land or the income thereof is to be used for educational purposes, be void unless the assurance or a copy thereof is sent to the Minister [of Education] within six months after the date upon which the assurance takes effect . . .”

The applicants, the president and scholars of Magdalen College, Oxford (a charity exempt from the ordinary laws of mortmain), expended money in the purchase of No. 12, Regent Street, Oxford, but sent neither the assurance nor a copy thereof to the Minister. The Chief Land Registrar refused to register the assurance and, pursuant to his direction, the applicants issued this summons.

HELD: property assured for the purposes of the college was assured “for educational purposes” within s. 87 (2); “assurance” in s. 87 (2) was not to be limited to assurances which had previously been subject to restriction under the Mortmain Acts; and, therefore, the assurance was void unless the notice was given within the stipulated time.

[FOR THE EDUCATION ACT, 1944 (c. 31), s. 87, see HALSBURY'S STATUTES, Vol. 37, p. 199.]

Cases referred to :

- (1) *Rhondda's (Viscountess) Claim*, [1922] 2 A.C. 339; 92 L.J.P.C. 81; 128 L.T. 155; 42 Digest 613, 137.
- (2) *Re Harrow School Governors and Murray's Contract*, [1927] 1 Ch. 556; 96 L.J.Ch. 267; 137 L.T. 119; Digest Supp.

ADJOURNED SUMMONS.

Application by the president and scholars of Magdalen College, Oxford, under R.S.C., Ord. 54D, r. 6, pursuant to a direction of the Chief Land Registrar under the Land Registration Act, 1925, s. 140, and the Land Registration Rules, 1925, r. 298 (2). The applicants asked whether an assurance dated Nov. 3, 1947, of premises known as No. 12, Regent Street, Oxford, by the registered proprietor to the applicants, would become void under the Education Act, 1944, s. 87, if neither the assurance nor a copy was sent to the Minister of Education within 6 months after the date on which the assurance took effect. JENKINS, J., held that s. 87 would so operate.

Geoffrey Cross for the applicants, the president and scholars of Magdalen College, Oxford.

Danckwerts for the respondent, the Attorney-General.

JENKINS, J.: This is a reference under the Land Registration Act, 1925, s. 140, and the relevant Land Registration Rules, concerning the acquisition by the president and scholars of Magdalen College, Oxford, of registered land comprising No. 12, Regent Street, Oxford. The question I have to decide is whether the transfer of that property to Magdalen College ought to be sent to the Minister of Education to be recorded under the provisions of the Education Act, 1944, s. 87. It is contended, on behalf of the college, that s. 87 has no application to the transfer in question. The respondent to the summons is the

Attorney-General who, for the assistance of the court, has put forward reasons why the contention of the college should not prevail.

Section 87 of the Education Act, 1944, in in these terms :

A (1) The Mortmain and Charitable Uses Act, 1888, the Mortmain and Charitable Uses Act, 1891, and the Mortmain and Charitable Uses Act Amendment Act, 1892, (which impose restrictions upon assurances of land and personal estate to corporations and to charitable uses) shall not have effect with respect to any assurance of land or of personal estate to be laid out in the purchase of land if the land or the income thereof is to be used for educational purposes. (2) Every assurance of land or of personal estate to be laid out in the purchase of land, including every assurance of land to any local education authority, shall, if the land or the income thereof is to be used for educational purposes, be void unless the assurance or a copy thereof is sent to the Minister within six months after the date upon which the assurance takes effect : Provided that the Minister may, either before or after the expiration thereof, extend the said period of six months in any particular case, and if the assurance or a copy thereof is sent to the Minister within the extended period the assurance shall not be void or shall be deemed not to have been voided, as the case may be. (3) The Minister shall cause to be kept a record of every assurance which, or a copy of which, is sent to him in compliance with the provisions of this section. (4) In this section the expression "assurance" has the meaning assigned to it by s. 10 of the Mortmain and Charitable Uses Act, 1888. (5) Nothing in sub-s. (2) of this section shall affect the validity of any assurance which has taken effect before the date of the commencement of Part II of this Act.

C It is, I think, material to notice that the Education Act, 1944, s. 87, had been preceded by the Education Act, 1918, s. 46, and the Education Act, 1921, s. 117. Those sections successively dealt with the same subject-matter as s. 87 in substantially similar terms, with the important difference that the precursors of s. 87 did not include a provision avoiding assurances not sent to the Minister to be recorded, so that they contained a statutory requirement with no sanction, if I may use that expression, to ensure that it should be complied with.

D It seems to me that, reading s. 87 by itself and as it stands, it is reasonably plain that an assurance to a foundation such as Magdalen College would fall within its terms. I think there is no doubt that the assurance here in question is an assurance of land which, or the income of which, is to be used for educational purposes, the college being, undoubtedly, in the nature of an educational charity.

E But it is said that, if the section is read in the light of the legislation which preceded it, a necessary implication is raised to the effect that the requirements of the section are not to apply to the college. The argument depends on the exemption accorded to the universities of Oxford and Cambridge and the colleges therein, and incidentally to other foundations as well, from the provisions of the Mortmain and Charitable Uses Act, 1888, and the Mortmain and Charitable Uses Act, 1891. It is said that, reading the section with knowledge of those already existing exemptions, one is constrained to come to the conclusion that the new requirements imposed by the section are only applicable to assurances which were previously subject to the requirements of the Acts mentioned in sub-s. (1). It is said that a new exemption is given, and in exchange a new requirement as regards sending the assurance or a copy thereof to the Minister to be recorded is imposed on the assurances to which the new exemption applies, and that there could have been no object in imposing on assurances already exempt the new requirements which the section indicates.

G It will be remembered that pt. I of the Mortmain and Charitable Uses Act, 1888, concerns the acquisition of land by a corporation in mortmain, *i.e.*, it relates to the law of mortmain properly so called. The universities of Oxford and Cambridge and their colleges had enjoyed a partial exemption from the ordinary law of mortmain, which was an exemption of long standing. That was ultimately made general by the Universities of Oxford and Cambridge Act, 1923, s. 9. Part II of the Act of 1888 relates to assurances of land to or for the benefit of any charitable use, and it imposes certain well known requirements, the scheme of this Part of the Act being to avoid assurances to or for the benefit of charitable uses unless they accord with the requirements therein set out ; *i.e.*, by s. 4 (2) the assurance must take effect immediately on possession, and by sub-s. (3), except as provided by that section, it must be without any power of revocation. Sub-section (6) provides that the assurance must be made by deed executed in the presence of at least two witnesses. Sub-section (7) provides

that it must be made at least twelve months before the death of the assurer. Sub-section (9) provides that if the assurance is of land by a personal estate other than stock in the public funds it must be enrolled in the Central Office. Part III of the Act deals with exemptions and includes, in particular, this exemption in s. 7 :

Part II of this Act shall not apply to the following assurances : (i) An assurance of land, or personal estate to be laid out in the purchase of land, to or in trust for any of the universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any of the colleges or houses of learning within any of those universities, or to or in trust for any of the colleges of Eton, Winchester, and Westminster, for the better support and maintenance of the scholars only upon the foundations of those last-mentioned colleges, or to or in trust for the warden, council, and scholars of Keble College.

The only other provision of the Act of 1888 to which I need refer is the definition of "assurance" in s. 10, which provides :

"Assurance" includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will, or other instrument ; and "assure" and "assuror" have meanings corresponding with assurance.

Reverting for a moment to the Education Act, 1944, s. 87, one finds that "assurance" in that section has the comprehensive meaning which I have just read from the definition clause in the Mortmain and Charitable Uses Act, 1888. I should next refer to the Mortmain and Charitable Uses Act, 1891. That is the Act which enabled land to be assured by will for charitable purposes on certain conditions. The most important section is s. 5 :

Land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners.

Section 10 of the Act of 1891 contains this exempting provision : "Nothing in this Act contained shall limit or affect the exemptions contained in Part III of the Mortmain and Charitable Uses Act, 1888."

The Mortmain and Charitable Uses Act Amendment Act, 1892, provides by s. 1 as follows :

Section 6 of the Mortmain and Charitable Uses Act, 1888, except so much of sub-s. (2) thereof as provides that an assurance by deed, made otherwise than in good faith for full and valuable consideration, must be executed not less than twelve months before the death of the assuror, shall apply to any assurance by deed of land to any local authority for any purpose or purposes for which such authority is empowered by any Act of Parliament to acquire land.

The effect of that Act, therefore, was to accord to local authorities a qualified exemption from the provisions of the Act of 1888. It exempted such assurances from the requirement that assurances must be executed not less than twelve months before the death of the assurer, but not, as I understand it, from the requirements as to enrolment. It is also, I think, material to note that s. 62 of the Charitable Trusts Act, 1853, exempts from the operation of that Act, among other bodies, the universities of Oxford and Cambridge and any college or hall in the said universities of Oxford or Cambridge.

As a matter of history I should next mention that the powers of the Charity Commissioners in relation to educational purposes were transferred to the Board of Education by the joint effect of the Board of Education Act, 1899, and the Board of Education Powers Order in Council, 1900. Therefore, the Minister of Education became the appropriate minister for such matters as the recording of assurances of land to be used for educational purposes, dealt with by s. 87 of the Act of 1944.

The Settled Land Act, 1925, s. 29 (4), altered the procedure as regards the recording of assurances for charitable uses by providing as follows :

Every assurance of land or of personal estate, within the meaning of s. 4 of the Mortmain and Charitable Uses Act, 1888, or if the charitable uses are declared by a separate instrument, then that instrument, shall, in place of the requirements respecting attestation and enrolment prescribed by sub-ss. (6) and (9) of that section, be sent to the offices of the Charity Commissioners within six months after the execution

thereof or within such extended period as the said commissioners may, either before or after the expiration of the six months, in any particular case allow, for the purpose of being recorded in the books of the said commissioners. Where the original cannot be produced, an attested or office copy may be sent instead of the original. This sub-section does not apply to registered dispositions of registered land, or to assurances or instruments required by s. 117 of the Education Act, 1921, to be sent to the Board of Education, and only applies to instruments executed after the commencement of this Act.

- A It will be remembered that s. 117 of the Education Act, 1921, was the then current precursor of s. 87 of the Act of 1944.

The Settled Land Act, 1925, s. 29 (6), then provides this exemption:

This section applies (save as otherwise provided) whether the trust was created before or after the commencement of this Act, but does not apply to land to which the Universities and College Estates Act, 1925, applies.

- B Therefore there is an express exemption from the provisions of the Settled Land Act, 1925, s. 29, which extends to the universities of Oxford and Cambridge and their colleges. Under the Universities and Colleges Estates Act, 1925, the consent of the Minister of Agriculture and Fisheries is required to the acquisition of land by the universities of Oxford and Cambridge and their colleges. That is one of the circumstances relied on by Magdalen College in the present case, in support of the argument that s. 87 of the Act of 1944 does not apply to them.

I have already mentioned the exemption from the ordinary law of mortmain accorded to the universities of Oxford and Cambridge and the colleges therein by the Universities of Oxford and Cambridge Act, 1923. The relevant section is s. 9, which is in these terms:

- D The exemption from the obligation to obtain a licence in mortmain which is given by s. 60 of the universities of Oxford and Cambridge Act, 1877, in respect of certain purchases of land by the university or a college shall extend, and be deemed always to have extended, to all assurances of land to the university or a college.

My attention was also called to a provision in the University of Reading Act, 1926, which provided, I understand, by s. 8 that Reading University should be deemed to have been included in the Mortmain and Charitable Uses Act, 1888, s. 7.

- E Those, I think, are all the relevant statutory provisions to which I have been referred, and I am invited, on the strength of them and on the general principles applicable to the construction of statutes, with respect to which I would refer to the *Rhondda Peerage* case (*Viscountess Rhondda's Claim*) (1), to construe s. 87 as excluding from its operation assurances to the universities of Oxford and Cambridge or the colleges therein for educational purposes on the ground that the intention of the enactment, which is to be gathered, not only from its terms but also from the state of the law when it was enacted, makes it manifest that the section is not designed to extend to these bodies. The bodies, assurances to which are by implication on this argument exempted from the provisions of s. 87, are, as I understand, all bodies which previously enjoyed the exemption from the enactments mentioned in sub-s. (1). The argument turns, first of all, on the meaning of the words "any assurance" in sub-s. (1) of s. 87. The sub-section commences by referring to the various Acts and goes on to describe them in a bracket in this way: "which impose restrictions upon assurances of land and personal estate to corporations and to charitable uses." It is said that the reference in the bracket must be to assurances which are subject to the restrictions imposed by the Acts referred to, and with that I think I am disposed to agree. The sub-section then continues to say that the Act:

- H . . . shall not have effect with respect to any assurance of land or of personal estate to be laid out in the purchase of land if the land or the income thereof is to be used for educational purposes.

It is said, again, that in that passage "any assurance" must refer to assurances previously subject to the restriction. There, again, I think I agree, because the sub-section is granting an exemption, and *ex hypothesi* the assurances to which it applies must be assurances which previously were subject to restrictions which the sub-section is designed to remove. From those arguments as to the meaning of "assurance" in s. 1, a conclusion is adduced that "every assurance" in

sub-s. (2) must have a similar limited meaning. I am invited to construe "every assurance of land and personal estate," and so on, in sub-s. (2), as meaning: "every such assurance as aforesaid of land and personal estate to be laid out in the purchase of land"—in other words, every assurance exempted by sub-s. (1) from the provisions of the Mortmain and Charitable Uses Acts. If, as a matter of construction, I could accept that contention, the result would be that the argument for Magdalen College in the present case must prevail; but I find myself unable to accept it. Sub-section (2) is an independent sub-section which provides, in perfectly general terms, that:

Every assurance of land or of personal estate to be laid out in the purchase of land, . . . shall, if the land or the income thereof is to be used for educational purposes, be void unless the assurance or a copy thereof is sent to the Minister within [the stipulated time].

I can see no ground for construing that, simply as a matter of construction, as limited to the assurances which benefit by the exemption accorded by sub-s. (1). Sub-section (2) seems to me to be perfectly general in its terms, and, so far, therefore, I come to the conclusion that the assurance in the present case, being an assurance of land which, or the income of which, is to be used for educational purposes, is one which is made void by sub-s. (2) unless the requirements of that sub-section are complied with.

Next, it was said that some limited meaning must be placed on the words "for educational purposes" in s. 87. It was suggested that, although an Oxford college is essentially an educational foundation, property assured for the purposes of the college would not be assured for educational purposes within the meaning of that expression in this particular section. That is an argument to which I find myself unable to accede. There are various references in the Education Act, 1944, for instance, in s. 84 of that Act, which show quite clearly that the references in the Act to "education" are in no way limited necessarily to educational establishments which are under the jurisdiction of the Minister. I was referred to the *Harrow School* case (2) in which it was held that the Education Act, 1918, s. 46, reproduced by the Education Act, 1921, s. 117, applied generally to all schools, including public schools. Of course, a public school is a different thing from an Oxford college, but I think that the decision in that case and the reasoning on which ASTBURY, J.'s judgment proceeded, supports my view that the words "for educational purposes" in the Act of 1944 are wide enough to include purposes of an Oxford college.

I can, therefore, find nothing in the construction of the section to warrant my introducing into it the limitation or qualification which I am invited to introduce, nor, as it seems to me, is there anything so unexpected or surprising or absurd in including assurances to these universities and colleges in the provisions of s. 87 as to make it possible for the court to impose such a qualification. I see nothing unreasonable in a section which replaces exemptions accorded to various educational foundations by a general exemption applicable to all assurances for educational purposes. I see nothing unreasonable in a provision which, as a corollary to that new and all-embracing exemption, imposes a new obligation which is to extend to all assurances for educational purpose, whether the particular assurances would have been exempt under some earlier provision or not.

It was suggested that strong support could be found for the argument on behalf of the college in the Universities of Oxford and Cambridge Act, 1923, s. 9, and in the University of Reading Act, 1926, s. 8. The argument founded on those sections proceeds thus. It is said that both s. 9 of the Act of 1923 and s. 8 of the private University of Reading Act, 1926, assume that there was still some virtue in the exemption from the Mortmain and Charitable Uses Act, 1888, and the Mortmain and Charitable Uses Act, 1891, in relation to educational charities. It follows from that, that the draftsman of these sections must have taken the view, and the legislature must have taken the view, that s. 87 of the Education Act, 1944, or the corresponding sections of the Act of 1918 and the Act of 1921, did not apply to the institutions already covered by the old exemptions. That argument, as it seems to me, really goes no further than to raise a doubt whether it was appreciated that s. 87 had the effect of including in its operation the bodies already exempted from the Mortmain

and Charitable Uses Acts. I do not think the argument goes any further than that, and I certainly do not regard it as enough to displace what seems to me to be the meaning of the language used in s. 87. Reliance was also placed on the inclusion in sub-s. (2) of an express reference to assurances of land to local education authorities. The argument based on that, as I understand it, was that local education authorities, independently of s. 87, enjoy a personal exemption from the provisions of the Mortmain and Charitable Uses Acts, and for that reason the draftsman considered it necessary to include an express reference to local education authorities. It is said that that shows that if it had been intended also to include the universities of Oxford and Cambridge and the colleges therein, the draftsman would have referred to them specifically also. For my part, I do not think there is really very much force in that argument. It seems to me that the express reference to local education authorities can be accounted for by the fact that the Act of 1892 contains special provisions relating to assurances to local authorities, not merely for educational purposes but also for any purpose or purposes for which the authority was empowered by any Act of Parliament to acquire land. That being so, it seems to me quite natural to include the reference to "local education authority" so as to make it clear that the appropriate recording authority as regards assurances to local authorities, when for educational purposes, but not otherwise, was to be the Minister of Education. I cannot, therefore, regard that argument as having any real bearing on the question which I have to decide.

Looking at the matter as a whole, I think the very most one can say is that that it is, perhaps, doubtful whether it was really intended to impose the requirements of sub-s. (2) of s. 87 on assurances which under the old law were subject to no restriction at all. A study of the previous legislation does seem to me to raise a doubt about that, but, in my judgment, a mere doubt is not enough to justify the court in departing from what seems to me to be really the plain meaning of the language used. Before the court would be justified in doing that, I think one must find in the previous legislation something so manifestly inconsistent with the section which one is construing, if construed by itself simply in accordance with its ordinary meaning, as to constrain the court to say that that cannot be what the legislature meant. The circumstances here fall far short of anything of that kind. Accordingly, the conclusion to which I have come is that the transfer of Nov. 3, 1947, of the land in question will become void under the provisions of s. 87 of the Education Act, 1944, if neither it nor a copy of it is sent to the Minister of Education within six months, or within such extended period as the Minister should allow, from the date on which the applicants are entered on the register as proprietors of the land thereby transferred.

Declaration accordingly. No order as to costs.

Solicitors: *Lee & Pembertons* (for the applicants); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

CURTIS v. WILCOX.

[COURT OF APPEAL (Scott and Wrottesley, L.JJ., and Wynn-Parry, J.), July 6, 19, 1948.]

Husband and Wife—Legal proceedings—Protection of separate property—Tort by husband before marriage—"Thing in action"—Married Women's Property Act, 1882 (c. 75), ss. 12, 24.

An unmarried woman sustained injuries in a motor car accident which was caused by the negligence of the man she subsequently married.

H HELD: the right of action which accrued before marriage was a "thing in action" within the meaning of s. 24 of the Married Women's Property Act, 1882, and was, therefore, the wife's property within the meaning of s. 12 of the Act, for the protection and security of which she was entitled to maintain an action against her husband.

Gottliffe v. Edelston ([1930] 2 K.B. 378), *overruled*.

[**EDITORIAL NOTE.** It should be noted that ss. 1 and 2 of the Married Women's Property Act, 1882, were repealed by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 5 (2); sched. II.

AS TO WIFE'S REMEDIES FOR SECURITY OF SEPARATE PROPERTY, see HALSBURY, Hailsham Edn., Vol. 16, p. 739, para. 1209; and FOR CASES, see DIGEST, Vol. 27, pp. 258, 259, Nos. 2278-2287.]

Cases referred to :

- (1) *Gottliffe v. Edelston*, [1930] 2 K.B. 378; 99 L.J.K.B. 547; 143 L.T. 595; Digest Supp.
- (2) *Chant v. Read*, [1939] 2 All E.R. 286; [1939] 2 K.B. 346; 108 L.J.K.B. 547; 160 L.T. 462; Digest Supp.
- (3) *Re Park Gate Waggon Works Co.*, (1881), 17 Ch.D. 234; 44 L.T. 901; 10 Digest 923, 6329.

APPEAL by the plaintiff from an order of OLIVER, J., dated Nov. 4, 1947, refusing general damages for injuries sustained by her, before marriage, in a motor accident caused by the negligence of the defendant, whom she married after the issue of the writ in the action. The appeal was allowed. The facts appear in the judgment of the court.

Paget, K.C., for the plaintiff.
Stimson for the defendant.

Cur. adv. vult.

July 19. WYNN-PARRY, J., read the following judgment of the court. This is an appeal from the judgment of OLIVER, J., given by him at the trial of the action on Nov. 4, 1947. The facts, so far as relevant, are as follows. On Jan. 12, 1947, the plaintiff was injured in an accident in which a motor car driven by the defendant, in which she was a passenger, collided with another motor car. Negligence on the part of the defendant was admitted. On May 2, 1947, the writ in the action was issued whereby the plaintiff claimed damages from the defendant for his negligence. By her statement of claim, which was delivered on June 11, 1947, the plaintiff claimed general damages for pain and suffering and in addition special damages for damage to her property, expenses and loss of earnings. On May 26, 1947, the plaintiff married the defendant. On July 21, 1947, the defence in this action, which in substance is being defended by the insurance company with whom the defendant is insured in respect of his motor car, was delivered. By para. 2 of that defence it was pleaded that the plaintiff had become the wife of the defendant, and that she was thereby barred from all remedy sought in the action. At the trial OLIVER, J., whose attention was drawn to the considered judgment of MCCARDIE, J., in *Gottliffe v. Edelston* (1) regarded himself as bound by that decision, and on the reasoning of that judgment gave judgment for the plaintiff for £72 13s. 0d., the amount of the special damage claimed, but gave the plaintiff no sum by way of general damages. It is from the learned judge's refusal to award any sum by way of general damages that the plaintiff appeals to this court.

It will thus be seen that this is in substance an appeal challenging the correctness of MCCARDIE, J.'s decision in *Gottliffe v. Edelston* (1) which was applied, and the reasoning in which was approved by HALLETT, J., in *Chant v. Read* (2). The facts in *Gottliffe v. Edelston* (1) were in all material respects similar to the facts in this case. There the plaintiff, an unmarried woman, sustained injuries through the defendant's negligent driving, and issued a writ against him claiming damages in respect thereof. Before the trial of the action she married him. It was held that her right of action was not such a thing in action as would become her separate property within the meaning of the Married Women's Property Act, 1882, but was barred by the general disability of husband and wife to sue each other. It is clear, as MCCARDIE, J., held, that at common law a wife cannot sue her husband for a tort committed before the marriage. If, therefore, the wife had a cause of action which she could pursue after the marriage it must have been because her right of action in tort, which arose before the marriage, was a thing in action forming part of her estate, which she could reduce into possession by action before marriage, which, by virtue of the Married Women's Property Act, 1882, became part of her separate estate on her marriage, and which, therefore, she could reduce into possession by action after marriage, such action being pursued for the purpose of securing that part of her separate estate. The reasoning of MCCARDIE, J., proceeded on the basis of recognising that a right of action for damages for tort is a thing in action. He says ([1930] 2 K.B. 378, 390) :

Undoubtedly the phrase "thing in action," when taken in its broadest possible sense, may be used to cover such a right as that to bring an action for a pure tort, such, for example, as for negligence or assault.

He held, however, that the phrase "thing in action" as used in the Married Women's Property Act, 1882, was used in a limited sense only and did not cover a right of action in the wife to sue her husband for a tort committed before marriage.

A We agree with the view of the learned judge that a right of action in tort is a thing in action. On this point a number of legal dictionaries and abridgements, some of them of considerable antiquity, were referred to by McCARDIE, J., in his judgment and we were referred to some of these and a number of others by counsel. We do not propose to refer to them in any detail. It is sufficient to say that, apart from a statement in BLACKSTONE'S COMMENTARIES, vol. II, p. 397, that all property in action depends on contracts, either express or implied (a statement on which the editor of the 21st edition makes the comment "This is too limited, since a right to recover damages for a wrong is a *chose in action* which does not arise out of any contract"), all the books to which we were referred treat a right of action to recover damages for a tort as being a thing in action. This view has the great authority of SIR GEORGE JESSEL, M.R., to support it. In *Re Park Gate Waggon Works Co.* (3), he said (17 Ch.D. 234, 239):

C The questions raised in this discussion are two. The first is whether a *chose in action* of this kind can be assigned by an official liquidator by virtue of the 95th section of the Companies Act, 1862, or otherwise. I think that the case is clearly within the 95th section. There is in that section no limit whatever in words upon what can be sold. It enables the liquidator "to sell the real and personal and heritable and movable property, effects, and things in action of the company, by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels." The two demands in question are certainly things in action of the company. One is said to arise in this way. It is alleged that the directors, or some of them, sold property belonging to the company at an undervalue, and the company, through their liquidator, claims the amount of the loss. That is a demand for so much money due from the directors to the company, and is an asset of the company. The other demand is very similar. It is a case in which the directors are said to have bought for the company, at the price of £8,000, some property which one of them had bought a few months before for £4,081 5s. The company claims the difference between these two sums, as being money of the company improperly expended by the directors. I have no doubt both those sums are portions of the property which the company or the liquidator could dispose of.

D It was argued on behalf of the defendant that the test of whether or not a right is a thing in action is whether or not it is assignable, and reliance was placed on s. 25 of the Supreme Court of Judicature Act, 1873, now embodied in s. 196 of the Law of Property Act, 1925, and ss. 38 and 45 of the Bankruptcy Act, 1914. In our view, there is no substance in this argument. No assistance for it can be derived from s. 196 of the Law of Property Act, 1925, which, like s. 25 of the Supreme Court of Judicature Act, 1873, is a procedural section, nor from ss. 38 or 45 of the Bankruptcy Act, 1914, which deal with the assignment of certain things in action for the special purposes of that Act. F The existence of things in action as a form of personal property was established long before the right to assign any kind of thing in action was admitted, and it would be strange, indeed, if it were now the law that the crucial test of whether or not a right was a thing in action was whether or not it was capable of assignment. G

The question, therefore, remains whether McCARDIE, J., was correct in his view that "thing in action" as used in the Married Women's Property Act, 1882, has the limited meaning which he attributed to it. The point before us turns on the true construction of the relevant sections of that Act and is unaffected by the Law Reform (Married Women and Tortfeasors) Act, 1935, which, subject to s. 12 of the Married Women's Property Act, 1882, treats a married woman in regard to her property as a *feme sole*. Section 1 of the Married Women's Property Act, 1882, (so far as material) provided as follows: H

(1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*,

without the intervention of any trustee. (2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

Section 2 :

Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage.

Section 12 (as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935), sched. II :

Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort . . .

Section 24 (the definition clause) says : "The word 'property' in this Act includes a thing in action."

The effect of s. 2, the language of which is unambiguous, is that in her separate property there is or can be included without exception all the real and personal property which belongs to her at the time of the marriage, while the definition of property in s. 24 makes it clear beyond doubt that, as the language of s. 2 itself indicates, her personal property includes her things in action. Under s. 12 the right of suing which is given to a married woman extends, so far as concerns what may be the subject-matter of the action, to all her property. The limitation which is imposed by the section is not on the kind of property which may be the subject of an action by her, but only on the purpose for which the action may be brought; it must be for the protection or security of her property. It follows, in our judgment, that there is no ground to be discovered in the language of the relevant sections of the Married Women's Property Act, 1882, for holding that "thing in action" is used in that Act in any limited sense. In our judgment, therefore, *Gottliffe v. Edelston* (1) was wrongly decided and is not good law.

It was suggested in argument that the words in s. 12 "but, except as aforesaid, no husband or wife shall be entitled to sue the other in tort," were mere surplusage. In a sense this is true, but they serve to emphasise that the section constitutes an exception to the common law rule, which otherwise still applies and would still prevent a married woman from pursuing a purely personal claim against her husband, *e.g.*, for damages for libel or slander or assault. In the result, the appeal will be allowed with costs here and below.

Appeal allowed with costs in both courts.

Solicitors : *Gibson & Weldon*, agents for *C. Leslie Hale*, Coalville (for the plaintiff); *Kingsford, Dorman & Co.*, agents for *Harvey, Clarke & Adams*, Leicester (for the defendant).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

SYAL v. HEYWARD AND ANOTHER.

[COURT OF APPEAL (Scott, Cohen and Wrottesley, L.JJ.), July 23, 29, 1948.]

Foreign Judgment—Registration in High Court—Setting aside registration—Judgment obtained by fraud on foreign court—Facts relied on known to defendants at time of proceedings in foreign court—Order for trial of issue of fraud—Condition that defendants should bring money into court—Foreign Judgments (Reciprocal Enforcement) Act, 1933 (c. 13), s. 4 (1) (a) (iv)—R.S.C., Ord. 41B, r. 3.

On Feb. 12, 1947, the plaintiff obtained against the defendants in India a judgment on a plaint in which he alleged that he had lent the defendants rupees 20,000. On Nov. 28, 1947, by order of a master, that judgment was registered as a judgment in the King's Bench Division under s. 2 (1) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The defendants applied for an order that the registration of the judgment be set aside pursuant to s. 4 (1) (a) (iv) of the Act on the ground that it had been obtained by fraud. They alleged that the plaintiff had deceived the court in India in that the amount lent to them by the plaintiff was rupees 10,800 and not, as the plaintiff had stated, rupees 20,000, the difference being made up by commission and interest paid in advance, and that thereby the plaintiff had concealed from the Indian court the possibility that the defendants might have a defence under the Indian usury laws.

HELD : it was immaterial that the facts on which the defendants relied to establish a *prima facie* case of fraud were known to them at all material times and could have been raised by them by way of defence in the Indian proceedings, and, therefore, the defendants were entitled to have tried the issue of fraud.

Abouloff v. Oppenheimer (1882) (10 Q.B.D. 295), applied.

HELD, further : in proceedings under s. 4 (1) (a) (iv) of the Act of 1933 in which it is sought to set aside a judgment on the ground of fraud the court has no power to impose as a condition of directing the issue of fraud to be tried that the defendants should bring money into court.

[AS TO JUDGMENT OBTAINED BY FRAUD, see HALSBURY, Hailsham Edn., Vol. 6, pp. 333, 334, para. 389; and FOR CASES, see DIGEST, Vol. 11, pp. 456, 457, Nos. 1124-1135.]

Cases referred to :

- (1) *Vadala v. Lawes*, (1890), 25 Q.B.D. 310; 63 L.T. 128; 11 Digest 457, 1133.
- (2) *Coaks v. Boswell*, (1886), 11 App. Cas. 232; 55 L.J.Ch. 761; 55 L.T. 32; *revsq.* S.C. *sub nom.*, *Boswell v. Coaks*, (1884), 27 Ch.D. 424; *subsequent proceedings*, *sub nom.*, *Boswell v. Coaks* (No. 2), (1894), 86 L.T. 365; 35 Digest 20, 115.
- (3) *Birch v. Birch*, [1902] P. 130; 71 L.J.P. 58; 86 L.T. 364; 23 Digest 244, 2993.
- (4) *Abouloff v. Oppenheimer*, (1882), 10 Q.B.D. 295; 52 L.J.Q.B. 1; *subsequent proceedings*, (1883), 52 L.J.Q.B. 309; 11 Digest 457, 1132.
- (5) *Bank of Australasia v. Nias*, (1851), 16 Q.B. 717; 20 L.J.Q.B. 284; 16 L.T.O.S. 483; 11 Digest 445, 1042.
- (6) *Ochsenbein v. Papelier*, (1873), 8 Ch. App. 695; 42 L.J.Ch. 861; 28 L.T. 459; 37 J.P. 724; 11 Digest 457, 1131.
- (7) *Cammell v. Sewell*, (1860), 5 H. & N. 728; 29 L.J.Ex. 350; 2 L.T. 799; 11 Digest 463, 1192.

INTERLOCUTORY APPEAL by the defendants from an order of JONES, J., dated June 11, 1948.

A judgment of an Indian court having been registered under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, as a judgment of the King's Bench Division on the application of the plaintiff, the defendants applied for the registration to be set aside on the ground that the judgment had been obtained by fraud. The master dismissed this application on the ground that all the facts on which the defendants relied could have been raised by them in defence in the Indian proceedings. On appeal by the defendants, the judge directed the issue of fraud to be tried on condition that the defendants paid into court the amount of the judgment debt. On an appeal by the defendants, the Court of Appeal held that the defendants were entitled to have tried the issue of fraud and that the judge had no power to impose the condition as to payment into court.

H. C. Leon for the defendants.

Dingle Foot for the judgment creditor.

Cur. adv. vult.

July 29. **COHEN, L.J.**, read the following judgment of the court. This appeal arises under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and R.S.C., Ord. 41B, made pursuant to the power conferred by s. 3 of that Act. On Feb. 12, 1947, the plaintiff obtained a judgment from the First Civil Judge at Saharanpur, India, on a plaint dated Nov. 19, 1946, in which he alleged that the defendants had borrowed rupees 20,000 from him on Oct. 7, 1946, and had executed a promissory note for that amount. On Nov. 28,

1947, Master Baker made an order that the said judgment be registered as a judgment in the King's Bench Division. The defendants, Col. Heyward and Col. David, then applied for an order that the registration of the said judgment be set aside pursuant to s. 4 (1) (iv) of the Act on the ground that the judgment had been obtained by fraud. In support of that application they filed an affidavit in which they alleged that the amount which they borrowed from the plaintiff was not rupees 20,000, as alleged by him in the action in Saharanpur, but only rupees 10,800, the difference being made up in part of commission and in part of interest which they alleged the plaintiff had insisted on being paid in advance. They had to face the fact that they had not defended the proceedings in India. Col. David relied on a promise alleged to have been made by the plaintiff early in December, 1946, not to take any further proceedings against the defendants and to consent to the proceedings being adjourned for a period of 6 months from that December. Col. Heyward relied on the same promise and also on the fact that he had left India at the end of December on repatriation. Col. David exhibited some documents from one of which it appeared that on Nov. 25, 1946, the defendants had been served with notice of the suit for rupees 20,420, and that the date fixed for hearing was Jan. 10, 1947. Another document showed that on Dec. 31, 1946, the defendants wrote to the court at Saharanpur applying for an adjournment for 6 months in accordance with the plaintiff's promise, while a third document (which was dated Jan. 13, 1947) was a notice from the court that the case had been adjourned to Jan. 20, 1947, and that, in default of the defendants' appearance, it would be heard *ex parte*. Col. David, at any rate, must have known what the court's intentions were. Col. Heyward may have been ignorant of them as he had left for England. To that affidavit the plaintiff put in a reply in which he denied the material allegations made by the defendants, and alleged that the whole rupees 20,000 had been advanced by him. He also exhibited a number of documents including the plaint to which we have already referred. The plaint was verified by the plaintiff on oath. It was not confined to an allegation that the defendants were indebted to the plaintiff in rupees 20,000 on the promissory note, but asserted that the defendants had *borrowed* that sum. The main basis of the defendants' allegation of fraud was that the plaintiff had deceived the court by pretending that he had lent rupees 20,000, whereas, in fact, he had only lent rupees 10,800, thus concealing from the court the possibility that the defendants might have a defence under the Indian Usurious Loans Act. The plaintiff also filed other affidavits dealing with subsidiary matters raised by the defendants to which we do not think it necessary to refer.

On this evidence the case came before the master, and on June 1, 1948, the master dismissed the application on the ground, as we were informed, that all the facts on which the defendants relied were known to them at all material times and could have been raised by way of defence in the Indian proceedings. From this order the defendants appealed to the judge. Before the matter came before the judge, they filed evidence in answer to the affidavits filed on behalf of the plaintiff. We need not refer to this evidence in detail. It is sufficient to read the last sentence of para. 1 of the affidavit of the defendant, David, sworn on June 9, 1948, in which he says :

I further say that the plaint dated Nov. 19, 1946, which is exhibited to the said affidavit of the said Syal was a fraud upon the court to which it was presented inasmuch as it stated that Lieut. Colonel Heyward and I received the full consideration of rupees 20,000 when in fact to the knowledge of the said Syal we only received rupees 10,800. The matter came before the learned judge on June 11, 1948, and he made an order as follows :

It is ordered that if the sum of £1,800 (such sum being the amount of the judgment debt and the balance being as security for costs) be paid into court by the said Lieut. Col. Paul Henry Maurice Heyward and Lieut. Col. I. A. David within fourteen days from the date hereof an issue is directed to be tried and be referred to the master for directions and that in such event the costs of the application to the master to set aside the registration of the above mentioned judgment and the costs of this appeal be costs in the issue. And it is further ordered that if the said sum of £1,800 be not paid into court within the time limited by this order the said appeal be dismissed with costs to be taxed and paid to the said Soth Gurnparshad Syal by the said Lieut. Col. Paul Henry Maurice Heyward and Lieut. Col. I. A. David.

From this order the defendants appealed with the leave of this court. They were willing as a matter of grace to bring into court the sterling equivalent of the sum of rupees 10,800 which they admitted they owed, but they contended that the court had no jurisdiction to impose conditions if it decided to direct an issue. When the matter came before us, the plaintiff had not applied either to the learned judge or to this court for leave to appeal, but he had given notice out of time under Ord. 58, r. 6, that he intended on the hearing of the appeal to contend that the order of the master was right and the order of the learned judge wrong. Counsel for the defendants submitted that Ord. 58, r. 6, was merely machinery and did not get rid of the necessity for leave, if under the rules leave to appeal would be required. Accordingly, he submitted that application for leave should have been made in the first instance to the learned judge in the court below. He desired us, however, to deal with the matter on its merits and, accordingly, without deciding whether leave was necessary, we gave leave to counsel for the plaintiff to argue his appeal. As this appeal, if successful, would dispose of the whole matter, it will be convenient to deal with it first.

Counsel for the plaintiff, in his able argument, submitted that : (i) The fraud contemplated by s. 4 of the Act is fraud on the court. Unless the court has been deceived, the section is not applicable. (ii) An application under s. 4 should be treated in the same way as, before the Act of 1933 came into force, an action to set aside a judgment would have been treated. (iii) Precisely the same tests apply whether the judgment sought to be set aside is a foreign judgment or an English judgment. (iv) Where a judgment is sought to be set aside on the ground of fraud, the fraud must have been discovered by the applicants since the date of the judgment. (v) It was plain that the facts relied on in the present case were all known to the defendants before the date of the Indian judgment. Counsel for the defendants agreed with the first of these propositions and he did not, we think, dispute the second. The third is supported by the observations of LINDLEY, L.J., in *Vadala v. Lawes* (1) (25 Q.B.D. 310, 316), where he says :

First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English court or of a foreign court does not matter ; using general language, that is a general proposition unconditional and undisputed.

It is unnecessary for us on this appeal to consider how far those observations go. The fifth proposition is also plainly correct if counsel means only that the defendants knew they were being sued for a sum in excess of rupees 20,000 and that in the plaint verified by affidavit the plaintiff was alleging that they had borrowed rupees 20,000, but there is no evidence that they knew that the plaint so verified would be the only evidence before the court if, in fact, that was the position.

Be that as it may, counsel's real difficulty is in his fourth proposition. For it he relied on *Boswell v. Coaks* (2), a decision of the House of Lords applied in *Birch v. Birch* (3). These cases, no doubt, establish that in proceedings to set aside an English judgment the defendants cannot ask for a re-trial of the issue of fraud as between them and the plaintiff on facts known to them at the date of the earlier judgment, but in cases under s. 4, the question is not one of fraud on the plaintiff, but of fraud on the court, and it seems to us to be clearly established by authority binding on us that, if the defendant shows a *prima facie* case that the court was deceived, he is entitled to have that issue tried even though, in trying it, the court may have to go into defences which could have been raised at the first trial : see *Abouloff v. Oppenheimer* (4), as explained in *Vadala v. Lawes* (1), where LINDLEY, L.J., immediately after the passage we have already cited, says :

Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits. Which rule is to prevail ? That point appears to me to have been one of very great difficulty before the case of *Abouloff v. Oppenheimer* (4). At the time when that case was decided, namely, in 1882, there was a long line of authorities including *Bank of Australasia v. Nias* (5), *Ochsenbein v. Papelier* (6), and

Cammell v. Sewell (7), all recognising and enforcing the general proposition, that in an action on a foreign judgment you cannot re-try the merits. But until *Abouloff's* case (4) the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without re-opening the merits, had never come forward for explicit decision. That point was raised directly in the case of *Abouloff v. Oppenheimer* (4), and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can re-open the whole case even although you will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this court you have to consider whether the foreign court has been imposed upon. That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much importance to it; but in that case the court faced the difficulty that you could not give effect to the defence without re-trying the merits. The fraud practised on the court, or alleged to have been practised on the court, was the misleading of the court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the court below was or was not false, was the very question of fact that had been adjudicated on in the foreign court; and, notwithstanding that was so, when the court came to consider how the two rules, to which I have alluded, could be worked together, they said: "Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to re-try the merits, you are entitled to do so according to the law of this country." I cannot read that case in any other way.

In the present case it is plain that the defendants are alleging a fraud on the court, and it is, therefore, immaterial that to establish their allegation they will have to adduce evidence which was available to them before the date of the Indian judgment.

As a subsidiary point, counsel for the plaintiff contended that the defendants had failed to establish a *prima facie* case of fraud. We are unable to accede to this argument. It may well be that the plaintiff will rebut that *prima facie* case, but we think that the evidence filed by the defendants discloses sufficient evidence of a case to entitle them to an issue.

We turn, therefore, to the defendants' appeal. Their counsel argued that under the Act and the rules the court had no power to impose as a condition of directing an issue that the defendants should bring money into court. In our opinion, this contention is well founded. Neither the Act nor the rules in terms confer such a power. In this respect the contrast with Ord. 14, r. 6, and with Ord. 27, r. 15, both of which expressly empower the court to impose terms as a condition, in the first case of giving leave to defend under Ord. 14, and in the second case of setting aside a judgment, is marked. In proceedings under the Act of 1933 the court is not bound to direct an issue. It should not do so in the case of an application based on an allegation of fraud unless it is satisfied that a *prima facie* case of fraud on the court is established, but, if it is so satisfied, we can see no justification for such an order as *JONES, J.*, has made in this case. In this connection it is not immaterial to observe that in a proper case the court may require security from a plaintiff seeking to enforce his judgment: see s. 3 (1) (a) of the Act, and Ord. 41B, r. 3. It is to be observed that under that rule the plaintiff may be ordered to find security to include the cost of proceedings to set aside the registration. For these reasons at the conclusion of the hearing we dismissed the plaintiff's cross-appeal and varied the order of *JONES, J.*, in the manner asked for by the defendants, namely, by directing an issue subject only to the defendants bringing into court £810, the agreed sterling equivalent of rupees 10,800, an offer they had made in the court below and repeated in this court.

Order varied. Cross-appeal dismissed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the defendants); *Douglas Grant & Dold* (for the judgment creditor).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

R. v. PONTYPRIDD LICENSING JUSTICES.

Ex parte ELY BREWERY CO., LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Singleton and Denning, JJ.), July 28, 1948.]

Intoxicating Liquor—Justices' consent to structural alterations—Destruction of identity of premises—Relevant consideration—Change from hotel to public house—Licensing (Consolidation) Act, 1910 (c. 24), s. 71.

A Some 50 years ago the P. hotel was constructed, with 32 bedrooms. It had on the ground floor two bars, an hotel bar, primarily intended for the use of people staying in the hotel, and a vaults bar, which was something in the nature of a public bar with a separate entrance into the street. The hotel was not a financial success, and the E. brewery company, to which it belonged, wished to discontinue using it as a hotel and to let the premises, with the exception of the vaults bar, to a government department as offices. For this purpose they wished to stop up the entrance into the vaults bar so that there would be no communication between the ground floor where the bar was situate and the upper floors of the building. There was one other hotel in the same town.

B
C **HELD:** in considering an application for leave to make the proposed structural alterations the justices were entitled to take into account that they would prevent the upper part of the premises being used as a residential hotel.

R. v. Watford Licensing JJ., *Ex p. Trust Houses, Ltd.* ([1929] 1 K.B. 313; 140 L.T. 350), *applied*.

[AS TO CONSENT TO ALTERATIONS IN LICENSED PREMISES, see HALSBURY, Hailsham Edn., Vol. 19, pp. 37, 38, paras. 100, 101; and for CASES, see DIGEST, Vol. 30, p. 44, Nos. 339-341, and Supplement.]

D Cases referred to:

- (1) *R. v. Watford Licensing Justices, Ex p. Trust Houses, Ltd.*, [1929] 1 K.B. 313; 98 L.J.K.B. 198; 140 L.T. 350; 93 J.P. 41; Digest Supp.
 (2) *R. v. Wandsworth Licensing Justices, Ex p. Whitbread & Co.*, [1921] 3 K.B. 487; 90 L.J.K.B. 1114; 125 L.T. 540; 85 J.P. 171; 30 Digest 44, 339.
 (3) *R. v. Weston-Super-Mare Licensing Justices, Ex parte Powell*, [1939] 1 All E.R. 212; [1939] 1 K.B. 700; 108 L.J.K.B. 206; 160 L.T. 227; 103 J.P. 95; Digest Supp.

E **MOTION** for *mandamus*.

On Mar. 31, 1948, the Pontypridd licensing justices at the adjourned annual licensing meeting refused an application by the applicants, Ely Brewery Co., Ltd., under s. 71 of the Licensing (Consolidation) Act, 1910, for permission to make certain alterations in the licensed premises known as Park Hotel, Pontypridd, Glamorgan, on the ground that the alterations (a) would entail the destruction of the identity of the premises in respect of which the licence was held; and (b) would leave Pontypridd with only one residential hotel, thus reducing the facilities for refreshment and prevent the legitimate and reasonable requirements of the public being met. The applicants moved for an order of *mandamus* directed to the justices calling on them to hear and determine the application according to law. The motion was refused. The facts appear in the headnote.

G *Edmund Davies, K.C.*, and *Cennydd Traherne* for the applicants.

Sir David Maxwell Fyfe, K.C., and *Roderic Bowen* for the respondent justices.

H **LORD GODDARD, C.J.:** In this case counsel for the applicants moves for an order of *mandamus* directed to the licensing justices of Pontypridd calling on them to hear and determine according to law an application made to them by the Ely Brewery Co., Ltd., to approve certain alterations in licensed premises. I approach the case with the knowledge that this court ought not lightly to interfere with the discretion of licensing justices, and also that the fact that this court might have come to a different conclusion if they had been sitting as licensing justices is no ground for granting a *mandamus* directed to the justices if they have heard and determined the case.

The main grounds on which the justices have refused this application is that, in their opinion, it is desirable that there should be additional accommodation for travellers and greater catering facilities in Pontypridd, though hitherto

very few persons have shown any desire to stay there for the night. Perhaps it is. The justices are far better judges of that than we can be, and it is not a matter on which we are entitled to express any opinion, except that the justices cannot force the Ely Brewery Co. to continue carrying on the business as an hotel and losing money by so doing. The justices have stated three grounds for their refusal. The first is that :

The granting of the said application would have entailed the destruction of the identity of the premises in respect of which the licence is held, in that it involved the alteration of the premises from that of a substantial residential hotel capable of providing sleeping accommodation, general catering, and, particularly, catering for social functions, into premises materially different in size and solely confined in function to the sale of exciseable goods. A

With some considerable hesitation I have come to the conclusion that it is impossible to say that the justices took into account a matter which they ought not to have taken into account. I cannot ignore the decision of this court in *R. v. Watford Licensing Justices, Ex p. Trust Houses, Ltd.* (1). That is a case which I have some difficulty in understanding, and it may yet come before another court, but, sitting in this court, I am bound by the decision which was that where an application is made under s. 71 for the approval by justices of alterations, they can consider any questions they like whether or not they have any regard to the alterations for which their consent is necessary. The only occasions on which the owner of licensed premises has to ask for the consent of justices to alterations is where the alteration :

... gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking, or which affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises, or any street or other public way.

R. v. Watford Licensing Justices, Ex p. Trust Houses, Ltd. (1) decided that if an alteration of one of these classes comes before the justices for their consent, the justices, in dealing with it, are not limited to the consideration of the alteration itself solely from the point of view of the descriptive words contained in the sub-section. The justices are entitled, and are bound, to take into account whatever matters are relevant to the whole inquiry. My difficulty in accepting that case, though I am bound by it, is that when one comes to examine the facts one finds that the justices were considering one of the points dealt with in the section, and whether or not the words which I have referred to were *obiter* is a matter which may be discussed hereafter. However that may be, that case has stood since 1929, and I think we must follow it. If that is so, it gives the justices, on an application to approve an alteration, the widest possible discretion to consider any matters they like, although in *R. v. Wandsworth Licensing Justices, Ex p. Whitbread & Co.* (2) ([1921] 3 K.B. 487, at p. 496) SIR ALFRED LAWRENCE, C.J., said that the justices had :

... to consider the needs of the neighbourhood for the supply of intoxicating liquor, and the nature of these proposed improvements, and to come to a decision on the merits of the proposed improvements, whether they ought or ought not to be allowed.

I do not, however, think we can say, at any rate since *R. v. Watford Licensing Justices, Ex p. Trust Houses, Ltd.* (1), that those are the only grounds the justices may take into account. Therefore, it seems to me to follow that the justices could, in considering the alterations in the present case, say : "This alteration will prevent the upper part of these premises being used as a residential hotel. We will, therefore, refuse our consent to it."

The second ground on which the justices based their decision seems to me to be no more than a repetition of the first, because they said :

The said alteration ... would leave Pontypridd with only one licensed residential hotel, reduce the facilities for refreshment, and prevent the legitimate and reasonable requirements of the public being met.

Again, while I have some difficulty in seeing how the refusal of this application will in any way increase the facilities, that is a matter which the justices know better than I do. It seems to me that that really comes within the ambit of the first ground, and that the considerations which apply to the first ground apply to the second. For these reasons I have come to the conclusion that this application must fail and be dismissed with costs. H

SINGLETON, J.: I agree that this application fails. The applicants were anxious to make certain alterations to the Park Hotel, Pontypridd, and by reason of s. 71 of the Licensing (Consolidation) Act of 1910, they required the consent of the licensing justices before the alterations could be made. I agree entirely with what my Lord said as to this court being slow to interfere with the discretion of licensing justices. We have no right to interfere with them so long as they act according to the law. The licensing justices have put in an affidavit in which they express their reasons for acting as they did. They say the first reason was that:

The granting of the said application would have entailed the destruction of the identity of the premises in respect of which the licence is held, in that it involved the alteration of the premises from that of a substantial residential hotel capable of providing sleeping accommodation, general catering, and, particularly, catering for social functions, into premises materially different in size and solely confined in function to the sale of exciseable goods.

In *R. v. Weston-super-Mare Licensing Justices, Ex p. Powell* (3), the Court of Appeal expressed the view that licensing justices could consent to alterations so long as those alterations would not destroy the identity of the premises as already existing. I can understand that licensing justices might think that the taking away of the whole, or practically the whole, of the hotel accommodation and entertaining accommodation, leaving just the bars would be the destruction of the identity of the premises. That was the view which they formed. They were entitled to form it, and I do not think this court can interfere. At the same time, I share the regret expressed by my Lord because I should have been very glad if this case could have gone back for reconsideration by the licensing justices. I have before me figures which show what happened in pre-war days in this hotel in regard to the use of bedroom accommodation. There were 32 bedrooms, and the figures show that in 1937 the takings for the letting of apartments amounted to £70, in 1938 to £201 and in 1946 to £246. Obviously, the living or hotel part could not be made to pay on that basis, and one has no reason to assume that things are any better in that respect at the present time. I wonder how far the licensing justices considered that fact, but I do not think we are in a position to say they did not. The justices seem to think that they can compel the applicants to spend thousands of pounds on re-decorating and re-furnishing the hotel part of the premises and to go on using it as a hotel. I do not think they can do that.

DENNING, J.: I agree.

Motion refused with costs.

Solicitors: *Theodore Goddard & Co.*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the applicants); *Torr & Co.*, agents for *Richard John*, Glamorgan County Hall (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

EAST BARNET U.D.C. v. ALLEN TRENARRY (BARNET), LTD.

[KINGS' BENCH DIVISION (Lord Goddard, C.J., Singleton and Slade, JJ.), July 22, 1948.]

Rates and Rating—Recovery of rate—Distress—Application for issue of warrant—Defence—Allegation that assessment increased on defective proposal.

On an application for the issue of a distress warrant for non-payment of rates, the ratepayer cannot set up a defect in the proposal for the amendment of the valuation list, pursuant to which the increased rates were demanded.

Shillito v. Hinchliffe ([1922] 2 K.B. 236; 127 L.T. 367), *applied*.

[**EDITORIAL NOTE.** In *Shillito v. Hinchliffe* (1) it was held that on the hearing of an application for a distress warrant for non-payment of rates the justices had no jurisdiction to entertain a defence alleging that the ratepayer was not liable on the ground that the rate was bad by reason of flaws in the valuation list on which it was based. The present case applies the *ratio decidendi* in that case to one where the ratepayer alleges that the rate was bad because it was based on an increased assessment which had been made as the result of a defective proposal.

AS TO GROUNDS FOR RESISTING THE ISSUE OF A DISTRESS WARRANT FOR NON-PAYMENT OF RATES, see HALSBURY, Vol. 27, p. 527.]

Cases referred to :

- (1) *Shillito v. Hinchliffe*, [1922] 2 K.B. 236; 91 L.J.K.B. 730; 127 L.T. 367; 86 J.P. 110; 18 Digest 401, 1414.
- (2) *R. v. Thanet & District Assessment Area Assessment Committee & Kent County Valuation Committee, Ex parte Isle of Thanet Gas Light & Coke Co.*, [1939] 2 All E.R. 489; [1939] 2 K.B. 640; 108 L.J.K.B. 515; 160 L.T. 509; 103 J.P. 186; Digest Supp.
- (3) *R. v. Reading Assessment Committee, Ex parte McCarthy E. Fitt, Ltd.*, [1948] 1 All E.R. 194.

CASE STATED by Hertfordshire justices.

At a court of summary jurisdiction sitting at Barnet a complaint was preferred by Gilbert Baldwin, acting as assistant collector of and agent for the appellants, the East Barnet Urban District Council, alleging that the respondent ratepayers had not paid £9 10s., payable by virtue of a general rate made on Mar. 17, 1947, in respect of offices, buildings and yard situate at 27, Cat Hill, in the East Barnet urban district. The premises rated had been assessed in the valuation list at £17 gross value and £10 rateable value, and they were subject to a general rate at the rate of 19s. in the £ made on Mar. 17, 1947, for the year from Apr. 1, 1947, to Mar. 31, 1948, payable in two instalments. The ratepayers paid the first instalment of £4 15s. on Aug. 13, 1947. On July 31, 1947, the appellant council made a proposal for the amendment of the valuation list by increasing the gross value and rateable value of the premises to £40 and £30 respectively. On Sept. 9, 1947, the assessment committee heard the proposal and determined to amend the valuation list in accordance therewith. The rateable value appearing in the rate book was amended to £30, and on Sept. 29, 1947, the appellants demanded the sum of £9 10s. arrears of the first instalment in respect of the increase of rateable value and £14 5s. in respect of the second instalment. The ratepayers paid the second instalment, but refused to pay the first on the ground that the proposal was invalid in that it did not sufficiently specify the grounds on which it was made and that there was no power to amend, in pursuance of the proposal, the valuation list or the rate in respect of the premises. The complaint was dismissed on Mar. 10, 1948, when the court refused to issue a distress warrant. The council now appealed. The court allowed the appeal and held that this question could not be raised on an application for the issue of a distress warrant.

Squibb for the appellants.

The respondents did not appear and were not represented.

LORD GODDARD, C.J. : This case must be remitted to the magistrates with the expression of opinion that they had no jurisdiction to consider the contentions which were put forward by the ratepayers, but that it was their duty to issue a distress warrant, which must now be issued. I do not think it necessary to go through the facts because *Shillito v. Hinchliffe* (1) is clear authority that the magistrates, in refusing to issue the distress warrant, were wrong. The case will be remitted to the magistrates with a direction to issue a distress warrant.

SINGLETON, J. : I agree.

SLADE, J. : I agree.

Appeal allowed with costs.

Solicitors : *Lees & Co.* (for the appellants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re BARNATO (deceased). JOEL AND ANOTHER v. SANGES
AND OTHERS.

[CHANCERY DIVISION (Harman, J.), July 6, 7, 21, 1948.]

Practice—Originating summons—Joinder of Crown as party—Future liability to estate duty—Crown Proceedings Act, 1947 (c. 44), ss. 13, 23 (2) (b)—R.S.C., Ord. 1A, r. 1, Ord. 54A, r. 1A, Ord. 55, r. 3, Ord. 55, r. 5.

By his will a testator bequeathed a fund to trustees to hold for L.A. for life on protective trusts with various remainders over and with power to the trustees, with the consent of L.A., to make advances in favour of the issue of L.A. The trustees desired to ascertain whether, if a certain advance was made, they would be liable for estate duty in respect thereof on the death of L.A., and they, therefore, issued a summons joining the Inland Revenue Commissioners as defendants. The commissioners applied under R.S.C., Ord. 16, r. 11, to be struck out as having been improperly joined. It was accepted that procedure under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, was inappropriate.

HELD: (i) there was no general right in the subject to oblige the Crown to become a defendant to proceedings by way of originating summons not provided for by statute.

Dyson v. A.-G. ([1911] 1 K.B. 410), distinguished.

(ii) the effect of the Crown Proceedings Act, 1947, ss. 13 and 23 (2) (b), and Ord. 1A, r. 1, was to make the procedure by originating summons available to the subject against the Crown in any case where it would be available between subject and subject, but the question asked could not be brought within the rules, since it was not within Ord. 54A, r. 1A, because no claim for duty at present existed, nor was it within Ord. 55, r. 3, because the Crown was not included in the categories to be served under Ord. 55, r. 5, and, therefore, the commissioners were improperly joined.

[AS TO ORIGINATING SUMMONS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 106-108, paras. 209-212; and FOR CASES, see DIGEST, Practice, pp. 701-703.]

Cases referred to:

- (1) *Dyson v. A.-G.*, [1911] 1 K.B. 410; 81 L.J.K.B. 217; 105 L.T. 753; 11 Digest 524, 292.
- (2) *Smeeton v. A.-G.*, [1920] 1 Ch. 85; 88 L.J.Ch. 535; 122 L.T. 23; 30 Digest 144, 198.
- (3) *Re Clay, Clay v. Booth, Re a Deed of Indemnity*, [1919] 1 Ch. 66; 88 L.J.Ch. 40; 119 L.T. 754; 30 Digest 144, 201.
- (4) *Re King, Mellor v. South Australian Land Mortgage & Agency Co.*, [1907] 1 Ch. 72; 76 L.J.Ch. 44; 95 L.T. 724; 24 Digest 608, 6385.
- (5) *Re Davies, Davies v. Davies*, (1888), 38 Ch.D. 210; 57 L.J.Ch. 759; 58 L.T. 312; 24 Digest 769, 7993.

PROCEDURE SUMMONS by which the Inland Revenue Commissioners applied under R.S.C., Ord. 16, r. 11, to be struck out from an originating summons to which, they alleged, they had been improperly joined as parties. The application was allowed. The facts are summarised in the headnote and appear fully in the judgment.

Christie, K.C., and *Hillaby* for the plaintiffs, the trustees of the settled fund. *Jopling (Blackett-Ord with him)* for the first, second and third defendants, issue of L.A. and beneficiaries under the will.

Elverston for the fourth defendant, a daughter of L.A., and a beneficiary under the will.

J. H. Stamp (R. L. Edwards with him) for the Inland Revenue Commissioners.

Cur. adv. vult.

July 21. **HARMAN, J.**, read the following judgment. The plaintiffs in the originating summons in this matter are trustees in whom is vested a large settled legacy and other property settled by the will of Henry Isaacs Barnato, but long since segregated from his estate. It appears that under the limitations of the will the fund stands limited in favour of one Lily Asher for a protected life interest, with various remainders over under which the defendants (other than the last defendant) have beneficial interests. In particular, a power of

advancement is vested in the plaintiffs as trustees, with the consent of Mrs. Asher, in favour of her issue, who are represented here.

By the originating summons, which was issued on June 3, 1948, the plaintiffs raise two questions of construction and administration respectively in connection with the said power of advancement and the application of any sums to be advanced. In neither of these questions is the Crown in any way interested or concerned. By question 3, however, the originating summons seeks to have determined the question whether, if a proposed advance be made, the plaintiffs will remain accountable to the Crown on the death of Mrs. Asher for any estate duty exigible in respect of the sum advanced. It is said that estate duty may become payable by virtue of the Finance Act, 1940, s. 43, and that liability for it of the plaintiffs may arise under the Finance Act, 1894, s. 8. The plaintiffs, quite naturally, are desirous of knowing whether this claim can in law be established against them, for that may be a vital factor in considering whether they will part with the money to be advanced, and, accordingly, before the issue of the originating summons, they communicated through their solicitors with the solicitor to the Inland Revenue Commissioners submitting a draft of the summons to him and asking whether the Attorney-General should be joined. By his answer, made on Mar. 25 last, the solicitor to the Inland Revenue Commissioners made, among others, the following observations :

Should the proposed advance be made, it would seem that the death of Mrs. Lily Asher would give rise to a claim for estate duty (additional to that on the funds retained by the trustees till her death) . . . the official view is the proposed plaintiffs to the summons will be accountable for any estate duty payable.

By the same letter, the solicitor to the commissioners objected to the joinder of the Attorney-General for reasons which I need not elaborate. Notwithstanding this, the plaintiffs have seen fit to join the Inland Revenue Commissioners as the last defendants to the originating summons, they having been joined to represent the Crown instead of the Attorney-General by reason of the Crown Proceedings Act, 1947, s. 17 (3). The Inland Revenue Commissioners now apply by summons under R.S.C., Ord. 16, r. 11, to be struck out as having been improperly joined as parties.

The first question which arises is whether proceedings of this nature are available to the subject against the Crown. The estate duty was created by the Finance Act, 1894, and under that Act certain machinery was set up for determining questions between the subject and the Crown. Thus, under s. 10 an appeal was provided from a decision of the commissioners to the High Court, and under rules made in 1895 such proceedings must be taken by way of petition in the Queen's Remembrancer's Department. The Act of 1894 was considerably altered by the Finance (1909-10) Act, 1910, and, under s. 33 of that Act, further machinery for deciding questions was provided, the procedure being again by petition. So far as I am aware, before 1933 questions of liability to estate duty between the Crown and the subject were always decided either under the before mentioned machinery or on English information of the Attorney-General. It was, however, realised that it would be extremely convenient if questions of this sort could be decided by a less cumbrous procedure than petition or information, and, accordingly, there was included in the Administration of Justice (Miscellaneous Provisions) Act, 1933, a section (s. 3) providing for the determination by the High Court in a summary way of such questions of liability. The section provided for rules of court. None has ever been made, but ever since the passing of that Act the procedure by originating summons under Ord. 54A, r. 1A, has been frequently resorted to and has proved convenient and efficient. To such summonses, the Attorney-General or the commissioners are made defendants.

It is admitted that that section has no application here because (to adopt the language of the section) no "claim has been made by the Crown" nor is any claim apprehended in respect of "duties which have or are alleged to have become chargeable" by reason of the death of any person. Mrs. Asher is still alive. The plaintiffs, nevertheless, allege that there is a general right in the subject to oblige the Crown to become a defendant to proceedings by way of originating summons not provided for by any statute, and that, in fact, a remedy of this sort has always been open ever since 1894, though never

before resorted to. This is a bold claim, and I do not accept it. The summary procedure by way of originating summons is not, in my judgment (unless under the Crown Proceedings Act, 1947, with which I will deal in a moment) available against the Crown for the determination of a question of liability to estate duty except insofar as is provided by s. 3 of the Act of 1933. There may have been cases, for aught I know, where the Crown has been willing to accede to the request of the subject to submit to the jurisdiction of the court for the purpose of deciding such a question of liability, but I do not think that the Crown can be obliged to take this course, and, indeed, it would often be highly inconvenient that the Crown should be made a defendant to proceedings of a domestic character between beneficiaries under a will or settlement simply because the result of the answer to one of them might be supposed to affect some question of liability to estate duty, or, for that matter, to income tax.

The plaintiffs justify this claim on the authority of *Dyson v. Attorney-General* (1), where the Court of Appeal held that a declaratory judgment under Ord. 25, r. 5, could be made against the Attorney-General. Those, however, were proceedings by writ, and, in my judgment, the decision in that case does not apply to the summary procedure by originating summons. FARWELL, L.J., in that case pointed out that when the interests of the Crown were only indirectly affected, the old courts of equity, whether the Court of Chancery or the Court of Exchequer, did make declaratory orders which affected the rights of the Crown. Whether the plaintiffs would have been in a better position if they had started the present proceedings by writ I need not determine, but as at present advised it seems to me that there would have been very great difficulties in their way in framing a claim that could not be struck out *in limine*. Moreover, the making of a declaration in such proceedings was always a matter of discretion: see *Smeeton v. Attorney-General* (2). The Attorney-General is, of course, frequently added as a defendant to originating summonses which raise questions where charitable bequests or donations are or may be involved, but these are not, in my judgment, a precedent for present purposes. In charity cases the Attorney-General is joined to represent the Crown as *pater patriae*, and to enable him to intervene for the protection of charities and to assist the court. No question of the liability of the subject to tax is involved. The Crown is concerned in a fiduciary capacity.

I must next consider whether the position in this respect has been altered by the Crown Proceedings Act, 1947. It is to be observed that s. 3 of the Act of 1933 already referred to has not been repealed by the Act of 1947 which does repeal other sections in the same Act. It is, therefore, clear that the procedure already referred to for the decision of estate duty claims is not abolished, and s. 1 of the Act of 1947 which refers to proceedings under any statutory provision repealed by the Act does not apply. The Crown Proceedings Act, 1947, s. 13, provides that all civil proceedings against the Crown "shall be instituted and proceeded with in accordance with rules of court." Section 23 (2) provides that any reference in the Act to civil proceedings against the Crown:

... shall be construed as a reference to . . . (b) proceedings for . . . the obtaining of any relief which, if this Act had not been passed, might have been . . . obtained by an action against the Attorney-General . . .

By R.S.C., Ord. 1A, r. 1:

(a) The Rules of the Supreme Court . . . shall, so far as may be, apply to all civil proceedings by or against the Crown instituted in the High Court on or after Jan. 1, 1948; (b) such civil proceedings as aforesaid shall, so far as may be, take the same form as civil proceedings between subjects, and shall, if no special form is applicable, take the form of an action commenced by writ of summons.

At an early stage of the hearing both parties appearing before me disclaimed the notion that this Act had anything to do with the present proceedings, but counsel for the plaintiffs later resiled from that view. In my judgment, he was right, and the effect of the sections and the rules, to which I have referred, is to make the procedure by originating summons available to the subject against the Crown in any case where it would be available between subject and subject. I must, therefore, consider whether question 3 of the summonses is one that comes within the rules of court, for procedure by way of originating

summons, being a creature of statute, can only be resorted to in cases provided for by the rules. The plaintiffs allege that question 3 of the originating summons is justified either by R.S.C., Ord. 54A, r. 1A, or by Ord. 55, r. 3. As to the first of these the plaintiffs must be persons claiming a "legal or equitable right," such right depending on a question of construction of a statute. In my judgment, the plaintiffs in this respect are not claiming any legal or equitable right, for no claim for duty at present exists. The plaintiffs are merely asking the court to assume that hereafter, when Mrs. Asher dies, they may acquire such a right. Moreover, the statute to be considered—*i.e.*, the Finance Act, 1894, s. 8—may not be in existence at the relevant date. This rule, therefore, does not help the plaintiffs. As to Ord. 55, r. 3, that clearly justifies the taking out of a summons in respect of questions 1 and 2 and the joinder of the defendants other than the Crown, but when one turns to Ord. 55, r. 5, to find who are the persons to be served, I do not find that the Crown comes into any of the categories set out in the rule. It is true that the commissioners have alleged that their present view is that a claim may hereafter arise, but no present claim has been made, nor has any right or interest yet arisen in the Crown which is sought to be effected. *Re Clay* (3) shows that there was no jurisdiction to make a declaratory order in a case where the defendant had put forward no present claim. Moreover, the decision in *Re King* (4) shows that a person not a beneficiary under a trust cannot be brought before the court on an originating summons for the purpose of deciding a future contingent claim where the alleged claimant has not asserted any right presently enforceable either at law or in equity.

It was urged by the plaintiffs that a question of this sort ought to be left to be decided at the hearing and not dealt with by an interlocutory order, but I do not feel the force of this. The point could be taken as a preliminary point at the hearing, but there is no object in leaving it undecided now that it has been raised and argued. Moreover, *Re Davies* (5) shows that the court favours the taking of such a point at an early stage, and, indeed, may penalise a defendant who fails to do so. Consequently, on this ground I am of opinion that the commissioners have been improperly joined and ought to be struck out.

Order accordingly. The plaintiffs to pay the costs of the Crown as between party and party, and the costs of all other parties to be costs in the cause on the originating summons.

Solicitors : *Wild, Collins & Crosse* (for the plaintiffs) ; *R. H. Behrend, Kendall, Price & Francis* (for the first, second and third defendants) ; *Elvy Robb & Co.* (for the fourth defendant) ; *Solicitor of Inland Revenue.*

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

firm. C.A. [1949] 1 All E.R. 6.

HELMAN v. HORSHAM AND WORTHING ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Singleton and Slade, JJ.), July 23, 1948.]

Rates and Rating—Assessment—Building occupied in part—Occupation by lodger or tenant—Owner occupying rest of house—Presumption that other occupant a lodger—Right to assess part separately—Rating and Valuation Act, 1925 (c. 90), s. 23 (1).

The owner of a house, who himself occupied three rooms and a kitchen-scullery on the ground floor and one room on the first floor, let to one M. two rooms and a kitchen-scullery on the first floor, with the right to use, in common with himself, the combined bathroom and W.C. on that floor, the upper landings, the entrance hall, the front and back doors and the yard and outside W.C., to get to which there was a right to go through the downstairs rooms. The rent included payment for the use of the carpet on the stairs and in the hall and of linoleum in the rooms let, and the owner kept the hall and landings clean.

HELD : the Rating and Valuation Act, 1925, s. 23 (1) did not give the rating authorities an unfettered discretion in such a case either to divide the house into two hereditaments for rating purposes or to rate it as one

hereditament, but, the owner being resident on the premises, there was a presumption that M. was a lodger only, and, there being no evidence to show that the relationship of landlord and tenant had been created between the owner and M., the owner must be deemed to be in occupation of the whole house as a single hereditament and chargeable to rates as such.

Bradley v. Baylis, (1881) (8 Q.B.D. 195; 46 L.T. 253) and *Kent v. Fittall* ([1911] 2 K.B. 1102; 105 L.T. 422), *applied*.

A [EDITORIAL NOTE. Section 23 (1) of the Rating and Valuation Act, 1925, is now replaced (with slight amendment) by s. 57 of the Local Government Act, 1948, which will come into force on the "appointed day," the date of which has not yet been fixed. AS TO THE RATING OF HOUSES OF WHICH PARTS ARE LET OFF, see HALSBURY, *Hailsham Edn.*, Vol. 27, pp. 361-363, paras. 791, 793; and FOR CASES, see DIGEST, Vol. 38, pp. 452-454, Nos. 191-202.]

B FOR THE RATING AND VALUATION ACT, 1925, s. 23, see HALSBURY'S STATUTES, Vol. 14, p. 649.]

Cases referred to :

(1) *Bradley v. Baylis*, (1881), 8 Q.B.D. 195; Colt. 188; 51 L.J.Q.B. 183; 46 L.T. 253; 45 J.P. 847; 20 Digest 21, 123.

(2) *Kent v. Fittall*, [1911] 2 K.B. 1102; 81 L.J.K.B. 82; 105 L.T. 422; 75 J.P. 378; 20 Digest 22, 126.

(3) *Allan v. Liverpool, Inman & Kirkdale*, (1874), L.R. 9 Q.B. 180; 43 L.J.M.C. 69; 30 L.T. 93; 38 J.P. 261; 38 Digest 446, 155.

(4) *Allchurch v. Hendon Union Assessment Committee*, [1891] 2 Q.B. 436; 61 L.J.M.C. 27; 65 L.T. 450; 56 J.P. 117; 38 Digest 453, 200.

CASE STATED by West Sussex Quarter Sessions.

D On a hearing of a proposal for the amendment of the valuation list for the borough of Worthing, the respondent assessment committee determined that a house should be assessed in parts—one part as being in the occupation of the appellant, Helman, the owner of the house and resident therein, and the other part, which comprised two rooms and a kitchen-scullery let off to one Miles (with a right to use the bathroom, water closet, landings, staircase, entrances, etc.) as being in the occupation of the said Miles. The appellant appealed to quarter sessions who dismissed the appeal, and he now appealed to the High Court by Case Stated. He contended that the occupant of the part let off was in the position of a lodger, and, therefore, that the part let to him was not separately rateable. The court allowed the appeal.

Heathcote-Williams for the appellant.

Casswell, K.C., and *H. J. Brown* for the assessment committee.

F LORD GODDARD, C.J. : This is a Special Case stated by the Rating and Valuation Committee of the West Sussex Quarter Sessions, who affirmed a decision of the assessment committee of the Horsham and Worthing area whereby they divided for rating purposes a house known as 78, Brighton Road, Worthing, rating three rooms on the first floor of the hereditament as a separate hereditament and the rooms on the ground floor and one room on the first floor also as a separate hereditament. The Case is signed by the learned chairman of quarter sessions, for whose opinion I have the most profound respect, but I feel myself bound to take a different view from that to which quarter sessions came.

G The Case states that the appellant is the owner of these premises. To my mind it is a most important fact that not only is he the owner but also that he lives on the premises. "The said dwelling-house was originally designed as a single dwelling . . ."—I read those words because I think they give some indication why quarter sessions came to the decision they did—" . . . the accommodation being three living rooms, a kitchen-scullery and a combined bathroom and W.C. on the first floor, and three living rooms, a kitchen-scullery and outside W.C. on the ground floor." The Case finds that on Mar. 8, 1947, the appellant entered into a verbal agreement with Miles, the other occupant of the house, the material terms of which were that Miles was to have the sole use and occupation of two living rooms and the kitchen-scullery on the first floor, the appellant remaining in occupation of the rooms on the ground floor and the other room on the first floor. There was, therefore, no demise of a complete floor. Miles was to have a right in common with the appellant to use the bathroom and both W.C.'s, and a right of passage through the entrance

hall and over two upper landings and through the rooms on the ground floor as and when he required for the purpose of using the outside W.C. and gaining access to the yard at the rear, to the use of which he had a right in common with the appellant. The front and the back doors were to be used in common, there being no separate entrance to the first floor of the house. Miles was to pay the sum of 37s. 6d. a week, which was the rent fixed by the tribunal appointed under the Furnished Houses (Rent Control) Act, 1946, and included the use of carpets on the stairs and in the hall and of linoleum laid in the rooms which he occupied. The hall and landings were to be kept clean by the appellant.

The first argument which counsel for the assessment committee put forward was that the committee had an unfettered discretion given to them by s. 23 (1) of the Rating and Valuation Act, 1925, to rate any premises of which there were two occupiers as two hereditaments if the house had been originally constructed as a separate dwelling. In my opinion, that is a mistaken reading of s. 23. I do not think s. 23 (1) gives the rating authority or the assessment committee the uncontrolled discretion which it is contended it does. It is a somewhat involved sub-section, but the concluding words, which are :

a building or portion of a building so treated as a single hereditament shall, for the purposes of rating, be deemed to be a single hereditament in the occupation of the person who receives the rents payable in respect of the parts

are perfectly intelligible if they are confined to treating a house which may be divided into different lettings of one sort or another as being a single hereditament so that the person who receives the rents is the person to be rated. But in this case it seems to me that a different set of circumstances arises because the appellant landlord remained on the premises and received no rent for that part of the premises which he occupied. He only received rent for the part which Miles occupied. I think the doubt which is expressed in *RYDE ON RATING* 6th ed., at p. 48, "whether, if the owner or tenant of the whole building himself occupies a part of it, he can be described in these words, or whether there is anyone who can be so described," is well founded. I do not think that on any construction s. 23 (1) can be regarded as having the effect of overriding a long line of authorities beginning, more particularly, with *Bradley v. Baylis* (1), which is one of three cases all raising the same point. That case, like many of the cases which raise the point whether a person is to be regarded as a lodger or a tenant, arose under the Representation of the People Act, 1918, and the question was whether a person could claim a vote as an occupier in the days before lodgers' votes. That was followed and considered in subsequent cases, and more especially in *Kent v. Fittall* (2). As I understand those cases, they come to this. The distinction between a lodger and a weekly tenant is often exceedingly difficult to define and it is a matter of very considerable difficulty where one is to draw the line, but one matter has always been treated in the later decisions, not as conclusive, but never as an element to be ignored, namely, whether the landlord remains resident on the premises himself. If a landlord has a house which is structurally altered, as many houses are now and have been since these decisions, so that there is one floor or two floors converted into a separate flat, often having its own door on a landing, the fact that the landlord occupies the lower part of the house as his own flat would certainly not be in any way conclusive that he did not intend the person who was, to use a neutral expression, in the upper part of the house, to be a tenant in the true sense of the word and to have an estate in that upper part. But in a house where no structural alteration is made, so that it remains just as it was built and people can walk up and down the stairs freely and go in and out of the rooms freely from a physical point of view, the fact that the landlord is living on the premises does seem to me to raise the presumption, and has always been treated in these cases as raising a presumption, that he intends to retain control of the whole of the premises. And if the landlord intends to retain control of the whole of the premises, that, I think, *prima facie* at least negatives the fact that the person who is occupying rooms in the other part of the house than that in which the landlord lives is a tenant in the true sense and not a lodger.

I refer briefly to *Allan v. Liverpool, Inman and Kirkdale* (3) which was decided before *Bradley v. Baylis* (1). In that case BLACKBURN, J., said (L.R. 9 Q.B. 180, 191) :

A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense [*i.e.*, for rating purposes], because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger.

In *Kent v. Fittall* (2) PICKFORD, J., said ([1911] 2 K.B. 1102, 1111):

A It has been established by many cases that if a man lets off rooms in a house in which he himself resides, although he may give to other persons exclusive occupation of parts of the house and render no services to those inmates, he nevertheless *prima facie* retains control, and the inmates are lodgers and not occupying tenants.

B In the present case we have, among other things, the fact that there was a bathroom in this house and that that bathroom was to be used both by the landlord and by Miles. The assessment committee, in treating these premises as two separate hereditaments, did not apparently, include the bathroom. They have taken as one hereditament the two rooms on the first floor, with what is called the kitchenette, and attributed that to one hereditament, and to the other hereditament they have attributed the other room on the first floor and the rooms on the ground floor. I do not suppose they intend the bathroom to be treated as a separate hereditament in itself. They have simply ignored it, but Miles is given the right to use the bathroom, and that does not mean he is to have the exclusive use of it. The control of the bathroom remains in the appellant, and there is nothing which I can see which goes to show that the appellant, who is living on the premises and has certainly only parted with—I am using that phrase in the popular, and not in the strictly legal, sense—two rooms and a kitchenette (which may for all I know be nothing more than a room with a cupboard and a gas stove in it), intended to part with the general control of those premises. He could, as I conceive, claim the right to go into these rooms to make any necessary repairs. Miles is not put under any obligation to repair, and if something happened to the roof, the windows or the walls, and the wet was being let in, I should think that the landlord would have the right to enter so that his property, in which he is living, would be properly preserved. He is taking a weekly rent. It is very common for lodgers to pay so much a week. Unfurnished lodgings are perfectly well known; lodgings are not always furnished. In this case the rooms come within the Furnished Houses (Rent Control) Act, 1946, but that is not conclusive in any way because both lodgings and tenancies come within that Act.

E It seems to me if, as I think, the line of cases to which I have referred have not been impliedly overruled by s. 23, the position is this. Although the presence of the landlord in the hereditament is not of itself conclusive that the other occupant must be a lodger, it is not only a fact of great weight but is also one which calls for the production of further facts which show that the landlord has renounced the right of control in the house, and it is on that point I think that quarter sessions have gone wrong. I can find no fact found which suggests that the landlord has renounced his control over these premises. In fact, I think the facts found indicate that the landlord has not renounced his rights over the premises. Moreover, if it was intended to vest an estate in Miles, giving him certain rights in the nature of an easement for the better enjoyment of what had been demised to him, it is most unlikely that that would have been done by a merely verbal agreement even although it was only a weekly tenancy. In the circumstances I come to the conclusion that I am bound to differ from quarter sessions because I think the proper inference to be drawn from the facts here is that Miles was no more than a lodger and it can never have been intended by s. 23 (1) of the Rating and Valuation Act, 1925, that, if a man lets lodgings to one or more persons, the rating authorities in their discretion can treat all those people as separate tenants and rate them in respect of their rooms as being in occupation of separate hereditaments. I, therefore, come to the conclusion that this house remained one hereditament, and that the facts found by quarter sessions are not enough to show that any estate was created and granted to Miles who was a lodger only. I arrive at that conclusion mainly because I can find nothing to indicate that the landlord, the appellant, had in any shape or form renounced the control which he exercised, and, so long as he remained

in control of the premises, the premises must be regarded as one hereditament.

I have only one other word to say with regard to a case which counsel for the assessment committee cited to us, *Allchurch v. Hendon Assessment Committee* (4). That case seems to me to differ on its facts in the most material respects. There the landlord of a house let part of it to A and part to B. He himself did not live on the premises at all. The assessment committee treated the whole house as jointly occupied by these two people so that each of them became liable for the rates of the whole. They appealed and it was held they were entitled to be assessed separately, but neither could pretend that he was a lodger of the landlord, who had parted with the whole house to them in consideration of the rent, and they were certainly not lodgers the one of the other. The house was let in part to the one person and in part to the other, and, therefore, it was rightly treated as two separate hereditaments. That seems to me to be an entirely different case from the one we are now considering.

SINGLETON, J. : I agree that this appeal should be allowed. Before us the first point taken by counsel for the assessment committee was under s. 23 (1) of the Rating and Valuation Act, 1925, which Act was :

An Act to simplify and amend the law with respect to the making and collection of rates by the consolidation of rates and otherwise, to promote uniformity in the valuation of property for the purpose of rates, to amend the law with respect to the valuation of machinery . . .

The submission which counsel made was that the effect of s. 23 was that it matters not, once a house is in the occupation of more than one person, whether the position of the person other than the owner is that of lodger or tenant. There were separate occupations, and it was for the rating authority or the assessment committee to say whether they would assess the hereditament all in one or in different pieces. I do not think that that is the effect of s. 23. In so far as material it reads as follows :

Where a building . . . is occupied in parts, the rating authority or the assessment committee . . . may, if they think fit, . . . treat the building or any portion thereof as a single hereditament, and a building or portion of a building so treated as a single hereditament shall, for the purposes of rating, be deemed to be a single hereditament in the occupation of the person who receives the rents payable in respect of the parts.

The word "occupied" is used in the earlier part of the section. The occupier is the person to be rated, and has been since the statute of Elizabeth. The word "occupied," when used in s. 23 of the Act of 1925, is, I believe, used in the sense of rateable occupation and the effect of the section is to give the rating authority an easy and a simple way to collect the rates where a house is occupied in parts. They may say : "We treat it as one hereditament and we will collect the rates from the occupier, the person who receives the rent payable in respect of the parts." The argument of counsel for the assessment committee was that s. 23 had made a change in the law of rating and it mattered not whether the persons in occupation of the different parts of the hereditament were lodgers or tenants. I cannot think that that view of the section is right. The authorities, to some of which my Lord has referred, are set out in the current edition of RYDE ON RATING and every text book on the matter. They still stand for the purpose of applying the provisions of the Act of 1925. I agree that the appeal must be allowed.

SLADE, J. : Although I have considerable doubt in this case, I am not prepared to dissent from the conclusion at which my brethren have arrived. The liability to be rated rests on rateable occupation, and it has been held that a lodger is not an occupier in that sense, but that, generally speaking, a tenant is. The sole question, therefore, which seems to me to arise on this Case is whether there was evidence before quarter sessions which justified them in arriving at the conclusion that the relationship between the appellant and Miles was that of landlord and tenant or was merely that of landlord and lodger. I am prepared to assume that where a landlord retains part of a hereditament in his own occupation, there is a presumption that he intends to retain control over the whole of the premises, and it seems to me that the best way in which such a presumption can be rebutted is by showing that, in fact, he has created the relationship of landlord and tenant between himself and some other person

in respect of part of the premises, because if he has, not only does he retain no control over the part which he has demised, but, on the contrary, the tenant of the demised part can turn the landlord out or bring trespass or a writ of *elegit* if the landlord attempts to enter that part of the premises. Therefore, I think the presumption carries us no further, and the sole point resolves itself into the question: Aye or no, was there or was there not evidence which entitled quarter sessions to come to the conclusion on the facts stated in this Case that the contract which was entered into between the appellant and Miles did or did not make the relationship of landlord and tenant. If there was evidence on which quarter sessions was entitled to come to the conclusion that the agreement entered into between the appellant and Miles created the relationship of landlord and tenant, this court could not, in my opinion, interfere with that decision. That is the matter on which I have felt doubt, but it is not one on which I feel justified in dissenting from the conclusion which my brethren have reached.

Appeal allowed with costs.

Solicitors: *A. Kramer & Co.* (for the appellant); *Waller, Neale & Houlston*, agents for *Marsh & Ferriman*, Worthing (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Affirmed. H.L. [1949] 1 All E.R. 1094.

Re CHATTERLEY-WHITFIELD COLLIERIES, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Asquith and Evershed, L.JJ.), July 14, 15, 16, 19, 20, 30, 1948.]

Coal—Nationalisation of industry—Colliery company—Reduction of capital—Rights of shareholders under Coal Industry Nationalisation Act, 1946 (c. 59), s. 25 (1).

A colliery company, whose capital of £400,000 was divided into 20,000 six per cent. preference shares of £10 each and the same number of ordinary shares of a like nominal value, passed a special resolution, as empowered by its articles of association, to reduce its capital to £200,000 by returning to the preference shareholders the whole capital paid up on their shares. The articles conferred on the preference shareholders a right to a cumulative preference dividend of 6 per cent., and, on winding-up, in priority to ordinary shareholders, to repayment of capital and an amount equal to the difference between the total amount of dividends paid on their shares and 6 per cent. per annum on the capital paid up thereon as from the time of payment of such capital, but to no other participation in the assets. On Jan. 1, 1947, under the Coal Industry Nationalisation Act, 1946, the company's colliery undertaking became vested in the National Coal Board, and, pending the payment of compensation, the company was entitled under s. 22 (3) of the Act to interim income, and, under s. 22 (2), to interest on the amount of the compensation. The Act provides by s. 25: "(1) Provision shall be made by regulations for due regard being had, as between classes . . . of members . . . of a company being an owner of transferred interests, to what their relative expectations of income yield from their respective interests in the company would have been if this Act had not been passed, and for that purpose the regulations shall provide facilities for adjusting the respective interests of such classes in the company's assets as affected by the substitution of the compensation under this Act for the transferred interests of the company so as to give effect, so far as may be, on the one hand to the said expectations and on the other hand to the rights of priority conferred on such classes respectively by . . . the memorandum and articles of association of the company." Certain preference shareholders dissented from the resolution to reduce capital in the proposed manner and opposed the petition to confirm it. It appeared that the company was not contemplating liquidation, but was prospecting for coal in Ireland, and had other activities.

HELD (EVERSHED, L.J., *dissentiente*): it was a principle recognised and accepted by the courts and by business men that where shareholders are entitled to priority in a winding-up, but not to participation in surplus

assets, they are to be paid off first on a reduction of capital, and s. 25 did not purport expressly or impliedly to limit or affect that principle in any way; having regard to all the circumstances, the proposed reduction was not rendered unfair by excluding the preference shareholders from consideration under s. 25; and it should be confirmed.

Wilsons & Clyde Coal Co., Ltd. v. Scottish Insurance Corporation, Ltd. and Others (1948 Session Notes 43), considered.

Decision of His Honour JUDGE PEEL, K.C., Deputy Vice-Chancellor of the Duchy and County Palatine of Lancaster ([1948] 1 All E.R. 911), reversed.

[AS TO REDUCTION OF CAPITAL, see HALSBURY, Hailsham Edn., Vol. 5, pp. 170-176, paras. 305-316; and FOR CASES, see DIGEST, Vol. 9, pp. 148-161, Nos. 833-936.]

Cases referred to :

- (1) *Wilsons & Clyde Coal Co., Ltd. v. Scottish Insurance Corporation, Ltd. and Others*, 1948 Session Notes 43.
- (2) *British & American Trustee Corporation v. Couper*, [1894] A.C. 399; 63 L.J.Ch. 425; 70 L.T. 882; 9 Digest 49, 840.
- (3) *Re Mackenzie & Co., Ltd.*, [1916] 2 Ch. 450; 85 L.J.Ch. 804; 115 L.T. 440; 9 Digest 158, 903.

APPEAL by a company from a judgment of His Honour JUDGE PEEL, K.C., Deputy Vice-Chancellor of the Duchy and County Palatine of Lancaster, reported [1948] 1 All E.R. 911, refusing confirmation of a special resolution of the company to reduce its capital by returning to the preference shareholders all capital paid up on their shares. JUDGE PEEL held that the court was bound to take into account, as one of the material circumstances in considering the fairness of the proposed reduction, the prospect of the preference shareholders obtaining an adjustment under the Coal Industry Nationalisation Act, 1946, s. 25, of their contractual rights under the articles. The Court of Appeal by a majority now reversed JUDGE PEEL's decision and confirmed the reduction. The facts appear in the judgments of LORD GREENE, M.R., and EVERSHED, L.J.

Christie, K.C., and *Eric Griffith* for the company.

Ungoed-Thomas, K.C., and *Raymond Walton* for dissentient preference shareholders.

Cur. adv. vult.

July 30. The following judgments were read.

LORD GREENE, M.R.: The question for decision on this appeal is whether and to what extent an obscurely drafted section of the Coal Industry Nationalisation Act, 1946, is to be regarded as affecting the power of the court to confirm a reduction of capital under the Companies Act, 1929, s. 55 (1) (c). It must be observed at the outset that, if the section in question does operate in the manner suggested, it does so without there being present in it any reference whatever to the power of the court or to the provisions of the Companies Act, 1929, relating to reduction of capital. What is said is that the section brings about such a state of affairs as to compel the court, in the exercise of its power to confirm a reduction, to act in a manner in which it would not otherwise have acted: It is, perhaps, not unfair to say that, if this was the intention of the legislature, it might in fairness to all concerned have expressed it with some clarity instead of leaving it to be inferred. The power of the court to confirm reduction of capital is after all a very important part of our system of company organisation and finance, and might, one would have thought, have deserved at least a mention in a section designed, as it is said, to affect its exercise.

The issued capital of the company is £400,000, divided into 40,000 shares of £10 each, one half of which are 6 per cent. preference shares and one half ordinary shares. The preference shares are entitled in a winding-up to priority of capital and arrears of dividend but to no further participation in assets. The company is a private company which had for a number of years before the Nationalisation Act carried on with success the business of coal-mining. This was its principal undertaking, and on Jan. 1, 1947, this undertaking passed out of the company and vested in the National Coal Board.

In spite of the loss of its principal business in this manner, the company does not propose to go into liquidation. It proposes to embark in certain new

A businesses, one of them that of coal mining in Eire and Northern Ireland if prospecting operations in which it is engaged turn out to be successful, and another (carried on through a subsidiary company) the business of digging for clay in Northern Ireland and manufacturing tiles, drain pipes, etc. Appreciation of the fact that the company is going to continue an active existence is essential for the proper understanding of this case. In respect of the loss of its coal mining business under nationalisation, the company will eventually become entitled to compensation fixed in accordance with the Nationalisation Act. So far as the evidence goes, its future foreseeable sources of income will consist of (a) income (if any) from the proposed coal mining business in Ireland; (b) dividends from the subsidiary company which carries on the clay and tile manufacturing business above referred to; (c) income from any investments it may hold, including any investments of compensation moneys which may not be embarked in the businesses mentioned in (a) and (b); (d) interim income payable under the Nationalisation Act, *viz.*, (1) during the first two years a sum (calculated to amount to £83,000 a year after deduction of tax) representing half of the profits of the nationalised undertaking during the year ended Dec. 31, 1945; (2) such interest as the Treasury, under s. 22 (2) (a) of the Act, may retrospectively allow when compensation is finally paid. I am unable to infer from this that the company in the future will be likely to earn anything like the large profits which it had been in the habit of earning before nationalisation.

C The process of ascertaining the share of the global figure of compensation to which an individual company will become entitled is admitted on all sides to be a lengthy one. This ascertainment is the third of the processes of valuation prescribed by the Act, and it is notorious that the second of those processes is not as yet anywhere near completion. It may be expected, therefore, that the company will not receive its compensation until after the expiration of a considerable time, running perhaps into several years. In the meanwhile the company is faced with the following situation. Its principal business has gone and it is proposing to embark on certain new activities which may or may not turn out to be successful. So long as it was possessed of its colliery it clearly required to keep all its issued capital in the business—there was no question of its having capital surplus to its business requirements. The reduced form of its activities is, however, such that it has a great deal more capital than it requires, and it is not unimportant to observe that it finds itself in this position quite apart from any compensation which it may receive when its share of the compensation is ultimately ascertained and paid. The repayment can be made without recourse to the compensation.

What is a company in that situation to do? The business answer to this question does not admit of doubt, particularly where a substantial part of its capital consists of preference shares bearing a higher rate of dividend than the company is reasonably likely to earn in the future. It will do what this company seeks to do, *i.e.*, reduce its capital by paying off as much of its preference capital as it is able to pay off out of its surplus. A company which satisfies its capital requirements by issuing preference shares only does so where it is satisfied that the new capital will earn at least the promised rate of dividend. A company which has issued preference shares carrying a high rate of dividend and finds its business so curtailed that it has capital surplus to its requirements and sees the likelihood, or at any rate the possibility, that its preference capital will not, if I may use the expression, “earn its keep,” would be guilty of financial ineptitude if it did not take steps to reduce its capital by paying off preference capital so far as the law allowed it to do so. That is mere common-place in company finance.

There has been a tendency, indeed more than a tendency, to represent a company confronted by this sort of practical question as though it were nothing but an uneasy and warring combination of hostile classes of shareholders. In a sense, no doubt, it is. But it is more than this. The position of the company itself as an economic entity must be considered, and nothing can be more destructive of a company's financial equilibrium than to have to carry the burden of capital which it does not need, bearing a high rate of dividend which it cannot earn. In a company so situated, the ordinary shareholders will be unfairly treated *vis-a-vis* the preference shareholders, and the company may well fall into the situation when its preference dividends will begin to fall into

irretrievable arrears. It is a fallacy to suppose that because ordinary shareholders will benefit, the transaction ought to be vetoed as being unfair to the preference shareholders.

It is a clearly recognised principle that the court, in confirming a reduction by the payment off of capital surplus to a company's needs, will allow, or rather require, that the reduction shall be effected in the first instance by payment off of capital which is entitled to priority in a winding-up. Apart from special cases where by agreement between classes the incidence of reduction is arranged in a different manner, this is and has for years been the normal and recognised practice of the courts, accepted by the courts and by business men as the fair and equitable method of carrying out a reduction by payment off of surplus capital. I know of no case where this method has, apart from agreement, been departed from. Every person who acquires shares in a company has only himself to blame if he does not know this, and I have no doubt that it is well recognised by business men. The following passage from LORD WRENBURY'S book accurately states the practice (BUCKLEY ON THE COMPANIES ACTS, 11th ed., p. 120):

Subject to the power of the court to sanction any reduction which is fair and equitable the inference to be drawn from the fact that the Act is silent as to the manner in which, in case of reduction, loss is to be borne or money is to be returned as among the several shareholders, is that, if it be loss, it is to be borne among them in such manner as under the constitution of the company loss in respect of capital is to be borne, and, if it be money to be returned, it is in like manner to be returned as capital is returnable.

In the argument before us there seemed to me at times to be involved some idea that preference shareholders, so far from being entitled to be paid off first, ought to be regarded as being entitled *not* to be paid off first, *i.e.*, that a company, having once issued preference shares, is bound either to keep them for ever, irrespective of the fact that it has surplus capital sufficient to pay them off, or at any rate is only entitled to reduce its capital by spreading the reduction rateably over its preference and its ordinary capital, with the result that the company will always be left with a certain amount of preference capital. The theory at the bottom of this idea appears to be that a preference shareholder subscribes his capital on the basis that he is to receive a preferential dividend of an agreed amount and that it is unfair to him to oust him from the company and thus deprive him of his contractual expectation of dividend. Apart from the fact that no such principle has ever been recognised by the court, it is, in my opinion, unsound for the reason that it ignores the facts (1) that the risk of a reduction of capital taking place is as much an element in the bargain as the right to a preferential dividend, and (2) that the well known practice of the courts involves what (as I have endeavoured to point out) is really in accordance with sound business practice and, moreover, is based on the recognised analogy of priorities as to capital in a winding-up, *viz.*, that, at any rate where preference shares are not entitled to participate in surplus assets, they are to be paid off first on a reduction, and references to the reasonable expectations of preference shareholders which are intended to suggest that there is something inequitable in this form of treatment, have, in my judgment, no support either in practice or on principle, and are unsound.

It is, in my opinion, important to start the consideration of the present question from this firm ground, *viz.*, that reduction by payment off of surplus capital is a sound and desirable operation in maintaining the financial health of limited companies, and that the recognised method of effecting it, of which I have been speaking, is the one which has always received the approval of the court. The occasions which may lead a company to pay off capital are, of course, many and various. A company which has provided itself with capital for the purpose of exploiting a patent may find that the patent is valueless or that the market for its product has disappeared. Unless it proposes to embark on some other operation it will desire to disembarass itself of unwanted capital. Or a company may carry on part of its business in a foreign country and suffer the misfortune of the cancellation of its concession or the expropriation of its undertaking. It will want to repay capital thus set free and no longer required. Indeed, the shareholders will in such circumstances normally desire to be paid off, and preference shareholders would normally have resisted any proposal

to pay off junior capital in priority to themselves. There appeared to be a suggestion that, owing to the fall in interest rates, preference shareholders ought now to be allowed to make a complete *volte face*, and to insist on remaining in the company in order that they may continue to receive their preference dividend, and that, irrespective of the question whether the company is in a position to earn it.

A In the present case the occurrence which has happened to this company is the extinction of its colliery business by nationalisation. If there had been nothing else in the case, I should have had no hesitation in holding that the preference shareholders ought to be paid off first, and would not have been entitled to object to such repayment. Indeed, I do not think that in the end the contrary was seriously suggested, but it was said, and in the judgment under appeal it was held, that the Coal Industry Nationalisation Act, 1946, s. 25, compelled the court to hold that what would be the usual method of affecting the reduction ought not to be confirmed as being unfair and inequitable. B The only alternative suggested is a *pari passu* reduction falling equally on the two classes of shares. No such proposal is, of course, before the court and our only power is to confirm or refuse to confirm the actual proposal. A *pari passu* reduction would leave the company saddled with £100,000 of 6 per cent. preference capital.

C A point was made that the voting on the resolution for reduction is no guide to the ascertainment of the real views of the preference shareholders as a class, having regard to the large proportion of these shareholders who hold an even greater quantity of ordinary shares, and that the views of the present opponents are the only sure guide, they being the only really independent preference shareholders. I do not find that this consideration is a helpful one. We are not considering whether some bargain between different classes of shareholders D is one which has been approved by business men. No such approval appears to me to be necessary. The question, so far as analysis of the voting is concerned, is whether a method of reduction which has always been regarded by the courts as fair and equitable ought to be regarded as unfair and inequitable because a particular large preference shareholder does not like it. I am particularly unimpressed by the dislike of this shareholder since in its affidavit it places no reliance on, and, indeed, makes no mention of, s. 25, but appears to complain E merely because it is being asked to accept £10 in place of a share which, by a method of highly questionable applicability, it values at £12. This method of approach was not that of counsel for the opponents who based his case on s. 25.

I have deferred too long in coming to what is really the crux of the case, and I must now examine s. 25. Unfortunately, a preliminary consideration of certain other matters is required, and in order to understand the section I F must say something about the nature of the compensation for which the Act makes provision. The compensation is made to the colliery-owning companies, not to the individual shareholders. It would not have been possible in the case of these companies to adopt the method of compensation adopted in other cases of nationalisation (*e.g.*, that of railways) when the compensation is given not to the companies but to the shareholders and is fixed by reference to stock G exchange values. Under that type of compensation provision, the shareholder, if he holds a well secured preference share the stock exchange value of which stands at above par, can be given compensation in, *e.g.*, government stock of an equivalent nominal value. The result of such a scheme is that, theoretically, the shareholder gets government stock of a nominal value equivalent to the stock exchange value of his investment. This, of course, applies to capital values only, and preference shareholders in such companies have been heard H to complain that the compensation received does not provide them with an income equivalent to what they previously enjoyed. The theoretical answer to this is that this is made up to them in the higher quality of the security. Now, in the case of the colliery companies it was impossible to proceed on these lines. Recourse to stock exchange values as a basis for compensation of individual shareholders was impossible for two simple reasons. A vast number of collieries were owned by private companies for whose shares there was no stock exchange quotation, and many of the larger companies which were public companies with quoted shares were carrying on composite undertakings of

which their colliery interests formed only a part, with the result that there was no quotation referable to these interests alone. In the result, a special method of compensation was adopted by which a global sum was fixed to cover all the undertakings taken over, a sum which by two subsequent stages was ultimately to be divided among the various undertakings, and those undertakings themselves, as distinct from their shareholders, were to receive the compensation.

This scheme, however, opened the door to another matter of difficulty. It was obvious that in many, if not the majority of, cases, at any rate where a company's entire business consisted of working a colliery, the company would go into liquidation. The result of its so doing would be that its assets, including its share of the compensation, would be divisible in such a way that debentures would be paid off at par and preference shareholders would, in all cases where the articles so provided, receive nothing but the nominal value of their shares. Those who had invested in comparatively high yielding and well secured debentures or preference shares would obviously have had serious ground for complaint since their investments, if they had been quoted, would have been quoted well above par, while, unlike shareholders in nationalised concerns who were to be compensated on the basis of stock exchange values, they would not have received even the nominal equivalent of the capital value of their investments.

Unless these matters are well understood it is not possible to understand the purpose and effect of s. 25 of the Act. It is as follows :

(1) Provision shall be made by regulations for due regard being had, as between classes of debenture holders, or of members, or of both, of a company being an owner of transferred interests, to what their relative expectations of income yield from their respective interests in the company would have been if this Act had not been passed, and for that purpose the regulations shall provide facilities for adjusting the respective interests of such classes in the company's assets as affected by the substitution of the compensation under this Act for the transferred interests of the company so as to give effect, so far as may be, on the one hand to the said expectations and on the other hand to the rights of priority conferred on such classes respectively by the debentures and the memorandum and articles of association of the company. (2) The said provision shall include facilities for the taking effect of schemes for such adjustment if assented to within a prescribed period by such majorities as may be prescribed, on the basis of sub-s. (2) of s. 153 of the Companies Act, 1929, of the members of each of the classes concerned and either not objected to by any member of a class concerned or, if so objected to, approved by a tribunal to be established under the regulations, and in default of schemes so taking effect, for the giving of directions for such adjustment by the tribunal to be so established on application as may be prescribed of the company or of members of a class concerned.

I hope that I shall not be thought disrespectful to Parliament if I describe the provisions of this section as displaying a certain amount of amateurishness. The following points may, however, be noted : (1) as the section requires to be put into operation in the case of individual companies it cannot begin to operate until the compensation payable to the particular individual company concerned has been fixed ; (2) this, no doubt, explains why it is that no regulations have yet been made : there can be no need to make them yet ; (3) accordingly, during the period which will elapse between the vesting date and the fixing of a company's quantum of compensation—already one year and seven months—nothing can be done under the section ; (4) meanwhile, anyone who tries to forecast the manner in which the section is likely to affect individual cases is met with a double difficulty of a formidable nature : he does not know what "provision" the regulations will make since the regulations are yet to be made, and he does not know what attitude the "tribunal" will adopt or on what principles it will act ; (5) in the case of a company which goes into liquidation the administration of the section may not in practice present very great difficulties ; (6) but in the case of a company which is going to continue in existence problems of a very different character may arise : the section, though no doubt directed to meeting the contemplated case of a winding-up, is not in terms limited to such cases and it would appear to allow "adjustments" to be made in the case of companies which are to continue in existence ; (7) in such cases the nature of the problem of adjustment can be seen from the following example. If the tribunal has before it the case of a company with a share capital divided into high dividend bearing preference shares and ordinary shares, a company which in the past has been prosperous but whose future

activities are not likely to produce anything like the same income as before, what sort of "adjustment" will be required? If matters are left as they are, the relative positions of the two classes of shares will be altered to the prejudice of the ordinary shareholders, and the object of an adjustment must, I would suppose, be to redress the balance in some equitable way. A preference shareholder in such a case would then find his position not maintained but worsened. How could this be done? The facilities to be provided by the regulations are

A to be "facilities for adjusting the respective interests of such classes in the company's assets." Is this to be done by empowering the tribunal (a) to direct a reduction of capital by writing down the nominal value of some particular class of share or (b) to lower the rate of dividend, or how? A system of writing down capital by such a tribunal without the safeguards for creditors provided by the reduction sections of the Companies Act would, I cannot help thinking, be an unfortunate affair. But one thing appears to me to be certain, that, on B an application to the tribunal, preference shareholders are, to say the least of it, as likely to have their interests in their company scaled down as to have them maintained at their existing level; (8) is the tribunal to have power to annul or limit the right of the company under the Companies Acts to reduce its capital the moment after the tribunal has effected a readjustment of it, or to limit in some way the power of the court to confirm a reduction?

C I may summarise my conclusions on the relevant matters under this section by saying that, in my opinion, the legislature has omitted to make clear its implications in the case of a continuing company, and has omitted to form, much less to state, any ideas on the subject of capital reduction or as to how the section is to be dovetailed into the existing statutory code and practice with regard to reductions of capital. One thing the section clearly does not do. It does not purport expressly or impliedly to limit or affect in any way the existing D provisions of the Companies Act, or the well known practice of the courts thereunder, or to lay down any new principles for the court to follow.

In the Scottish case, *Wilson & Clyde Coal Co., Ltd.* (1), the LORD PRESIDENT, in his dissenting judgment, said (1948 Session Notes, 43):

I admit that Parliament has not enacted a "stand still order" against interim modifications of the capital structure of the transferor companies by reductions of capital of the type here proposed.

E With this I respectfully agree, and I attach great importance to the fact, but when the LORD PRESIDENT goes on to say (*ibid.*):

But it may well have been thought unnecessary to do so because the courts had already been directed by Parliament to exert a controlling authority over such reductions by their discretionary power to withhold confirmation.

F I must respectfully decline to follow him. It appears to me that the legislature never thought of the matter at all: it had done so, it seems to me impossible to suppose that it would have expected a fundamental departure from existing practice to take place without making it clear that such was its intention. If the court refuses to confirm the reduction proposed, it will be condemning a living company to the fate of having to support a weight of preference capital for which it has no need, in spite of the fact that it has ample surplus funds with which to pay it off. The only end to be achieved by the adoption of this G course will be to give the preference shareholders a chance of receiving better terms at some future date from a tribunal not yet set up with powers not yet defined under regulations not yet made. As I have pointed out, as the company is to remain in business on a reduced scale, the terms which the preference shareholders will receive may well be worse than those now proposed. Yet we are told that to deprive them of what is a purely speculative chance would H involve a departure from what is fair and equitable, and that in consequence a method of reduction which has always been adopted by the courts as the proper one ought to be abandoned. It is, of course, the case that the company will not be precluded from producing some other scheme, but the only scheme which has been suggested as being fair and equitable is one providing for a *pari passu* reduction of both classes of shares. Such a reduction would still leave the company saddled with £100,000 of preference capital carrying a rate of dividend which in present circumstances it is not to be expected that the company will be able to earn, and in so far as the preference capital thus left does not "earn

its keep " it will have to be fed at the expense of the ordinary shareholders. This does not appear to me to be fair or equitable. And what perhaps is of almost equal importance, it appears to me to be bad finance and bad business in the case of a continuing company.

My reasons for differing from the careful judgment of the DEPUTY VICE-CHANCELLOR already sufficiently appear, and I shall not, I hope, appear disrespectful if I do not deal in detail with the views which he expressed. I should say, however, that I differ from him not on a matter of discretion but on a matter of principle, *i.e.*, as to the effect that ought to be given to the existence of s. 25 on the statute book. I must, however, add a few words with regard to the Scottish case, *Wilson & Clyde Coal Co., Ltd.* (1), which I have already mentioned. We were provided with transcripts of the shorthand notes of the judgments of the First Division in that case. The facts there differed in important respects from those in the present case. There, as here, it was proposed to repay the preference capital, but this was being done as a preliminary to winding-up, and the business considerations which appear to me to be important in the case of a continuing company were, accordingly, absent. The LORD PRESIDENT, who dissented, held that the preference shares under the articles would be entitled in a winding-up to share in surplus assets *pari passu* with the ordinary shareholders, and this by itself may well have been sufficient to justify his view that payment off of the preference shareholders in the manner proposed would not be in accordance with the rights (in a winding-up) conferred by the articles. Of the other members of the court, LORD KEITH appears to have thought that the preference shareholders had no rights in surplus assets but he seems to have regarded it as immaterial. The position of these shareholders must, he thought, be evaluated as it was at the moment, and he was influenced by the fact that it lay in the power of the ordinary shareholders to take for themselves, prior to winding-up, the funds which in a winding-up might provide the surplus assets in question. LORD KEITH also took the view that the contemplated winding-up was irrelevant, and that the case must be treated in the same way as if the company was a going concern in the ordinary way. I am not sure, with respect, whether I would agree with this, but it is in any event not relevant to the facts of the present case. LORD KEITH dealt very shortly with s. 25, holding it to be irrelevant, his reasons being that the rights conferred by the section were future rights and that the function of the court was to consider the situation as it existed at the moment. It is not for me to criticise this argument, but it will be seen that my own method of approach having regard to the facts of the present case, is on different lines. The LORD PRESIDENT, in his dissenting judgment, emphasises, and—if I may respectfully say so—rightly emphasises, the distinction between the case of a company which is a going concern and the case before him of a company admittedly on the point of liquidation. The business distinction between the two cases has, I hope, appeared from what I have said earlier in this judgment. The LORD PRESIDENT, speaking of the case before him, said: "There is no question in this case, as in earlier cases, of re-casting the company's finances in its interests as a trading entity." The *ratio decidendi* of his judgment may, I think, be summarised as being that in the case of a company on the verge of liquidation, where preference shareholders have (as he held) a right to share in surplus assets, it is inequitable to regard their rights as though they were rights in a going concern and to pay them off at par notwithstanding that on the approaching liquidation they may receive more than par. In the LORD PRESIDENT's remarks as to s. 25 he says that, whatever s. 25 may mean, the relative interests of the classes of shareholders might be modified, and that the "declared intention" of Parliament might be *pro tanto* frustrated if the preference shares were to be extinguished in the meanwhile. Speaking for myself, I have, as will have been seen, some difficulty in appreciating what the declared intention of Parliament may be. But in any event there appears to me to be all the difference in the world between the case of a company going into liquidation, defects in whose financial structure cannot possibly affect its position, and the case of a company which proposes to continue as a going concern and ought not to be hampered by defects of that character. LORD RUSSELL was in general agreement with LORD KEITH. I do not find any assistance in this decision, dealing as it does with facts of a fundamentally different character.

In the result, I am of opinion that the present appeal should be allowed and the proposed reduction confirmed, the application being otherwise in order.

ASQUITH, L.J. : I agree, and would have been content to add nothing but for the dissent of my brother *EVERSHED* in a judgment which I have had the advantage and pleasure of perusing. It is not in dispute that an unwanted surplus exists, and it is not in dispute that the proposed method of reducing capital is perfectly consistent with the preference shareholders' contractual rights. The sole residual question is whether the scheme is "fair." In that connection the following points seem to me important. I will preface them by observing, for reasons which will appear, that a proposal fair in itself, is none the less so because an alternative proposal might be equally fair, or might even approximate more nearly to ideal justice. It has never been laid down that before confirming a scheme under s. 55 of the Companies Act, 1929, the court must be satisfied that it is perfect. It is enough if it be "fair."

What, then, is the criterion of fairness? One test surely is whether the scheme is consistent with the reasonable expectations of a shareholder of the class in question, in the sense that it involves no more than the realisation of a risk which he knows he is assuming when he acquires shares of that class. To be paid off in full is just such a risk as the purchaser of a preference share carrying a high rate of interest knows he is incurring. He must be taken to know of s. 55 of the Companies Act. He must be taken, in my view, to know more, namely, that a prudent company will cut the mill stone of onerous prior charges or senior stocks from its neck as soon as money becomes cheaper or the company finds itself in possession of a surplus of cash not needed to carry on its business. This risk is the price the preference shareholder pays for solid advantages, namely, for what is in the present case a high, as well as a well secured, rate of fixed dividend, and a first charge on the assets in a liquidation.

The main ground urged at the Bar for challenging the fairness of the existing proposal is that the preference (like other classes of) shareholders have some sort of inchoate rights, or, at least, *de facto* prospects, under s. 25 of the Nationalisation Act, and that they should not be debarred from any chance of benefit, albeit speculative, which might enure to them from this source—a chance from which they would be excluded if paid off under the scheme. Nevertheless, it seems to me unjustifiable to refuse confirmation of the scheme by assuming a particular operation for a clause the actual operation of which is today unpredictable. Those who oppose the existing proposal, I think tacitly assume that the preference shareholders have a reasonable prospect of benefits under s. 25 if they can, as it were, stay the course until that section takes effect. The company however, by not paying them off, might be reserving for them not benefits but burdens. Let us assume they are not paid off. On this assumption, if a forecast of the effect of s. 25 may, notwithstanding its speculative character, be permitted, my own view would be that an "adjustment" under that section, on the facts of the case, would probably work in favour of the ordinary shareholders and to the detriment of the preference shareholders.

The tribunal (in some years' time, when the quantum of compensation for this particular business had been ascertained) would have to consider three matters: (i) what were the relative expectations of the two classes of shareholders, if there had been no nationalisation; (ii) how these relative expectations have been affected by the "substitution of compensation" for the "transferred interests"; (iii) what "adjustment" (if any) is accordingly justified or required of the respective interests of the two classes of shareholders in the assets of the company. How would this calculation be likely to work out in the case of the present company? The company in the years preceding the Nationalisation Act was earning large and steadily mounting profits—a process tending inevitably to the progressive enrichment of the ordinary shareholder relatively to the preference shareholder whose reward is static. If this trend was likely to have been maintained (and there is no ground for assuming the contrary), the ordinary shareholders were the class whose high expectations would have been dashed by the "substitution of compensation," whether in money or low yield government stocks, and any "adjustment" would be likely to be in their favour and to the relative disadvantage of the preference shareholders. I am not forgetting that the tribunal is enjoined to take into account the priority

rights of the preference stock as well as the thwarted hopes of the ordinary shareholder.

It is, however, maintained that "fairness" requires the preference shareholders to be left free to enter for a lottery, which, it is conceded, may operate to their loss, and which I think would, in fact, do so, and it is suggested that a reduction of capital by £200,000 could be reconciled with their being left this freedom under an alternative method operating by a *pari passu* reduction of the capital of the preference and ordinary shareholders. If this were done, the preference capital and ordinary capital would each be reduced from £200,000 to £100,000, but there would still be a class of preference shareholders in being to attract the operation of s. 25 when that section came into force. If this proposal were adopted, what would be its results on the two classes of shareholders between the time of its adoption and the time, it may be many years hence, when the compensation for this company is ascertained and s. 25 takes effect? The effect would be in all probability that, during this period, the company would live largely on its reserves. These reserves are ample in the present case, but they represent the fruits of the ordinary shareholders' abstinence. It does not seem to me in the circumstances fair or reasonable, or required by s. 25, that one of two classes of shareholders should be kept alive, as it were, on oxygen hoarded by the other class, simply to enable the first named class to qualify for an "adjustment" under that section, an adjustment, moreover, which might well operate to its own detriment.

I will only add that two circumstances relied on against the proposed scheme do not impress me. The first is that the surplus in cash in this case would not have existed but for the operation of the Nationalisation Act. This is perfectly true, but it does not, in my view, create any presumption as to what is a fair way of disposing of the surplus once it has arisen. It amounts to no more than that the surplus is a neutral windfall and should not be disposed of in a way which assumes that it originated from either the merit or the fault of either class of shareholder. The proposed scheme seems to me consistent with this requirement. If the Nationalisation Act had repealed s. 55 of the Companies Act *quoad* coal mines, a different inference might have been justified, here and all along the line. Secondly, it was represented that it would be a hardship to pay off the 6 per cent. preference shareholder in circumstances in which he could only re-invest his money at something much below a 6 per cent. yield. But rate of interest must not be confused with yield; and the grievance in question would not attach to present holders who bought their shares well above par, and these may for all we know have been many. Leaving that consideration aside, under the suggested alternative scheme of *pari passu* repayment might not that half of the ordinary shareholders who had received dividends of 30 per cent. or more, nourish a more legitimate grievance if repaid at par? Would the suggested scheme be fair to them? I feel the greatest scepticism about the superior equity claimed for a *pari passu* repayment, but even if it were appreciably fairer, it does not follow, as I said earlier, that the existing scheme would be unfair.

While recognising fully the force of the arguments stressed by EVERSHED, L.J., in a judgment which I have had the advantage and pleasure of reading, I feel they are over-borne by the considerations indicated in the judgment of the MASTER OF THE ROLLS and in this judgment. I think this proposal should be confirmed.

EVERSHED, L.J.: In this appeal Chatterley-Whitfield Collieries, Ltd. (hereinafter called "the company") seeks confirmation by the court of a reduction of the company's capital by means of repayment to the company's preference shareholders of the whole of their paid-up capital, and cancellation of the appropriate nominal capital, on the footing that such paid-up capital is now surplus to the company's requirements.

As the name of the company implies, its business has, since its incorporation in the year 1891, been that of a colliery undertaking in Staffordshire. By virtue, therefore, of the Coal Industry Nationalisation Act, 1946 (hereinafter referred to as "the Coal Act") the company's colliery undertaking vested on Jan. 1, 1947, in the National Coal Board. The company does not, however, propose to go into liquidation. It is intended that its resources and energies

should be directed to coal mining in Ireland (if the prospecting operations in that country in which the company is now engaged prove successful) and also (through a subsidiary company) to digging for clay and manufacturing drain pipes and the like in Northern Ireland. In these enterprises the ordinary shareholders desire to dispense with the company of the preference shareholders, and the support (or burden) of their capital.

A The petition having been presented to the Chancellor of the Duchy and County Palatine of Lancaster was heard by His Honour JUDGE PEEL, K.C., sitting as Deputy Vice-Chancellor, and was by him dismissed. The substantial ground of the learned judge's decision was that in all the circumstances of the case, including particularly the effect of s. 25 of the Coal Act, it was not fair and equitable to the holders of the company's preference capital that they should now be compelled to accept repayment of their preference capital and be thereby excluded from all further participation with the ordinary shareholders in the assets and fortunes of the company. B In this respect the learned judge expressly departed from the view taken by the majority of the Scottish Court of Session in the case of *Wilson & Clyde Coal Co., Ltd.* (1), to which I shall later refer. The main question, therefore, for the decision of this court is of the effect, in the circumstances of the present case, of the nationalisation of the coal mining industry, and especially of s. 25 of the Coal Act, on the practice and duty of C the court under s. 55 of the Companies Act, 1929. Sub-sections (1) and (2) of s. 25 of the Coal Act have already been read by the MASTER OF THE ROLLS and I need not read them again.

As already appears, the company has carried on its coal business for a considerable period of time, and during the twelve years from 1935 (for which the company's accounts have been put in evidence) it has carried on its business most successfully. During the year ended Dec. 31, 1935, the net profit (after providing for depreciation, income tax and reserves) was £31,500 odd, and an ordinary dividend was paid at the rate of 5 per cent. During the succeeding four years the average rate of ordinary dividend was just under 10 per cent. The war years were still more profitable. The ordinary dividends for the years 1945 and 1946 were 15 per cent. and 30 per cent. respectively; and the company was able to create very substantial reserves, amounting altogether (with the undistributed balance to profit and loss account) to over £400,000. It was, however (according to the petition), the Coal Act which gave rise to the surplus of capital; and it is not suggested that, apart from nationalisation, the company would have desired or thought it proper to repay any part of its paid-up capital. Paragraph 11 of the petition states:

The capital proposed to be returned . . . is in excess of the wants of the company because, by virtue of the provisions of the Coal Industry Nationalisation Act, 1946, the assets of the colliery business of the company vested in the National Coal Board on Jan. 1, 1947, with the result that the company has been deprived of and has ceased to carry on its principal business.

It should be added that the value of the assets and business transferred to the National Coal Board stood in the company's books at a figure of over £380,000. The amount of the compensation payable to the company in respect of the transfer has not yet been fixed, and it appears unlikely that it will be fixed, still less paid, for some time to come. By the terms of the Coal Act, the company is entitled to receive by way of interest for each of the two years 1947 and 1948, a gross sum of approximately £85,000, a sum calculated by reference to the company's profits for the year 1945, and sufficient of itself to provide in each year the dividend on the company's preference shares and to pay a dividend on the ordinary shares of some 36 per cent. Alternatively, these two sums would alone suffice, after providing for the preference dividend, to maintain the ordinary dividend at its pre-war rate for seven years. After 1948 the company is entitled to interest on the amount of compensation (until paid) at such rate as the Treasury may determine. I assume that such interest will be very far short of £85,000 per annum.

The authorised capital of the company originally was, and still is, £400,000, consisting, according to the company's memorandum of association, of 40,000 shares of £10 each. By art. 7 of the company's present articles of association the first 20,000, numbered 1 to 20,000 inclusive, are designated preference

shares. The rights attached by the articles to these shares are: (i) the right to a cumulative preferential dividend at the rate of 6 per cent. per annum, and (ii) the right in the winding-up to repayment of the capital paid up on the shares and any arrears of the preference dividend in priority to all claims on the part of the ordinary shareholders, but to no other right to participate in the company's assets. Each share (of either class) is entitled to one vote at a general meeting. It does not appear from the evidence before us when the company's shares were issued, but by 1935 all had been issued. The preference shares had then been fully paid, but £7 10s. per share only had been paid up on the ordinary shares. The balance of £2 10s. per share was paid up in the year 1939—not, as we were informed by means of any capital bonus, but in cash, the company being then in need of further capital. The company is a private company, the total number of its shareholders being 47 at the date of the special resolution for reduction of capital. I shall make some analysis of the voting upon that special resolution hereafter. For present purposes it is sufficient to say that the resolution was opposed, and the confirmation of the reduction of capital was and is opposed, by shareholders holding 6,000 preference shares but no ordinary shares.

It is conceded that by virtue of the introductory words of s. 55 of the Companies Act, 1929—"subject to confirmation by the court"—there is conferred on the court a judicial discretion, on presentation of a petition under that section, whether or not to confirm the reduction proposed; and that, if the court is to accede to the prayer of the petition, the court must be satisfied not only of the formal validity of the steps taken by the petitioner company, but also that the reduction proposed is one that is fair and equitable to the shareholders or classes of shareholders affected. It is by the exercise of this discretionary power that a minority will be protected from the oppression of a majority: see, e.g., *British & American Trustee Corporation v. Couper* (2), per LORD HERSCHELL, L.C., ([1894] A.C. 406). It was argued by counsel for the objecting preference shareholders that, the learned judge having exercised his discretion, the court ought not—or at least ought not in the present case—to disturb the result. But, as I follow his judgment, the learned DEPUTY VICE-CHANCELLOR based his conclusion on the following reasoning. He assumed that, apart from the effect of the Coal Act, the repayment proposed would have been in accordance with the contractual or other rights of the preference shareholders as found expressly or by implication in the company's articles of association, but that s. 25, being imperative in terms, must be taken so far to have modified those rights, or to have foreshadowed such a modification by the regulations promised by the section, that on such a petition as the present a repayment in accordance with what he took to be the strict contractual position was no longer fair and equitable to the preference shareholders. It is plain that the reasoning involved the determination as a matter of law of the effect, at any rate of s. 25 of the Coal Act. In my opinion, therefore, it is an insufficient answer to the appellants to say that the order appealed from was one made by the judge in the exercise of his discretion. The question is whether he founded his exercise on a correct view of the law. On this question I have the misfortune to have reached a different conclusion from that of my brethren; for, in my opinion, the answer to the question is in the affirmative, and I think that this appeal ought to be dismissed.

It must, in my judgment, be allowed that, if on the presentation of a petition for reduction by way of repayment of surplus capital under s. 55 the exercise of a judicial discretion is required, and if, in order to exercise that discretion favourably to the petitioning company, the judge must be satisfied (*inter alia*) that the method and incidence of repayment proposed is one that is fair and equitable to all classes of shareholders affected, then the essential questions must be answered in each case by reference to the relevant facts and circumstances, as proved in evidence, of that case. Considerations or rules of practice which have in the past and in other cases been regarded as determining factors one way or another would not necessarily, as it seems to me, have the same effect in a given case today if it be shown that there has been such a change of conditions or other relevant considerations as substantially affect their force and validity. There is, however, one principle to which reference has more than once been made by the courts—that where there is, or may be, a conflict between

different classes of shares its solution is *prima facie* a matter of "business sense." If, therefore, a scheme of reduction has commended itself to those directly concerned financially, the court should accept their judgment and be extremely slow to pronounce it unfair or inequitable at the instance, *e.g.*, of a small dissentient minority who may be seeking to exploit their nuisance value for their individual gain. Counsel for the company urged on us that this principle was applicable in the present case. Of the 47 members of the company, there were present in person or by proxy at the extraordinary general meeting which passed the special resolution in favour of the proposed reduction 30 members representing 36,217 shares out of the total of 40,000 issued, and of these, 26 shareholders representing 30,217 voted in favour of the resolution and 4 representing 6,000 shares voted against. The four opponents held only preference shares, but the majority included 20 members holding 13,034 preference shares. Not only, therefore, said counsel, was there no ordinary shareholder in opposition to the resolution, but a majority of more than 2 to 1 in value of the preference shareholders declared themselves in its favour. It is, however, necessary to examine the figures somewhat more closely. As might be expected in a private company of this character, the great majority of the members held shares of both classes; and of these the great majority again held more ordinary shares than preference. The largest shareholder, and chairman of the company, Mr. Louis Edge, of Dublin, Eire, holds 6,200 preference shares and 11,732 ordinary shares. The Prudential Assurance Company—one of the opponents to the reduction—is by an appreciable margin the next largest individual shareholder after Mr. Edge. The North of England Trustee Debenture and Assets Corporation (1940), Ltd., appears as holding in its own right 1,547 preference and 874 ordinary shares. We have not been informed of the composition and control of this corporation, but it is to be observed that it is also registered in respect of three other holdings—two of 1,000 preference and 63 ordinary shares each, and one of 1,000 preference shares alone. These three holdings are described as "re account" of Miss T. J. A. Edge, Miss D. L. Edge and Miss Jessie Edge. For the purposes of the computation the North of England etc. Corporation has been, quite properly, counted as four, and all its votes were cast (by proxy) in favour of the resolution. The North of England etc. Corporation is one of the exceptional cases (as to three of its holdings) of a holding of preference shares in excess of ordinary shares; and as to one of its holdings, it holds preference shares alone. It seems to me, however, a fair inference—which was not, as I understood it, challenged by counsel for the company when put to him in the course of the argument—that the corporation was closely associated in interest with the chairman. In any case it is hardly to be expected that the corporation's proxy in respect of its holding *Re* Miss Jessie Edge's account would conflict with its proxies on account of its other holdings which included ordinary shares. For the rest, with the exception of Mrs. Mary Frances Mathews (250 preference, 11 ordinary), Mr. Herbert Thomas Marsh (112 preference, 61 ordinary) and Miss Phyllis Mary Owen (300 preference only), all those who voted on the side of the majority held ordinary shares alone, or had a greater interest in ordinary shares than in preference. On the other side are the Prudential Assurance Co., Ltd., and the Yorkshire Insurance Co., Ltd., holding between them, by themselves or their nominees (for the other two opponents are such nominees) 6,000 preference shares and no ordinary.

The analysis I have made leads, in my judgment, to the conclusion that there cannot here be found a business bargain between conflicting interests which the court could safely or properly adopt as the test of the "fair and equitable" character of the scheme. If this be so, by what test ought the court to be guided? Though the case is common of preference shares having the rights attached to those in the present company, no decision has been found in the books which directly provides the answer to the question. Where the priority of the preference shares is limited to dividend rights, all shares participating rateably in a winding-up, it has been conceded that on a return of surplus capital *prima facie* the fair and equitable course is a return to both classes *pari passu*: see *Re Mackenzie & Co., Ltd.* (3). Counsel for the dissentient shareholders has argued with some force that it is a strange anomaly if the additional privilege of priority in a winding-up (for such, I think, it would be taken to be) resulted in existing

circumstances to the disadvantage of the preference shareholders.

In the absence of direct authority, counsel for the company relied strongly on the passage in BUCKLEY ON THE COMPANIES ACTS (11th ed., at p. 120) which has already been read by the MASTER OF THE ROLLS. The passage cited had appeared in previous editions and has the authority of LORD WRENBURY himself. As regards the writing off of lost capital, I do not for myself find any difficulty in the principle suggested. A return of surplus capital is, to my mind, more doubtful. I take the passage quoted to apply to other cases than those in which by the company's constitution or regulations express provision is made for the order in which surplus capital is to be returned, and to mean, in such a case as the present, "in like manner as capital is returnable on a winding-up." On what foundation does the alleged principle rest? Where, as in the present case, the contract between the preference shareholders and the company makes no express provision in regard to the rights and obligations on a return of surplus capital, it seems to me impossible on general principles to imply a contractual term that, in the event of a surplus, preference capital shall be returned first. Apart from the general rules of construction, the effect of such an implication would be that the rights of preference shares such as those in the present case would in substance be equivalent to those of redeemable preference shares. But I am prepared to assume, following thus far the argument of counsel for the company, that it has for many years been the practice on a return of capital that preference shares with rights such as those in the present case should be paid off first, and that, generally speaking, in the past no objection has been taken to the practice by preference shareholders. If, however, the practice does not—as I think it cannot—rest on contract, it must rest on the view that, in all the circumstances of the case, such an order of return is fair and equitable. And, under what are (in retrospect) now called "normal conditions" I concede that this would be so. A 6 per cent. preference shareholder on repayment of his capital would have experienced no difficulty in finding a comparable investment for his money; and unless he were first repaid he might justly complain that the "security" for his priority in a winding-up would be diminished. In truth, under "normal conditions" such prior repayment would in the ordinary course be treated as a benefit and a privilege. It is also, no doubt, true that by popular acceptance the preference share has been clothed to some extent with the attributes of a charge. The use of such phrases as "prior stocks" and "equity," no less than the word "security" mentioned above, may be cited as illustrations. But this habit of expression is, I think, misleading and does not really accord, in my judgment, with the true contractual position of the preference shareholders in the present case.

I have already drawn attention to the fact that the shares to which preferential rights were attached by the articles were part of the original capital of the company—in fact, the first 20,000 of the company's shares—and the holders of the preference shares are, as it seems to me, *prima facie* entitled to regard themselves as corporators in the company's enterprise jointly with the other shareholders. It is to be remembered that the process of reduction of capital in such a case as the present involves more than the repayment to certain members of the cash equivalent of their shares, like the repayment to a chargee of the sum secured by his charge. It involves also the cancellation of a proportionate part of the company's nominal capital with whatever are the rights attached thereto by the company's constitution and regulations. It does not seem to me, as a matter of principle, right that ordinary shareholders should be entitled, because of the interest rates subsisting at the time, to treat preference shareholders as a "burden" comparable to holders of debentures and (to borrow the language of the LORD PRESIDENT in the Scottish case) to "cut them out" as soon as the company has accumulated sufficient funds for the purpose. Nor did counsel justify on this ground the practice he sought to apply. Such a conception appears to me indeed to conflict with the principle in BUCKLEY on which counsel founded his argument; for if, as a matter of business sense and expectation, the right of a company or of its ordinary shareholders, if a surplus of capital arises, is to disembarass themselves of capital conferring a burdensome rate of interest, the question of priority in a winding-up cannot, to my mind, provide the determining, still less the sole, test of the order of repayment; or, if it does provide the test, then the

rate of the preferential dividend and the question whether it is cumulative or non-cumulative would appear *prima facie* to be irrelevant. Without multiplying illustrations, one may ask what on such a view of the case would be the right order of repayment out of surplus capital between ordinary and preference shareholders (a) if the rights of the preference shareholders were to priority in a winding-up and to a non-cumulative preferential dividend of 4 per cent., and (b) if the rights of the preference shareholders were to 10 per cent. cumulative preference and also to participating dividends, and to no priority in a winding-up? The claims of business prudence and financial orthodoxy are no doubt attractive, but they cannot over-reach the company's obligations.

Whether or not I have rightly assumed its basis, I am content to assume nevertheless that under normal conditions the practice to which I have referred will *prima facie* be applied, and that the holders of preference shares will expect it to be applied. Conditions today are notoriously abnormal. It is common knowledge that a 6 per cent. preference shareholder who receives back his capital would have the utmost difficulty in finding any comparable investment for his money. The dissentient shareholders in the present case regard it as far from advantageous to be repaid their capital and to be expelled from the company; and the argument that, if there be a rateable repayment, their unpaid balance will be less well secured rings somewhat hollow in their ears. The truth is that the "business" interests of the ordinary and the preference shareholders have come into conflict, and a satisfactory "business" solution has not been found. For myself, therefore, if it be true that the exercise of a judicial discretion involves consideration of the circumstances of each case, I think the argument against treating the rule indicated in *BUCKLEY* as rigid and sacrosanct to be somewhat formidable. But I will even assume that long usage has, as it were, given to preference shares a characteristic now generally understood and accepted which will prevail even against such severe, if temporary, monetary changes as those experienced today. There still remains s. 25 of the Coal Act.

The language of the two sub-sections which have been quoted is not, it must be confessed, easy to follow. As I construe his judgment, the learned judge below interpreted the section as intended, or intended primarily, to provide for preference shareholders some protection against, or compensation for, the hardship with which I have just dealt arising out of existing monetary conditions. It has been pointed out in argument that the terms of the section are clearly not limited in favour only of one class of share—or debenture—holder. The result of nationalisation in the present case seems indeed likely in the light, at any rate, of the experience of the last ten years or so to occasion some disappointment, in the way of dividend rates, to the ordinary shareholders. On the other hand, the transfer of this company's colliery, by creating a surplus of capital, has, on the basis of previous usage and without regard to s. 25, destroyed the preference shareholders' expectations of a continuance of their investment. It is true that, so far, the contemplated regulations have not been made. Nevertheless, the section is in terms imperative and appears to apply to every company the assets of which are "transferred" under the Act. I cannot, therefore, regard difficulties of interpretation of the section any more than the absence, so far, of any regulations, or the fact that the regulations when published must lie before Parliament for forty days, as sufficient grounds for treating the section or its effect as wholly speculative and irrelevant.

Section 25, as it seems to me, recognises that the result of the nationalisation of the coal industry may in any given case be a real interference one way or another with the contractual and other relationships *inter se* of (*inter alia*) different classes of shares, both when the company affected is a going concern and in its winding-up, and shows, at least, that in the view of Parliament, unless there is some adjustment of the relationship, injustice may result. Different classes of shareholder joining together in an industrial enterprise did so in the hope and belief that the priority claims of one would not be irreconcilable with the high expectations of the other. Section 25 appears to recognise that this foundation to their joint enterprise may be disturbed, and directs affirmatively in each case that by appropriate concessions and adjustments one class shall not be over-ridden by the other. Put otherwise, if the previous practice rests (as has been the gist of the argument before us) solely

on the basis of the priority in winding-up, that basis is one of the matters in respect of which by the terms of the section it is directed that adjustment may be made. Parliament having so directed, it seems to me impossible for the court, in a case where the proposed repayment of capital is shown to be the direct consequence of the Act, itself to decide what is fair and reasonable in disregard of the very matters which Parliament has said requires adjustment and proposes to adjust. Further, if the preference shareholders' grievance in regard to loss of income could be neglected in the absence of s. 25, that section seems at least to say that such loss of income is one of the matters relevant for consideration.

I cannot for myself see that there is any significance in the fact that no reference is found in s. 25 of the Coal Act to s. 55 of the Companies Act, 1929. Any such reference would, to my mind, be inappropriate. The power and discretion of the court under s. 55 remain undiminished. The effect of s. 25 is merely to introduce, in any case to which that section applies, new considerations material to the exercise of the court's discretion on a reduction of capital. It does so by saying that the contractual and other rights attached to different classes of shares by the company's memorandum and articles are no longer conclusive. The court is not, to my mind, entitled to complain because the exercise of its discretion is thereby rendered more difficult or because a "business bargain" which has hitherto been regarded as a matter of course is no longer treated as universally acceptable.

In the circumstances of the present case, therefore, I agree with the learned judge in thinking that it is not fair and equitable that the ordinary shareholders should, as it were, forestall the Coal Act, and should "cut out" the preference shares as if the present case were a "normal" case of repayment of capital of twenty years ago. For that at least is the one thing that it is not.

Without repeating the various matters to which I have earlier referred, I have in the present case particularly in mind the present financial position and the immediate future prospects of the company as shown by its exhibited accounts as well as the circumstances which have given rise to the present application. I have in mind that only nine years ago this 57 year-old company required and obtained from its ordinary shareholders £50,000 of additional capital. It is not, in fact, intended to wind-up the company and determine the company's enterprise. There is plainly no present risk of loss of "security" for the preference shareholders, and, as I interpret the voting, there is no such business bargain as the court ought to affirm.

Nor is it shown to my satisfaction on the evidence that the company, as distinct from its ordinary shareholders, will benefit in any appreciable way from the proposed reduction or will be exposed to any appreciable risk of damage if such reduction is not confirmed. According to counsel for the company, the presence of the two objectors as shareholders on the register will deprive the company of certain privileges in regard to the publication of accounts—which it would otherwise have as a private company under the Companies Act, 1948—and will cause embarrassment, because the company's chairman and its auditor happen to be professional partners. But these somewhat oblique benefits are not sufficient, in my judgment, to affect the balance of fairness with which we are concerned. Counsel further pointed out that, if the proposed reduction were not confirmed, the company would, apart from the waste of costs already occurred, be in great difficulty in knowing what steps should now be taken. This difficulty is, no doubt, real. But it is one which must afflict every company whose proposals for a reduction of capital the court declines to confirm.

The function of the court is to say, aye or no, whether a specific proposal for reduction satisfies the test, and not to formulate of its own motion what in its judgment would be fair and reasonable. No doubt, in practice a decision that a particular proposal is not fair and reasonable postulates the existence in the mind of the court of something that, by contrast, is. There can, of course, be no question under s. 55 of the Companies Act, 1929, of the payment of any premium to the shareholders to be repaid, and counsel for the dissentient shareholders repudiated any such suggestion on his part or on the part of those whom he represents. A proposal for reduction which can fairly be described as a "business bargain" between the classes of members affected will, as I have said, normally be accepted as fair and equitable by the court. If it be necessary or desirable to express any opinion on the

matter, for my part I think that in the existing circumstances a repayment which was rateable among both classes of shareholders, and which, therefore, preserved as between them any right to adjustment under s. 25 of the Coal Act, would *prima facie* be fair and equitable; but I must not be taken to be pronouncing in advance on this or on any other mode of reduction, still less to be excluding any scheme which might in practice be found to satisfy the test of "business sense."

- A As regards the Scottish case, *Wilsons & Clyde Coal Co., Ltd.* (1), it is to be observed that in certain material respects the facts differed from those in the present case. In the view of the LORD PRESIDENT (whose opinion differed from those of LORD KEITH and LORD RUSSELL) it being of the essence of the matter that the company was moribund with one foot in the grave, the 7 per cent. preference stockholders were on the true construction of the articles entitled in a winding-up to participate *pari passu* with the ordinary shareholders. If B his view in this respect be right, then having regard to the fact that 71 preference stockholders representing 45 per cent. of the whole issue opposed the reduction, I respectfully share the LORD PRESIDENT's difficulty "in figuring circumstances in which it will ever be worth invoking it" (*i.e.*, the discretionary power to refuse confirmation) "again." LORD KEITH took a different view of the rights of the preference stockholders on a winding-up; and both he and C LORD RUSSELL drew attention to the significant provisions of art. 139 empowering the directors to use the reserve fund "for making provision for paying off the preference share capital." But as I read their opinions, both LORD KEITH and LORD RUSSELL based their conclusions not so much on the special terms of the articles, but rather on the fact that, however imminent the winding-up, the company was in fact still a going concern, and on the further general ground that D so long as the company remained a going concern (in the language of LORD KEITH) "the ordinary expectation and practice is that the prior ranking shares shall be paid off first" and that the preference stockholders must be taken to have contracted on that basis. Thus both LORD KEITH and LORD RUSSELL regarded consideration of the position on a winding-up and of the application of s. 25 of the Coal Act as future questions, which were wholly irrelevant. With the greatest respect to those learned judges, I am unable to share their view. In E so far as the matter is one of contract I have already given my reasons for thinking that in such a case as the present no such term can properly be implied into the contract between the preference shareholder and the company. And although such a reduction as is here proposed is no doubt supported by long usage, I think that the application of the practice must be limited to cases where the circumstances are comparable to those which gave rise to the practice and fairly justify it and ought not in other cases to be allowed to F render futile the proper exercise of a judicial discretion. Both LORD KEITH and LORD RUSSELL placed some reliance on the powers of the ordinary shareholders, so long as the company remained a going concern, to appropriate to themselves the undistributed reserves by the declaration of large dividends or the creation of bonuses. It seems to me that these arguments do not really avail the ordinary stockholders. Apart from the practical considerations to which the LORD PRESIDENT drew attention, the effect of such operations would G in the first place absorb the means of making any capital return; and secondly would be ineffective to disturb the rights of the preference shareholders to priority in respect of dividend and, in a winding-up, in respect of capital.

For the reasons which I have given I think that the learned DEPUTY VICE-CHANCELLOR rightly refused to confirm the reduction of capital proposed, and I, accordingly, would dismiss the appeal.

- H *Appeal allowed with costs. Order as to costs in the court below not disturbed.*
Solicitors: *Baddeley, Wardlaw & Co.*, agents for *Wilson, Cowie & Dillon*, Liverpool (for the company); *Slaughter & May* (for the dissentient preference shareholders).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

JOBBINS *v.* MIDDLESEX COUNTY COUNCIL.

[COURT OF APPEAL (Scott, Cohen and Wrottesley, L.JJ.), July 20, 21, 22, 1948.]

Local Government—Superannuation—Amount of allowance—Area public assistance officer acting also as interim superintendent registrar of births and deaths—Inclusion of fees as registrar in calculation of average remuneration—Calculation to be based on gross fees—Local Government Superannuation Act, 1937 (c. 68), ss. 8 (5) (c); 40 (1), (3).

Statutes—Construction—Right conferred by main enacting sections of Act—Effect of provision in interpretation section.

The Local Government Superannuation Act, 1937, s. 8 provides: "(1) Subject to the provisions of this Act, a contributory employee of an employing authority shall be entitled, on ceasing to be employed by them, to receive an annual superannuation allowance if he . . . (b) has attained the age of 60 years and completed 40 years' service . . . (2) The superannuation allowance to be made to a contributory employee under this part of this Act shall be on the following scale, that is to say: (a) in respect of every completed year of contributing service, one sixtieth of his average remuneration . . . (5) For the purposes of this section, the average remuneration of a contributory employee means the annual average of the remuneration received by him in respect of service rendered during the 5 years immediately preceding the day on which he ceases to hold his employment, or the day on which he attains the age of 65 years, whichever is the earlier: Provided that . . . (c) if a contributory employee in the whole-time employment of a single local authority becomes a contributory employee in the part-time employment of each of two or more authorities, then, if his remuneration in his whole-time employment becomes material for the purpose of calculating the superannuation allowance payable to him on his ceasing to hold one of his part-time employments, that remuneration shall for the purposes of the calculation be treated as attributable to those part-time employments and shall be apportioned between them." By s. 40, the interpretation section, sub-s. (1) provides: "'remuneration' means all salary, wages, fees, poundage and other payments paid or made to an employee as such for his own use, and includes the money value of any apartments, rations or other allowances in kind appertaining to his employment, but does not include payments for overtime, or any allowance paid to him to cover cost of office accommodation or clerks' assistance, or any travelling or subsistence allowance or other moneys to be spent, or to cover expenses incurred by him, for the purposes of his employment . . . 'service' means service rendered to any local authority . . . but does not include service in any employment if the person in question has already become entitled in respect of that service in that employment to a superannuation allowance under this or any other Act." By s. 40 (3): "Where an employee holds under a local authority two or more separate employments of such a nature that he can cease to hold one without ceasing to hold the other or others, the provisions of this Act shall, unless the context otherwise requires, apply as respects him in relation to each of those separate employments as if the other or others were an employment or employments held by him under another authority."

From Apr. 30, 1938, to June 30, 1940, an area public assistance officer of a county council was also an interim superintendent registrar of births and deaths. He was a "contributory employee," within the meaning of the Local Government Superannuation Act, 1937, as defined in s. 3 of the Act, in respect of his post as an area officer, and as such was bound to contribute to, and entitled to participate in, the council's superannuation fund, and it was accepted that he was also a contributory employee of the council in respect of his office as interim superintendent registrar. On Nov. 2, 1943, he retired from the post of area officer and became entitled to a superannuation allowance, under s. 8 (1) (b) of the Act. He claimed that for the purpose of computing his average remuneration during the 5 years immediately preceding his retirement in 1943, on which computation the amount of the superannuation allowance depended, his remuneration in

respect of his office as interim superintendent registrar should be taken into account. The council contended that, by reason of ss. 8 (5) (c) and 40 (3) of the Act, the officer's remuneration as interim superintendent registrar should not be included in the computation of the allowance to which he became entitled on ceasing to be employed as area officer :

HELD : (i) on the true construction of the Act of 1937, the officer was entitled to have his remuneration as superintendent registrar of births and deaths taken into account in ascertaining his average remuneration under s. 8 (5).

(ii) on the true construction of the definition of "remuneration" in s. 40 (1) of the Act, the gross fees received by the officer as superintendent registrar were to be taken into account in calculating the superannuation allowance payable to him, and not those fees less expenditure incurred by him in the performance of his duties.

(iii) A definition section ought not to be construed as cutting down or modifying the main enacting sections of an Act unless it contains clear language to that effect.

Principle in Lysons v. Knowles (Andrew) & Sons, Ltd. ([1901] A.C. 79), applied.

Decision of the Divisional Court ([1947] 2 All E.R. 748), reversed.

C [FOR THE LOCAL GOVERNMENT SUPERANNUATION ACT, 1937, see HALSBURY'S STATUTES, Vol. 30, p. 385.]

Cases referred to :

(1) *Algar v. Middlesex County Council*, [1945] 2 All E.R. 243 ; 173 L.T. 143 ; 109 J.P. 213 ; 2nd Digest Supp.

(2) *Lysons v. Knowles (Andrew) & Sons, Ltd., Stuart v. Nixon & Bruce*, [1901] A.C. 79 ; 70 L.J.K.B. 170 ; 84 L.T. 65 ; 65 J.P. 388 ; 34 Digest 423, 3433.

D APPEAL by the applicant from a judgment of the Divisional Court, dated Nov. 10, 1947, on a Special Case stated by the Minister of Health under the Local Government Superannuation Act, 1937, s. 35.

The applicant, being dissatisfied with a decision of the Middlesex County Council that, in calculating the amount of the superannuation allowance payable to him under the Local Government Superannuation Act, 1937, on his ceasing to be employed by the council as area public assistance officer, no account could be taken of any fees received by him in respect of his office as interim superintendent registrar of births and deaths for the district of Willesden, referred the matter to the Minister of Health who stated a Case. The Divisional Court confirmed the decision of the county council. The applicant appealed, and the Court of Appeal now allowed his appeal. The facts and the relevant sections of the Act appear in the judgment of COHEN, L.J.

F The questions submitted by the Special Case were : (i) Whether, for the purpose of calculating, under s. 8 (2) of the Act of 1937, the amount of the superannuation allowance payable to the applicant on his ceasing to be employed by the Middlesex County Council as area officer, it was incumbent on the council to include in his average remuneration, as defined by s. 8 (5) of that Act, certain fees received by him as interim superintendent registrar of births and deaths in so far as such fees were remuneration as defined by s. 40 of the Act ? (ii)

G If the answer to the preceding question were in the affirmative, whether there should be taken into account as such remuneration (a) the gross fees received by the applicant, or (b) those fees less any expenditure incurred by the applicant in the performance of the duties of that appointment, as, for example, the salary paid by him to his deputy.

The applicant appeared in person.

H *Harold Williams, K.C.*, and *J. R. Willis* for the council.

SCOTT, L.J. : I will ask COHEN, L.J., to deliver the first judgment.

COHEN, L.J. : This is an appeal from a decision of the Divisional Court relating to the superannuation allowance payable to the applicant on his ceasing to be employed by the Middlesex County Council in the capacity of area officer. The appeal raises a difficult question of construction of the Local Government Superannuation Act, 1937. Before us the applicant has appeared in person. The difficulties, under which the applicant, appearing in person to argue difficult

questions of construction, must necessarily labour, might have been serious, had it not been for the assistance both he and the court have received from counsel for the council, to whose presentation of the case and clear statement of the possible interpretations of an extremely difficult Act we are much indebted.

The facts are fully set forth in paras. 1 and 2 of the Case. Paragraph 1 is :

On Feb. 29, 1944, Mr. H. W. Jobbins (hereinafter called "the applicant") being dissatisfied with a decision of the Middlesex County Council (hereinafter called "the council") that, in calculating the amount of the superannuation allowance payable to him under the Local Government Superannuation Act, 1937 (hereinafter called "the Act of 1937") on his ceasing to be employed by the council as area officer, no account could be taken of any fees received by him in respect of his office as interim superintendent registrar of births and deaths for the registration district of Willesden, referred the matter to the Minister of Health (hereinafter called "the Minister") for his determination under s. 35 of the Act of 1937 and requested the Minister to state a Case under the provisions of that section for the opinion of the court.

Paragraph 2 is :

The following facts are agreed between the parties :—(a) The applicant was, immediately before the coming into operation of the Local Government Act, 1929 (hereinafter called "the Act of 1929") employed by the Willesden Board of Guardians as their deputy clerk and as such officer he was required to make contributions for superannuation purposes under the Poor Law Officers' Superannuation Act, 1896 (hereinafter called "the Act of 1896"). (b) Under the operation of s. 119 of the Act of 1929 the applicant was, on Apr. 1, 1930, transferred to and became an officer of the council. (c) The applicant exercised the option given to him by s. 124 of the Act of 1929 of remaining subject to the provisions of the Act of 1896. (d) The applicant was employed by the council from the date of his transfer to them as aforesaid until Mar. 31, 1935, as local public assistance officer. He was then notified by the council that he had been appointed area officer with additional duties of a general county nature as from Apr. 1, 1935, and he continued to be employed in that capacity until Nov. 2, 1943. On the last mentioned date the applicant retired from his appointment as area officer, having attained the age of 60 years on the previous day, and has not since held any office or employment under the council. (e) In addition to his employment as deputy clerk under the Willesden Board of Guardians, and subsequently under the council first as local public assistance officer and subsequently as area officer, the applicant held the office of deputy superintendent registrar of births and deaths for the Willesden Registration District, to which he was appointed and in which he was paid by the superintendent registrar, from Jan. 1, 1914, to Apr. 30, 1936. In respect of that office, however, the applicant was not subject to the provisions of the Act of 1896, nor was he transferred to the service of the council under the Act of 1929. (f) On Apr. 30, 1938, the superintendent registrar of births and deaths for the Willesden Registration District died, whereupon the applicant became interim superintendent registrar of births and deaths for the said district by virtue of the provisions of the Births and Deaths Registration Act, 1874, s. 25, and was accordingly required by law to perform all the duties and to be subject to all the obligations, including the obligation to appoint a deputy superintendent registrar of births and deaths. The applicant continued to hold that appointment, in which he was remunerated by fees, until June 30, 1940, when another person was appointed superintendent registrar of births and deaths. (g) On the applicant becoming interim superintendent registrar as aforesaid he submitted that he was a superintendent registrar within the definition of "officer" in the Act of 1896 and claimed that contributions should be made by him under that Act in respect of the fees received as interim superintendent registrar. The council, after consideration, having finally come to the conclusion that this contention was incorrect, notified the applicant accordingly, and in these circumstances contributions which had been made by the applicant under the Act of 1896 in respect of his appointment as interim superintendent registrar were returned to him in May, 1939. (h) On Apr. 1, 1939, the Act of 1937 came into operation and applied as from that date to the council. The Act of 1896 ceased to apply to the applicant by virtue of s. 32 of the Act of 1937, under ss. 3 (1) and 3 (2) (a) of which the applicant became a contributory employee of the council in respect of his office as area officer. The council did not regard the applicant as a contributory employee in respect of his employment as interim superintendent registrar of births and deaths and contributions were accordingly not made by the applicant in respect of that appointment. In view, however, of the subsequent decision given by the court in June, 1945, in the case of *Algar v. Middlesex County Council* (1) the applicant should, as from Apr. 1, 1939, have been treated as a contributory employee under ss. 3 (1) and 3 (2) (d) of the Act of 1937 in respect of his said appointment. (i) On Nov. 2, 1943, the applicant, having attained the age of 60 years, ceased to be employed by the council as area officer, and the council thereupon proceeded to assess the amount of the superannuation allowance payable

to him under the Act of 1937. The council's decision on this matter, which is referred to in para. 1 of this Case, was communicated to the applicant on Dec. 17, 1943.

I will state shortly the applicant's history and, while doing so, briefly refer to the various statutory provisions which affect his position before the coming into force of the Act of 1937. He retired in 1943, at which date he had been for over 40 years in the service of the Middlesex County Council or its predecessors. In 1930, as a result of the passing of the Local Government Act, 1929, he became transferred poor law officer of the Middlesex County Council, and he elected to remain, so far as pension rights were concerned, under the Poor Law Officers' Superannuation Act, 1896. There was no dispute that he was employed as an officer within the meaning of that Act and would have been entitled to a pension had he ceased to be so employed. At that time he was also deputy superintendent registrar of births and deaths for the Willesden Registration District, having been appointed to that position by the superintendent registrar pursuant to the provisions of the Births and Deaths Registration Act, 1874, s. 24. As such he would not have been entitled to any superannuation rights at that time, but on Apr. 30, 1938, the then superintendent registrar of births and deaths for the Willesden Registration District died and thereupon the applicant became interim superintendent registrar pursuant to the express provisions of the Births and Deaths Registration Act, 1874, s. 25. I pause here to say that in that capacity it is admitted that, when the Act of 1937 came into force, he was a registration officer and became entitled to superannuation rights. When I say "it is admitted," I mean it was admitted in the court below, because counsel for the council was bound so to admit by reason of a decision of the court in *Algar v. Middlesex County Council* (1). Before us counsel for the council preferred to argue the case on the basis that *Algar's* case (1) was rightly decided, though he was not prepared to admit that it was rightly decided or debar himself from taking the point again should a similar point arise in some other litigation.

In 1937 the Act we have to construe, the Local Government Superannuation Act, 1937, was passed, but it did not come into operation until Apr. 1, 1939. Under that Act the applicant was no longer able to elect to remain bound by the Act of 1896, for under s. 32 of the Act of 1937 it was provided that :

... as from the appointed day [*viz.*, Apr. 1, 1939] (a) the Poor Law Officers' Superannuation Act, 1896, shall cease to apply to any transferred poor law employee or transferred rating employee.

There is no dispute that, from the date of the passing of that Act, the applicant came within the ambit of the Act both in his capacity as area officer and in his capacity as interim registration officer. He continued to act as interim registration officer until a new registration officer was appointed on June 30, 1940, and thereafter he remained in the service of the Middlesex County Council as area officer until he retired on Nov. 2, 1943. On those facts the Divisional Court held in answer to the first question submitted to them that, for the purpose of calculating under s. 8 (2) of the Act of 1937 the amount of the superannuation allowance payable to the applicant on his ceasing to be employed by the council as an area officer, it was not incumbent on the council :

... to include in his average remuneration, as defined by s. 8 (5) of that Act, the fees received by him as interim superintendent registrar of births and deaths in so far as such fees are remuneration as defined by s. 40 of that Act.

Before I refer to the judgment in detail, it will be convenient to go through the relevant provisions of the Act of 1937. Section 1 imposes on local authorities and other bodies mentioned in the section, the obligation to establish a superannuation fund. Section 3 (1) provides as follows :

On and after the appointed day all such persons as are mentioned in the next succeeding sub-section shall, subject to the provisions of this section and to the provisions of Part III of this Act relating to officers appointed in a temporary capacity, be entitled to participate in the benefits of the appropriate superannuation fund maintained under this part of this Act, and persons so entitled shall, unless they are such persons as are mentioned in the proviso to s. 6 (1) of this Act, contribute to that fund in accordance with the provisions of that section.

I pause to say that no one has suggested that the provisions relating to officers employed in a temporary capacity (referred to above) have any bearing on the

question we have to decide and that the proviso to s. 6 (1) is also irrelevant to the case before us. Then [at the end of s. 3 (1)] comes this provision :

In this Act, the expression "contributory employee" means a person who is for the time being entitled to participate in the benefits of such a superannuation fund, notwithstanding that he may be such a person as is mentioned in the said proviso.

Section 3 (2) provides :

The persons referred to in the preceding sub-section are (a) every whole-time officer of a local authority specified in Part I of sched. I to this Act who are not a local Act authority.

It is admitted that the applicant is a whole-time officer within the meaning of that provision. Sub-paragraphs (d) and (e) of s. 3 (2) are in these terms :

(d) every registration officer acting in or for a district in relation to which registration functions are discharged by a local authority who are not a local Act authority ; (e) in the circumstances mentioned in Part I of sched. II to this Act, a transferred poor law employee in the employment of a local authority who are not a local Act authority and a transferred rating employee in such employment.

There is no dispute that the applicant is a "contributory employee" within the meaning of one or more of those definitions. Section 6 provides what contributions are to be made to the appropriate superannuation fund. Nothing turns on its terms. Section 8, which is the vital section we have to construe, deals with : "Eligibility for superannuation allowance, and scale of allowances." Sub-section (1) is :

Subject to the provisions of this Act, a contributory employee of an employing authority shall be entitled, on ceasing to be employed by them, to receive an annual superannuation allowance if he either (a) has completed 10 years' service and is incapable of discharging efficiently the duties of his employment by reason of permanent ill-health or infirmity of mind or body ; or (b) has attained the age of 60 years and completed 40 years' service ; or (c) has attained the age of 65 years and completed 10 years' service.

The applicant retired under (b) because he had attained the age of 60 and completed 40 years' service. Sub-section (2) deals with the allowances to be made and is in these terms :

The superannuation allowance to be made to a contributory employee under this Part of this Act shall be on the following scale, that is to say : (a) in respect of every completed year of contributing service, one sixtieth of his average remuneration ; (b) in respect of every year of non-contributing service, one one-hundred-and-twentieth of his average remuneration . . .

Then come two provisos with which I need not trouble. Sub-section (3) provides :

No superannuation allowance under this part of this Act shall exceed two-thirds of the employee's average remuneration.

Sub-section (4), I think, is irrelevant. Sub-section (5) is :

For the purposes of this section, the average remuneration of a contributory employee means the annual average of the remuneration received by him in respect of service rendered during the 5 years immediately preceding the day on which he ceases to hold his employment or the day on which he attains the age of 65 years, whichever is the earlier : Provided that . . . (c) if a contributory employee in the whole-time employment of a single local authority becomes a contributory employee in the part-time employment of each of two or more authorities, then, if his remuneration in his whole-time employment becomes material for the purpose of calculating the superannuation allowance payable to him on his ceasing to hold one of his part-time employments, that remuneration shall for the purposes of the calculation be treated as attributable to those part-time employments and shall be apportioned between them.

Sub-section (6) provides :

For the purposes of sub-s. (1) of this section, an employee's service shall be calculated by aggregating all periods of service.

Sub-section (7) provides :

For the purpose of sub-s. (2) of this section (a) an employee's contributing service shall be calculated by aggregating all periods of such service ; (b) his non-contributing service shall be calculated by deducting from his service, calculated in accordance with the last preceding sub-section, all completed years of contributing service ; and

(c) if his non-contributing service as so calculated includes a fraction of a year, that fraction shall, if it amounts to or exceeds 6 months, be treated as a year, and in any other case be disregarded.

Section 10 (1) is :

A contributory employee of an employing authority who, before becoming entitled to a superannuation allowance under this part of this Act, ceases to be employed by that authority for any reason other than his voluntary resignation, or his resignation or dismissal in consequence of inefficiency or an offence of a fraudulent character or misconduct, shall be entitled to receive out of the appropriate superannuation fund a sum equal to the aggregate amount of his contributions to the fund, together with compound interest thereon, calculated to the date on which he ceased to hold his employment at the rate of 3 per cent. per annum with half-yearly rests.

Section 10 (6) is :

Notwithstanding anything in the foregoing provisions of this section, no payment shall be made thereunder to an employee of a local authority who leaves their employment in order to enter the employment of another local authority in such circumstances that a transfer value is payable in respect of him under the relevant provisions of pt. III of this Act.

Section 12, which deals with "Reckoning of service," provides :

(1) A contributory employee shall be entitled to reckon as contributing service, in relation to the employment in respect of which he is a contributory employee—(a) service in respect of which he was required to contribute to the appropriate superannuation fund ; (b) in the case of a person who became a contributory employee on the appointed day, any service which immediately before that day he was entitled to reckon as contributing service for the purposes of the Act of 1922 in relation to his said employment ; and (c) any other service which, by virtue of any of the provisions of this Act, or of any regulations made thereunder, is to be reckoned as contributing service : Provided that, subject to the provisions of this Act, a contributory employee shall not be entitled to reckon as contributing service any service in respect of which he has received a return of contributions under this Act or under the Act of 1922. (2) A contributory employee of a local authority shall be entitled to reckon as non-contributing service any service which he is not entitled to reckon as contributing service . . . (5) For the purpose of calculating the superannuation allowance of a contributory employee employed whole-time in a single employment who has formerly served as a part-time employee, the period of part-time service shall be treated as though it were whole-time service for a proportionately reduced period.

Section 27 provides :

(1) Every registration officer shall be deemed, for the purposes of this Act and of any local Act scheme, to be an officer in the employment of the local authority discharging registration functions in relation to the district in or for which the officer acts : Provided that nothing in this Act shall affect any power of the Registrar-General to remove a registration officer from office. (2) The provisions of Part IV of sched. II to this Act shall have effect with respect to such registration officers as are therein mentioned.

Section 32, to which I have already referred, provides for the Act of 1896 ceasing to apply to transferred employees. Section 35 provides for the reference of any dispute as to pension between employees and employers to the Minister of Health and contains a proviso :

Provided that the Minister may at any stage of the proceedings on the reference to him, and shall, if so directed by the High Court, state in the form of a Special Case for the opinion of the High Court any question of law arising in those proceedings.

It is under that power that the Special Case was referred to the Divisional Court. I now come to the next important section in this Act, the interpretation section, s. 40. The opening words of sub-s. (1) are : " In this Act, unless the context otherwise requires," and I now refer to the relevant definitions. The first is "appointed day," which was Apr. 1, 1939. Then :

... "contributing service" in relation to any person means service which he is entitled to reckon as contributing service in accordance with the provisions of s. 12 of this Act ; "contributing employee" has the meaning assigned to it by s. 3 of this Act.

"Local authority" includes county councils among other bodies. Then :

... "non-contributing service" in relation to any person means service which he is entitled to reckon as non-contributing service in accordance with the provisions of s. 12 of this Act.

Then "officer" is defined in terms which clearly show that the applicant in his character of area officer was included. "Registration officer" is defined in these words:

... "registration officer" means a superintendent registrar or registrar of births and deaths, and includes a registrar of births and deaths exercising any of the functions of a registrar of marriages and a person appointed by a local authority to act as a deputy superintendent registrar or deputy registrar of births and deaths.

As I have said, having regard to the decision in *Algar's* case (1) it is not denied in this court that the applicant is a registration officer within the meaning of this Act. Then come the definition of "remuneration," "service," and "whole-time officer":

... "remuneration" means all salary, wages, fees, poundage and other payments paid or made to an employee as such for his own use, and includes the money value of any apartments, rations or other allowances in kind appertaining to his employment, but does not include payments for overtime, or any allowance paid to him to cover cost of office accommodation or clerks' assistance, or any travelling or subsistence allowance or other moneys to be spent, or to cover expenses incurred by him, for the purposes of his employment ... "service" means service rendered to any local authority after attaining the age of 18 years and before attaining the age of 65 years, and includes, in the case of a contributory employee who first became subject to provision for superannuation on the appointed day and had then attained the age of 65 years, service rendered after attaining that age and before the appointed day, but does not include service in any employment if the person in question has already become entitled in respect of that service in that employment to a superannuation allowance under this or any other Act ... "whole-time officer" means, in relation to any local authority, an officer who devotes substantially the whole of his time to their employment, and includes an officer who is employed by them for a part only of his time but devotes substantially the whole of the rest of his time to employment by one or more other local authorities.

I think that counsel for the council agreed, having regard to that definition, that the applicant was at all times a whole-time officer within the meaning of that definition. Section 40 (2) provides:

Unless the context otherwise requires, reference in this Act to employees of a local authority include references to persons who are deemed for the purposes of this Act to be in the employment of the authority, and other provisions relating to employment by or under a local authority shall be construed accordingly.

Then comes s. 40 (3) on which the Divisional Court based its judgment. It is in these terms:

Where an employee holds under a local authority two or more separate employments of such a nature that he can cease to hold one without ceasing to hold the other or others, the provisions of this Act shall, unless the context otherwise requires, apply as respects him in relation to each of those separate employments as if the other or others were an employment or employments held by him under another authority.

I turn now to the schedules. Schedule I is not material except in so far as the Middlesex County Council is made thereunder a local authority whose whole-time officers are "to be compulsorily superannuable." Schedule II deals in pt. I, para. 2, with the transfer of poor law employees and says:

A transferred poor law employee who (a) was on the appointed day in the employment of a local authority and, having remained subject to the Act of 1896 by virtue of the Act of 1929, was immediately before that day still subject to the Act of 1896 ... shall, by virtue of this paragraph, become a contributory employee on the appointed day ...

The only other provision to which I need refer is contained in sched. II, pt. IV, which deals with registration officers. Paragraph 1 is:

The following provisions of this part of this schedule shall, in lieu of any other provisions of this Act or of any local Act scheme (including any definition of "service" contained in this Act or in the scheme), have effect with respect to the reckoning of service rendered as a registration officer before the appointed day by a registration officer who (a) was first appointed as such after Mar. 31, 1930, and before the appointed day ... and who ... either is in office as a registration officer on the appointed day, or, having ceased to hold office before the appointed day is, on or after the appointed day and within 12 months from the date on which he so ceased, re-appointed as a registration officer.

The applicant is such a registration officer, because he was first appointed in the sense that he succeeded by reason of the death of the then superintendent registrar after Mar. 31, 1930, and before the appointed day, and he was still in office at the appointed day. That being so, para. 3 of sched. II, pt. IV, applies :

A For the purposes of Part I of this Act and of any local Act scheme . . . (b) . . . account shall be taken of any such service in such manner and subject to such terms and conditions, including conditions as to the making of payments by an employee or a local authority, as may be prescribed.

B Regulations were prescribed under para. 2 (b) of sched. II, pt. IV. They contain nothing in any material way affecting the question we have to decide, but I ought to mention, in order to place it on record, that, by the Local Government Superannuation (Service of Registration Officers) Regulations, 1939 (S.R. & O., 1939, No. 57), art 3 (1), the Minister prescribed that a registration officer appointed as such after Mar. 31, 1930, and before the appointed day, who was within the schedule :

C . . . shall, subject to the provisions of the Act, be entitled to reckon as contributing service in relation to the appointment in respect of which he so became a contributory employee any service rendered by him as a registration officer before the appointed day which immediately before that day would have been treated as service for the purposes of the Act of 1896.

D The effect of that regulation was that the applicant became entitled to have reckoned as contributing service the service he rendered to the county council between Apr. 30, 1938, when he succeeded to the deceased superintendent registrar, down to the coming into force of the Act of 1937 on Apr. 1, 1939. There can be no question that, had he resigned both offices before that date in that period, he would have been entitled to have his remuneration in both capacities taken into account, because there was no provision in force corresponding to s. 40 (3) of the Act of 1937. He did not so retire. He retired on Nov. 2, 1943. He had previously vacated the office of registration officer by reason of the appointment of a successor on June 30, 1940.

E In those circumstances, as I have said, the Divisional Court decided that he was not entitled to have taken into account in ascertaining his average remuneration under s. 8 (5) of the Act of 1937, remuneration which he received for the five years preceding Nov. 2, 1943, in the capacity of registrar. They seem to have treated the express language of s. 40 (3) as excluding that claim. Unfortunately, their judgment does not show the reasoning by which they reached that conclusion and, therefore, I am bound to examine the section for myself unassisted by any full statement of the reasons of the Divisional Court for their conclusion. It is to be observed that s. 40 (3) is an interpretation section

F and in express terms provides nothing more than that :

. . . the provisions of this Act shall, unless the context otherwise requires, apply as respects him in relation to each of those separate employments as if the other or others were an employment or employments held by him under another authority.

G That means that, wherever we come to a reference to his employment, we have to consider him during the relevant period as having held two employments, one as arca officer under the Middlesex County Council, which I will call authority A, and the other under a notional authority which, in order to avoid ambiguous phrases, counsel for the council referred to as authority X. Approaching the matter in that way, I start with s. 40 and consider what "service" means. "Service" means "service rendered to any local authority . . ." Therefore, when construing those words, I think, wherever you find a reference to "service," you have to treat it as service rendered to any local authority

H whether successively or contemporaneously. Therefore, I think, there is something in the context there which prevents you limiting the service to the service of a particular authority. You have, however, to exclude service :

. . . in any employment if the person in question has already become entitled . . . to a superannuation allowance under this or any other Act.

Strictly, there can be no doubt that that does not apply, because it is quite plain that on Nov. 2, 1943, the applicant, immediately before his retirement from the service of authority A, was not entitled to a superannuation allowance

from anybody. What was his position when he ceased to be interim superintendent registrar on June 30, 1940? That position, on the basis on which I am now considering the matter, he must be treated as having held, not under authority A, the Middlesex County Council, but under authority X, so s. 10, as it seems to me, should have been brought into force. The fact that authority A took a wrong view of the meaning of the section, as counsel for the council very properly admitted, is immaterial. What is the position in those circumstances? The applicant was a contributory employee of authority X in his capacity as registrar, who, before becoming entitled to a superannuation allowance under that part of the Act, ceased to be employed by authority X for a reason other than his voluntary resignation. Therefore, *prima facie*, under s. 10 (1) he would have been entitled to receive payment of his contributions with compound interest thereon. He would have been so entitled unless the provisions of s. 10 (6) applied. But it was common ground that they did not apply, because, although authority X had a notional existence, there was no separate transfer fund, and there was no room for the operation of the provisions of s. 29 relating to transfer values. The position, therefore, was that the applicant had not become entitled to any superannuation allowance, and he would have been entitled to have his contributions returned if he had made them.

What is the consequence? Before I turn to s. 8 (5), I must look at s. 12, from which I find he would have been entitled to reckon as contributing service for the purposes of s. 8 service in respect of which he was required to contribute to the appropriate superannuation fund, including service both as area officer and as interim registration officer, subject to the proviso that he would not be entitled:

... to reckon as contributing service any service in respect of which he has received a return of contributions under this Act or under the Act of 1922.

He would be caught by that proviso, and, therefore, he could not count his service as interim registration officer as a contributing service. Under s. 12 (2) a contributory employee of a local authority is entitled:

... to reckon as non-contributing service any service which he is not entitled to reckon as contributing service.

Therefore, he would have been entitled to reckon his service as an interim registrar as non-contributing service subject only to the limitation that it is plain that, in applying s. 8 (2), the same calendar year cannot be counted twice over. Any years which the applicant counted as contributing service by virtue of his employment as area officer, he would count again as non-contributing service. The material provision is, however, s. 8 (5). Is there anything in s. 8 (5) which debars him from having his remuneration as interim registrar included in the calculation of the "annual average of the remuneration received by him in respect of service rendered during the 5 years immediately preceding" the date of his retirement. "Service" must receive the definition given to it by s. 40, and there is nothing in s. 40 which would exclude the service with authority X. On the contrary, the language of s. 40 refers expressly to "service rendered to any local authority." Nor is there anything in s. 8 (5) which says that only "contributing service" is to be taken into account. On the contrary, it is quite plain on the language that remuneration for "non-contributing service" is also to be taken into account. Therefore, it seems to me, as a matter of construction, subject only to a consideration of the effect of s. 40 (3), the answer is quite plain. Indeed, I do not think that counsel for the council denies that, if it were not for s. 40 (3), the applicant would be entitled to have his remuneration as interim registrar taken into account in making the calculation required by s. 8 (5). He admitted also that he could find nothing in the express language of s. 40 (3) which compelled one to an opposite conclusion, but he said that it was inconsistent with the policy of the Act and that s. 40 (3) indicated an intention that concurrent employment should be treated separately. I am unable to find any sufficient indication of such an intention in the language of s. 40 (3) to justify us in disregarding what I regard the plain meaning of the other sections to which I have already referred.

The other provision on which counsel for the council relied was that contained in s. 8 (5), proviso (c), which deals with the position of a contributory employee in the whole-time employment of a single local authority who becomes a contributory employee in part-time employment of each of two or more authorities, and provides that:

. . . if his remuneration in his whole-time employment becomes material for the purpose of calculating the superannuation allowance payable to him on his ceasing to hold one of his part-time employments, that remuneration shall . . . be apportioned . . .

That seems to me to be quite a different matter. It provides for his remuneration being apportioned and thus avoids its being brought into account twice. We are asked to say here that the remuneration in the capacity of superintendent registrar shall not be brought into account at all. I do not think that it would be safe for us to draw any inference from that proviso adverse to the contention put forward by the applicant.

Finally, it was said that, if we reach the conclusion that the applicant's contention is well-founded, it would necessarily follow that we should have to hold in an imaginary case which counsel for the council put to us that an employee might become entitled to twice the superannuation allowance which Parliament obviously intended him to have. The case counsel for the council put was this. He supposed that a contributory employee was employed part-time in the service of authority A at a salary of £800 a year, and part-time in the employment of authority B at a salary of £700 a year. In order to exclude s. 8 (5), proviso (c), he assumed that both employments had been held for at least five years previous to retirement, and he assumed that the employee retired simultaneously from both employments. He had to do that, otherwise the monstrous state of affairs which he visualised would have been prevented by the operation of the definition of "service" in s. 40 (1). He then said that on the basis of the applicant's argument the employee would be entitled from authority A to 40/60ths, and from authority B to the same amount. In other words, he would receive on retirement a superannuation allowance of £2,000, or £500 a year more than his salary, or, rather, he would have received that pension except that it might be reduced to two-thirds of £1,500, *i.e.*, £1,000 a year, by reason of the operation of s. 8 (3). In order that counsel for the council might bring out the full effect of his argument, my brother WROTTESELEY put to him a hypothetical case, not of retirement after 40 years under s. 8 (1) (b), but of retirement after 10 years owing to ill-health, in which event, on the facts suggested, he would receive a superannuation allowance twice the amount contemplated because, so calculated, it would not amount to two-thirds of the employee's remuneration. My first comment on that supposed case is that it would arise whether or not the applicant's argument was well-founded, because s. 40 (3) does not come into it. I can find nothing in the terms of the section to prevent its operation, but I think it is possible that we could here find a general policy in the Act which might prevent such an unfortunate result occurring. It might well be said that it was implicit in the concluding words of the definition of "service" that a man should not receive two superannuation allowances in respect of the same service. That is quite a different proposition from that which counsel for the council found himself compelled to argue in this case, because he has invited us to hold that the applicant is not entitled to have his service as interim registration officer taken into account for one superannuation allowance, because it is not suggested that the applicant has ever had his remuneration as interim registration officer taken into account in calculating a superannuation allowance. True, in theory, he is entitled to get his contributions back, but it seems to me impossible to hold that that fact can deprive him of his right to a superannuation allowance, because sub-ss. (1) and (2) of s. 12, read together, indicate what the effect of a return of contributions is to be. For these reasons, I am unable to find either in the express provisions of the Act, or in the policy of the Act, sufficient justification for disregarding what I think counsel for the council would admit is the plain meaning of the language used in s. 8 as qualified by s. 40. In my opinion, the appeal should be allowed, and question 1 should be answered in the affirmative.

That being so, we have to consider a question which the court below did not have to consider, and that is the second question stated in the Case :

If the answer to the preceding question is in the affirmative, whether there should be taken into account as such remuneration (a) the gross fees received by the applicant, or (b) those fees less any expenditure incurred by the applicant in the performance of the duties of that appointment, as, for example, the salary paid by him to his deputy.

I think it was common ground that that entirely depends on the construction of the definition of "remuneration" in s. 40 (1). I think it is sufficient to say that the express language of that section seems to me to leave no doubt that that question must be answered by saying that the gross fees received by the applicant must be taken into account. There is nothing in the section binding him to pay any expenditure out of those fees. It is true that he may, in order to discharge his duties effectively, have to incur expenditure, but the fees are paid to him for his own use. It was said that he would have to employ a deputy, but there is nothing which fixes the remuneration of deputies, and he might find a deputy who was prepared to act free of charge which would be a compliance with his obligation as interim registrar. As I have said, although the alternative answer might be a reasonable solution, the language of the definition seems to me so plain that it is impossible for us to come to any conclusion other than that which I have already indicated. In my opinion, therefore, the second question also should be answered in favour of the applicant. A

SCOTT, L.J.: I agree with the judgment of my brother COHEN on both questions. I only have one or two sentences to add. On the first question, that of liability, the position under this Act is one in which the right is laid down in the enacting section of the Act. The limitation, on which the argument for the council here was chiefly based, is contained in s. 40 (3). That is a part of the Act where you would not naturally look to find operative provisions. C If there is any ambiguity in the sub-section—indeed, I go further—unless there is in it absolutely clear language having the opposite effect, *prima facie* it ought to be construed as not cutting down the operative provisions of the Act, which are contained in s. 3 (1) and s. 8 (1) and (2) (a). The latter are the main enacting sections of the Act conferring the right to superannuation. In contrast with them, s. 40 ought not to be treated as *prima facie* an operative section, but rather as a definition section and no more. In this respect I think there is some analogy between this Act and the first Workmen's Compensation Act of 1897, which was considered in the House of Lords in *Lysons v. Knowles (Andrew) & Sons, Ltd.* (2). In that Act the right was conferred by s. 1. The *quantum* of compensation was dealt with in the schedule. That schedule contained a provision that generally the *quantum* of weekly compensation should be ascertained by taking the average of wages received. An argument was submitted to the county court and to the Court of Appeal to the effect that the word "average" showed that more than casual labour must have been in contemplation as a condition of the right to receive compensation under the Act. The Court of Appeal accepted that view. There was an appeal to the House of Lords. Their Lordships pointed out that that was a wrong principle of interpretation. **EARL OF HALSBURY, L.C.**, said ([1901] A.C. 79, 84-86): D

My Lords, the broad proposition of course was that the legislature intended that there should be compensation given to every workman in certain trades when an injury happened to him in the course of his employment, subject to certain exceptions which are not relevant to the question now under debate . . . The first thing, I think, one has to do is to apply one's mind to what is the substantive intention and meaning of this statute . . . My Lords, for my own part I cannot entertain a doubt that the legislature did mean that every workman in the prescribed trades should be entitled to compensation, and I think that is the language which one would naturally expect to have been used by the legislature if that was the meaning of the enactment. E

He then pointed out that to cut that right down by reason of something in the schedule was contrary to common sense. **LORD MACNAGHTEN** took the same view, saying (*ibid.*, 92): F

I have no doubt that if Parliament had intended to impose the condition which has been discovered in the schedule, the condition would have been inserted in the Act. **LORD DAVEY** said (*ibid.*, 95, 96): G

Now, my Lords, I turn to the examination of the Act, and I entirely agree with what has been said by my noble and learned friend on the Woolsack, that you ought to construe this Act so as, as far as possible, to give effect to the primary provisions of it. That principle was laid down there. When the Act of 1897 was repealed and the Act of 1906 took its place, as we all remember, the compensation provisions were transferred from the schedule to the body of the Act, but that made no H

difference to that basical interpretation which was always adhered to throughout those Acts. In my view, that is a principle applicable to s. 40 (3) of the Act of 1937, which contains no language at all adequate to the gloss which the very able and moderate argument addressed to us by counsel for the council necessarily endeavoured to put on it.

There is only one other observation I want to make. We were referred to the Local Government Superannuation (Service of Registration Officers) Regulations, 1939, made by the Minister and published in January, 1939, before the Act came into force on Apr. 1, 1939. They were made under the provisions contained in the Act itself for the making of regulations, *viz.*, s. 36 (6), which provides :

The Minister may make regulations for prescribing anything which under this Act is to be prescribed, and with respect to such administrative action to be taken by local authorities as is mentioned in sched. III to this Act.

It is to be observed that no power of delegated legislation is by that conferred on the Minister, and that his power is limited to administrative matters. Schedule II, pt. IV, of the Act of 1937, which has been referred to by my brother, provides in para 2 :

For the purposes of Part I of this Act . . . (b) . . . account shall be taken of any such service in such manner and subject to such terms and conditions, including conditions as to the making of payments by an employee or a local authority, as may be prescribed.

The regulations of 1939 were made under para. 2 (b) of sched. II, pt. IV, the word "prescribed" being defined in s. 40 as meaning "prescribed by regulations made by the Minister." I express no opinion on the regulations, but they have a look rather of being something more than administrative—it may be that they amount to legislation. I merely call attention to that by way of a *caveat*, without expressing any final opinion. I agree with the judgment proposed by my brother COHEN.

WROTTESLEY, L.J. : I agree. I should not expect to find at the end of an interpretation section a clause which would deprive the persons intended to be benefited by an Act of this kind of one of the principal benefits conferred by it. I should expect any such modification of the general principle of the Act to be contained in a substantive section. Nevertheless, I have sought to find somewhere in the Act a scope for working s. 40 (3). It must have a meaning and must apply somewhere. One instance, I think, is to be found in s. 10 (1), which, it is to be observed, says : "A contributory employee . . . who, before becoming entitled to a superannuation allowance . . . ceases to be employed by that authority," through something which is not his own fault, is entitled to receive back his contributions "together with compound interest thereon" at a stated rate. Supposing the applicant in this case had paid as registrar—as he ought to have paid—his contributions, he would naturally have expected to get them back on finding out on his retirement from being registration officer that he was not entitled to what is called an allowance, *i.e.*, to a pension. But it is to be observed that he is still a contributory employee within the meaning of s. 10, because he has not ceased to be employed by the county council in another capacity. When you turn to s. 40 (3), there is a passage in that sub-section which enables that difficulty to be put right and would enable the applicant to recover the payments which he ought to have made. It provides, in effect, that in relation to his appointment as registration officer he is to be regarded as if it were employment under an authority other than the Middlesex County Council. That appears to me to be a case where s. 40 (3) works, and works beneficially in accordance with the general purport of the Act.

Appeal allowed with costs here and below.

Solicitor : C. W. Radcliffe, solicitor for Middlesex County Council (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

HALDANE v. ECKFORD.

[COURT OF APPEAL (Lord Greene, M.R., and Evershed, L.J.J.), July 2, 5, 6, 30, 1948.]

Estate Duty—Property “passing”—Change in beneficial interest or possession of property on death of person contingently entitled to distributions—Accumulations—Direction by testator to accumulate up to £8,000 and then invest in land—Land to be entailed on fixed date—Periodical distributions under Scottish law of entail—Finance Act, 1894 (c. 30), s. 1.

By his will, dated Mar. 28, 1862, a testator, who died on Feb. 27, 1865, domiciled in Jersey, directed the conversion of his estate, and instructed his trustees to invest the proceeds of such conversion in the purchase of a landed estate in Scotland which they were to settle under a strict entail in conformity with Scottish law. By a first codicil, dated Feb. 15, 1865, the testator directed that the trusts of his will for the sale and conversion of his estate and the investment of the proceeds in land should not be carried out until a certain period (certified, by a certificate in the suit made by the Chief Clerk, to end in 1956) had elapsed, but that the income from certain parts of his estate should be accumulated and invested in certain securities. The codicil continued: “I direct that such investments and accumulations . . . shall continue and be made until such investments and accumulations amount in value to . . . £8,000 sterling or upwards and when . . . the same shall amount in value to the last mentioned sum I direct . . . that my trustees . . . shall . . . convert the same into money and invest the proceeds thereof in the purchase of real estate in the parish of Eckford . . . and in like manner thereafter whenever the investments of the . . . rents dividends interest and annual produce of my estate and the accumulations shall amount in value to the sum of £8,000 or upwards I direct that my trustees . . . shall . . . convert into money and . . . invest the same in the purchase of real estate in . . . Eckford . . . these successive purchases of real estate to continue . . . until [1956] . . . when . . . I will and direct that the trusts for the sale and conversion . . . and the investments of the trust moneys . . . in my said will contained shall be carried into effect . . .” Under an administration order of the Court of Chancery in England made in 1865, the trust funds were paid into court, and an inquiry was answered by that court to the effect that, according to the law of Jersey, the bequests and directions contained in the will and codicils were valid. Under the Scottish Entail Acts, where property is held in trust to purchase land to be entailed, it is competent for the person who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, to make summary application to the court for the payment to him of such property, and the court will order such payment without the consent of any person. Such an order was made by the Court of Session in favour of D.E., who received certain sums of money thereunder from time to time. In 1912, D.E. died, and his daughter, H.E., became tenant in tail in possession. In 1926, 1927 and 1932, by orders of the court, three amounts of £8,000 were disentailed and paid to H.E. for her own use. On Dec. 31, 1935, H.E. died, and this petition was presented by the Crown to obtain payment out of the funds in court on her death of estate duty alleged to become payable under the Finance Act, 1894, s. 1, in respect of the corpus of the funds. No claim was made under s. 2.

Held: H.E. was, in effect, entitled during her life, subject to her being *capax* and to her applying to the court, to the whole income of the corpus in a series of instalments; on her death there was an actual change in the title to the corpus as a whole in that her interest ceased and her successor became entitled to an interest exactly similar thereto; and there was, therefore, a passing of the corpus within s. 1.

Dicta of LORD PARKER in *A.-G. v. Milne* ([1914] A.C. 765, 779) and LORD RUSSELL OF KILLOWEN, in *Burrell & Kinnaird v. A.-G.* ([1936] 3 All E.R. 758, 764), *applied*.

Decision of ROMER, J., ([1948] 1 All E.R. 760), reversed.

[AS TO PROPERTY WHICH PASSES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 232-234, paras. 222, 223; and FOR CASES, see DIGEST, Vol. 21, pp. 7, 8, Nos. 21-27.]

Cases referred to:

- (1) *A.-G. v. Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, 296.
- (2) *Burrell & Kinnaird v. A.-G.*, [1936] 3 All E.R. 758; [1937] A.C. 286; 106 L.J.K.B. 134; 156 L.T. 36; Digest Supp.

APPEAL by the Attorney-General from a decision of ROMER, J., ([1948] 1 All E.R. 760) dismissing a petition to obtain payment out of court of a sum alleged to be due in respect of estate duty in connection with the death of Helen Louis Vivienne Eckford on Dec. 31, 1935. ROMER, J., held that the corpus of the fund did not "pass" in connection with the death within the meaning of the Finance Act, 1894, s. 1, and that, accordingly, estate duty was not chargeable under that section. The Court of Appeal now reversed that decision. The facts appear in the headnote and in the judgment of the court.

Pennyquick, K.C., and *J. H. Stamp* for the Attorney-General.
Salt, K.C., and *F. H. Talbot* for the trustees of the will.

Cur. adv. vult.

July 30. LORD GREENE, M.R., read the following judgment of the court. The facts which give rise to the present question are of a most unusual character. The action is an administration action which was commenced in 1865 in relation to the estate of the testator, Robert Eckford, who died on Feb. 27 of that year. There is a fund in court standing to the general credit of the action "*Haldane v. Eckford* 1865, H.174" and representing part of the residuary estate of the testator. It is in respect of this fund that the present controversy arises. The Inland Revenue Commissioners claim that the fund passed on the death on Dec. 31, 1935, of Helen Louis Vivienne Eckford (whom we will call "Helen") with the result that estate duty became payable under the Finance Act, 1894, s. 1, and they presented a petition in the Chancery Division the object of which was to obtain payment of the duty out of the fund in court. ROMER, J., dismissed the petition.

The facts are clearly set out in the judgment of ROMER, J., and we will state them in no greater detail than is necessary to make this judgment intelligible. The testator died domiciled in Jersey and by the law of that island the testamentary dispositions with which we are concerned were wholly valid. By his will the testator directed that his estate (which consisted entirely of personality) should be realised and invested in the purchase of a landed estate in Scotland which was to be settled in strict entail in conformity with Scottish law as therein mentioned. By a first codicil he directed that the realisation and investment of his estate should be postponed until the happening of a certain event (which will occur in 1956) and that the income meanwhile should be accumulated until the accumulations should be of a value of £8,000 sterling, whereupon they should be invested in the purchase of real estate in Scotland, and so on, whenever the accumulations should reach the value of £8,000, and he directed that on the happening of the event mentioned the trusts for realisation, investment and settlement of the corpus of his estate should be carried out, and further he directed that the estates purchased in the meanwhile out of the accumulations of income should be similarly settled. By a second codicil he directed that the rents of the estates from time to time purchased pursuant to the first codicil should go to the person for the time being entitled under the entail. Pursuant to orders made from time to time sums, amounting in each case to £8,000 and representing accumulations of income derived from the residuary estate of the testator, were placed to the credit of an account entitled "Moneys subject to be invested in land."

We must here interpose a reference to the law of Scotland the provisions of which have led to the present claim. By that law where money or other property is invested in trust for the purpose of purchasing land to be entailed the person who would have been heir of entail in possession if the land had been entailed "provided he is *capax* and of full age" may make summary application to the Court of Session for authority for the payment to him of such money. The court will grant this authority without the consent of any person if the direction to entail was contained in the will of a testator who died subsequently to Aug. 1, 1848, and the applicant was born subsequently to the death of the testator.

The first person born subsequently to the death of the testator who would have been heir of entail in possession was one Douglas Eckford, and he, pursuant to orders made from time to time by the Court of Session and consequential orders made in the present action, obtained payment to himself of all sums standing to the credit of the account "Moneys subject to be invested in land." Douglas Eckford died on Sept. 30, 1912, and Helen (then an infant), who was his only child, became heir female in possession under the entail directed by the testator to be made. During the minority of Helen two amounts of £8,000 (being accumulated income which rose to that figure subsequently to the death of Douglas Eckford) were put to the credit of the account "Moneys subject to be invested in land." On attaining her majority, Helen obtained a transfer of these funds to herself pursuant to an order of the Court of Session and a consequential order made in the present action. In like manner she obtained payment to herself of a third sum of £8,000 the relevant order of the court being dated Feb. 25, 1932. As the result of these transactions, Helen, in fact, enjoyed the whole of the income of the corpus standing to the general credit of the action consisting of (a) income which was accumulating at the death of Douglas Eckford but had not yet risen to the value of £8,000 at the date of his death; (b) income which accumulated and rose to the value of £8,000 during the life of Helen herself. But she did not enjoy the income which accrued between the date when the last-mentioned sum of £8,000 (dealt with by the order of Feb. 25, 1932) was paid to her and the date of her death on Dec. 31, 1935. She was succeeded by the present plaintiff, John Eckford Hackett, as tenant in tail in possession. The trustees of a settlement executed by him have by the procedure already indicated received payment of a further accumulation of £8,000 which rose to that figure subsequently to the death of Helen.

It must be clearly borne in mind that the question for decision is not whether on Helen's death there was a passing of the fund of income then accumulating which had not yet realised the value of £8,000. It is whether the corpus standing to the general credit of the action passed on her death. To answer this question, it is necessary to ascertain what her interest in the corpus was. Stated shortly, it existed by virtue of the joint operation of the testamentary dispositions of the testator, on the one hand, and Scottish law, on the other. It is true that the right of the heir of entail under Scottish law to obtain payment to himself of an accumulation of £8,000 is a right to obtain payment of what for that purpose and viewed from that angle is a capital fund. The right arises because (a) the fund is directed to be invested in land which is to be entailed, *i.e.*, it is capital, and (b) the applicant is heir of entail in possession, *i.e.*, the person for the time being entitled to enjoy the income of that capital. But this appears to us to be immaterial. The question is: What was Helen entitled to in fact in respect of income of the corpus? Now, when she succeeded as heir female of entail each accumulated sum of £8,000 which she should become and did become entitled to claim would be and was nothing more nor less than income of the corpus augmented by the process of accumulation. To treat these sums as though they did not represent or include the income of the corpus is, in our opinion, to take a mistaken view of their nature. Helen had, in fact, a right to receive the whole of the income earned by the corpus during her lifetime in what, in effect, was a series of instalments each of them payable only when, by virtue of the direction to accumulate, the figure of £8,000 should be reached in her lifetime. The circumstance that Scottish law only gave her this right in her capacity as tenant in tail entitled to the income of the instalments cannot, in our view, alter the incontrovertible fact that the right, viewed from the angle of its relationship to the corpus itself, was the right to receive the income of that corpus in the manner which we have stated. The further circumstance that round this core of income there had gathered an accretion due to accumulation cannot alter the fact.

We have not yet, however, considered the limitations on the rights of the tenant in tail imposed by Scottish law. They are three in number. The heir of entail must be (i) of full age, and (ii) *capax*, and (iii) he must obtain an order of the Scottish Court. In the present case, Helen did attain her majority and was *capax* to the date of her death. We see no necessity for inquiring what the position would have been if she had died an infant, or had ceased to be *capax* before she obtained any payment to herself. It was admitted that in such a

case the Finance Act, 1894, s. 5 (3), would have applied. Nor need we consider what would have happened if, having received one payment, she had ceased to be *capax* either temporarily or permanently. Once she attained her majority her right to apply for and receive the income whenever it should amount to £8,000 could only be defeated by a supervening loss (it may be a permanent loss) of capacity, and that never, in fact, occurred. The fact that, although of full age and *capax*, Helen could only disentail by making an application to the court does not appear to us to affect the substantial question to be decided. On attaining her majority, she was entitled to apply for and to obtain as of right the necessary order of the court the moment disentailing became possible. If she had refrained from exercising this right it could not, in our opinion, have prevented the passing of the corpus, assuming that the corpus would otherwise have passed. The case would, we think, have been similar to one where under a settlement income was made receivable only on a written application to the trustees. Failure to make application in such a case would, we think, be immaterial. Scottish law does not, of course, operate to reinstate the directions for entail of the corpus which are contained in the will. It did, however, have precisely the same practical effect so far as income of that corpus was concerned, save that the right to receive the income as it accrued, which would have belonged to Helen unconditionally if the directions contained in the will had prevailed, was limited to a right to receive income as and when (together with accumulations) it amounted to successive sums of £8,000 subject to the necessity of majority, capacity and application to the court.

In the course of the argument we put the case of a trust under which a beneficiary only became entitled to income as and when it should amount to a stated figure or at stated intervals of time, the income receivable by the trustees to be deposited in the meanwhile at a bank. Such a case appears to us to bear a close analogy to the present, whether the requisite figure or the intervals of time were to be large or small, provided, of course, it was reasonably attainable during the life of the beneficiary. The figure of £8,000 in the present case was clearly so attainable during the life of Helen and would have been attained several times over if she had not died at the early age of close on 31. What, then, was the right in relation to the corpus to which Helen succeeded on the death of her father? It was the right, contingent on her attaining 21 and being *capax* at the time of application, to apply for and obtain payment to herself of the entire accruing income of the corpus whenever and so often as such income (together with accretions arising from accumulation) should during her life amount to the sum of £8,000. As we have already said, the very nature of this right involved (1) that she would be entitled to obtain payment of income which had started to accumulate during the lifetime of her predecessor but which had not yet risen to the value of £8,000 at his death; (2) that as regards any sum accumulating during her own lifetime which had not risen to the value of £8,000 at the date of her death her interest therein, which was contingent on her being alive at the date when it should have risen to £8,000, would be defeated by her death. Theoretically, however, and given the necessary (if unlikely) combination of circumstances, her interest could secure for her every penny of income accruing from the corpus during her life if the attainment of £8,000, the order of the Scottish Court, and her death were all to take place at substantially the same time. As regards her *de facto* enjoyment of the income of the corpus came to an end. As regards the income which was at that moment in course of accumulation there was, no doubt, no immediate vesting in possession of a right in her successor. His right at that moment in regard to the growing accumulation was, as Helen's own right had been on her succession, contingent on his being of age and *capax* at the time when the value of £8,000 should be reached, but it was by reason of the death of Helen that this contingent right and similar rights in respect of subsequent accumulations of income passed to him freed from the prior right of Helen herself. It seems to us that the effect of the death of Helen was to bring about an actual change in the title to the corpus as a whole. Before that death it was producing income to which, by the combined operation of the codicils and of Scottish law, Helen became entitled at recurrent stages and subject to the contingency of her being alive and *capax* at the end of a stage. On her death this interest of hers came to an end and an exactly similar interest arose in her successor. Whenever the contingency of his being alive

and *capax* at the conclusion of an accumulation period is satisfied, he will become entitled to obtain all income produced by the corpus to date and on his death during the course of an accumulation period an exactly similar interest will pass to his successor assuming that the corpus has not by that time been itself disentailed. It is clear that Helen's right in respect of the income of the corpus determined on her death. It is also clear that subject to the requirements of Scottish law her successor stepped into her shoes, and succeeded to precisely similar rights in respect of that income. It is true that if he had died before the accumulations current at Helen's death had amounted to £8,000 he never would have enjoyed any income and in that case the Finance Act, 1894, s. 5 (3), would, we think, have operated to prevent duty becoming payable on his death, but this did not happen and he succeeded *de facto* and *de jure* to the right to obtain the whole income produced by the corpus during his lifetime whenever that income plus accumulated accretions should amount to £8,000. The fact that he could not obtain any income for himself until, during his lifetime, the necessary period subsequent to the death of Helen had elapsed for the accumulations to reach the figure of £8,000 does not, in our opinion, prevent a passing on the death of Helen: see Finance Act, 1894, s. 22.

ROMER, J., took the view that there was no change in the beneficial title or possession of the property as a whole on Helen's death. He said ([1948] 1 All E.R. 768): "There was clearly no change in the beneficial possession. That was not in Helen prior to her death, nor in her successor afterwards." As will have been seen, our view as to Helen's interest in the income of the corpus does not agree with this. Nor does it agree with the learned judge's view that the right to compel performance by the trustees of their duty to accumulate was the only immediately subsisting right or title in relation to the trust property (*i.e.*, the corpus) that Helen had. Nor, with great respect, can we agree that Helen's right in respect of income can properly be regarded as a mere series of expectations. What, in our opinion, requires to be considered is her right in respect of the income of the corpus during her life, and what happened to the right in respect of that income on her death, and not merely her right in respect of each accumulated fund of £8,000 taken, so to speak, in isolation. Regarding the position in this way we think that the corpus did pass on the death of Helen.

In the course of his judgment, ROMER, J., made a careful analysis of the relevant authorities to all of which we were also referred. The principle to be applied is not, we think, in any doubt and can best be stated by reference to certain passages cited by ROMER, J., from *Attorney-General v. Milne* (1) and *Burrell & Kinnaird v. Attorney-General* (2). In the former, LORD PARKER said ([1914] A.C. 779):

The expression "passing on the death" . . . is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death.

LORD RUSSELL in the latter case ([1936] 3 All E.R. 764) expressed the formula thus:

In order to test whether it can be said that property passed on [a particular] death, one must compare the position as regards the persons beneficially interested in the property immediately before the death with the position immediately afterwards.

The facts in the present case are, as we have said, exceptional and they differ in material respects from those in all the cited cases. The problem is, not as to the law to be applied, but as to its application to the special circumstances of this case. It has not, therefore, seemed necessary or useful to repeat or add to the references to the authorities which ROMER, J., has made, but for the reasons we have given we have formed a different opinion from that of the learned judge of their effect on the present question.

Appeal allowed with costs in both courts. Order to tax the Crown's costs as between party and party and the trustees' costs as between solicitor and client and to pay such taxed costs out of the fund in court.

Solicitors: Solicitor of Inland Revenue; Halsey, Lightly & Hemsley (for the trustees).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ROPPEL v. BENNETT.

[COURT OF APPEAL (Tucker, Bucknill and Somervell, L.JJ.), July 21, 22, 23, 1948.]

Rent Restriction—Furnished letting—Amount of rent attributable to use of furniture—Percentage of contractual rent—Value of furniture to tenant—Need to quantify value to tenant—Recovery of excessive rent—Excess paid in period ending before tenant's application for repayment—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 9 (1) (as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), sched. I); s. 12 (2), proviso (i)—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 10 (1).

By s. 12 (2), proviso (i), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "This Act shall not, save as otherwise expressly provided, apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance, or use of furniture." By s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923: "For the purposes of proviso (i) to sub-s. (2) of s. 12 of the . . . Act [of 1920] (which relates to the exclusion of dwelling-houses from [that] Act in certain circumstances), a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent."

The portion of the contractual rent payable in respect of a fully furnished room which was attributable to the use of the furniture was some ten per cent. and the tenant denied that the premises constituted a furnished letting within the meaning of the Rent Restrictions Acts and claimed the protection of those Acts.

HELD: (i) the court had to take into consideration, not only the percentage of the rent which was attributable to the furniture, but also the value to the tenant of the provision of the furniture by the landlord, and, in view of the quantity of furniture in the room, the proportion of the rent attributable to the furniture was a substantial one, and the tenant was not entitled to the protection of the Rent Acts.

Observations of VISCOUNT SIMON in *Palser v. Grinling* ([1948] 1 All E.R. 1, 10, 11), *applied*.

(ii) it was unnecessary for the court to quantify in pounds, shillings and pence the amount of rent fairly attributable to the use of the furniture, regard being had to its value to the tenant.

Observations of MORTON, L.J., in *Palser v. Grinling* ([1946] 2 All E.R. 287, 291), *explained*.

By s. 9 of the Rent and Mortgage Interest (Restrictions) Act, 1920, as modified by the Rent and Mortgage Interest Restrictions Act, 1939, sched. I: (1) "Where any person lets, or has, since the beginning of the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1939, let any dwelling-house to which this Act applies, or any part thereof, at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the tenant that the rent charged is yielding or will yield to the landlord a profit in excess of the normal profit as hereinafter defined, the court may order that the rent, so far as it exceeds such sum as would yield such normal profit shall be irrecoverable, and that the amount of any payment of rent in excess of such sum which may have been made in respect of any period after the commencement of the Rent and Mortgage Interest Restrictions Act, 1939, shall be repaid to the tenant. (2) For the purpose of this section 'normal profit' means the profit which might reasonably have been expected from a similar letting in the year ending on Sept. 1, 1939." By s. 7 of the Furnished Houses (Rent Control) Act, 1946: "Sections 9 and 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (which relate respectively to limitation on rent of houses let furnished and to penalty for excessive charges for furnished lettings), shall not apply as regards the rent charged for any house or part of a house entered in the register under the provisions of this Act in respect of any period subsequent to such

registration, but save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939."

By an application dated Sept. 5, 1947, the tenant sought to recover excessive rent paid over a period from Aug. 19, 1946, to April 17, 1947.

HELD: there was nothing in the enactments referred to to prevent a tenant recovering excessive rent paid during a period which had ended before the date of the tenant's application.

[AS TO DWELLING HOUSES LET AT RENT INCLUDING USE OF FURNITURE, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 560, 561, Nos. 7078-7084.]

Cases referred to:

(1) *Palser v. Grinling. Property Holding Co., Ltd. v. Mischeff* [1946] 2 All E.R. 287, 294; [1946] K.B. 631, 645; 175 L.T. 204, 192; *affd.*, H.L. [1948] 1 All E.R. 1; [1948] A.C. 291; [1948] L.J.R. 600.

(2) *Bowness v. O'Dwyer* [1948] 2 All E.R. 181.

APPEAL by the tenant from an order of His Honour JUDGE EARENGEY, K.C., and a cross-appeal by the landlord. The facts appear in the judgment of SOMERVELL, L.J. Both the appeal and the cross-appeal were dismissed.

H. B. Grant for the landlord.

S. W. Magnus for the tenant.

SOMERVELL, L.J.: This appeal turns on the provisions of the Rent Restrictions Acts relating to furnished lettings. In the Act of 1920, as originally enacted, it was provided by s. 12 (2) proviso (i):

This Act shall not, save as otherwise expressly provided, apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance, or use of furniture.

As a result of certain cases which came before the courts that part of the code was amended by s. 10 of the Act of 1923, which provides:

(1) For the purposes of proviso (i) to sub-s. (2) of s. 12 of the Act [of 1920] (which relates to the exclusion of dwelling-houses from [that] Act in certain circumstances), a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

In the present case the landlord claimed possession on the ground that the tenancy was not protected by the Rent Restrictions Acts. In her defence, the tenant denied that the premises constituted a furnished letting within the meaning of the Rent Restrictions Acts and claimed their protection. There was plenty of furniture in these premises. They were furnished in the ordinary sense, but that does not conclude the matter. The value of the furniture was referred to the registrar. He found it to be £30, and that report was accepted by the learned county court judge. Counsel agreed that 20 per cent., that is £6 a year, or 2s. 4d. a week, represented the proper percentage to take of that figure of £30 as what would be paid as between a willing borrower and a willing lender of furniture of that value. The learned county court judge found that the amount paid in respect of the furniture was a substantial portion of the rent, the rent for the room let being 23s. 0d. a week.

The question of the proper construction and the application of s. 10 came before this court, and then before the House of Lords in *Palser v. Grinling. Property Holding Co., Ltd. v. Mischeff* (1). The first case was concerned, not with furniture, but with attendance, and in the judgment of MORTON, L.J. (with which the other two members of the court, of whom I was one, agreed) this question of what constitutes a substantial portion of the whole rent was dealt with. MORTON, L.J., proceeded on the view that it was right and proper for this court to lay down guidance in the form of limits, a percentage below which an amount would not in ordinary circumstances be treated as a substantial portion and above which it should be so treated. He said this ([1946] 2 All E.R. 292):

The legislature has not seen fit to lay down any particular percentage as being a substantial portion, and I have carefully considered whether it would or would not be of assistance to judges who have to determine this difficult question if I gave some indication of my own view as to what proportion of the rent forms a substantial portion of the "whole rent" within the meaning of s. 10. We were invited by counsel for the de-

fendant to give some indication of this kind, and, on the whole, I think it is right to do so now, but I do not think it would be right to fasten upon a particular percentage and say: "This is a substantial portion, and any percentage below this is not a substantial portion." I am, however, prepared to say that, in my view, in the absence of special circumstances, 20 per cent. of the whole rent would be a substantial portion, any portion under 15 per cent. would not be a substantial portion, and any portion from 15 per cent. up to 20 per cent. would be a "border line" case.

A The view I take of this point is not really material, perhaps, to my final conclusion on this case, but I think it is right to refer to what LORD SIMON said in his speech in the House of Lords about that passage in MORTON, L.J.'s judgment. LORD SIMON said ([1948] 1 All E.R. 11):

"Substantial" in this connection is not the same as "not unsubstantial," i.e., just enough to avoid the *de minimis* principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, the onus being on the landlord. If the judgment of the Court of Appeal in *Palser's* case (1) were to be understood as fixing percentages as a legal measure, that would be going beyond the powers of the judiciary. To say that everything over 20 per cent. of the whole rent should be regarded as a substantial portion of that rent would be to play the part of a legislator. If Parliament thinks fit to amend the statute by fixing percentages, Parliament will do so. Aristotle long ago pointed out that the degree of precision that is attainable depends on the subject-matter.

C I construe that as meaning that the suggestion made by MORTON, L.J., and agreed to by the two other members of the court passes out of the picture as the limits on which a party can rely as a matter of law, and, therefore, the question is left to the county court judge to decide as a question of fact.

D In the present case, taking the figure of 2s. 4d., the percentage is about 10 per cent. of the contractual rent. It is unnecessary, in my view, to decide whether, if the matter had rested there, the tenant could have succeeded in getting this court to reverse the decision of the county court judge, because it is clear from the judge's judgment that he did not take the 2s. 4d. as the last word on the figures which he had to consider. At the time of his decision the cases to which I have referred had been decided in the House of Lords. His attention was drawn to them, and it is plain from his note that he considered carefully what had been said by LORD SIMON, and, in particular, that he relied on the following passage from LORD SIMON's speech ([1948] 1 All E.R. 10):

E A number of factors may be relevant in arriving at the proper figure and the governing consideration is the word "fairly." The questions involved are to be answered by common-sense considerations rather than by any formula which can be laid down by this House. In assessing "the amount of rent which is fairly attributable" to the use of furniture, a number of considerations are relevant, of which the chief is that if and so far as the landlord does not provide furniture which the tenant would normally require to use, the tenant would have to provide it himself. It is the value to the tenant of the landlord's covenant to provide furniture which mainly controls the figure to be arrived at, and not the cost of such furniture to the landlord, though the latter in many cases may also be a relevant factor.

G The 2s. 4d., therefore, as it seems to me, instead of becoming necessarily or normally the final figure, is the figure to which LORD SIMON refers as the one which "in many cases may also be a relevant factor." The learned judge in dealing with this part of the case said:

H As to the argument of counsel that £6 a year represents the value to the tenant of the use of the furniture, I understand that this was possibly based on the percentages suggested by MORTON, L.J. (as he then was), but that test did not meet with approval in the House of Lords. I refer to *Palser v. Grinling* (1) ([1948] 1 All E.R. pp. 9 to 11). What I have to consider is the value to the tenant of the landlord's obligations based on the wider consideration referred to in the speech of LORD SIMON, and then to compare it with the contractual rent. . . I proceed to point out the wider consideration mentioned by LORD SIMON. *Inter alia* it is necessary here to bear in mind that the room was let fully furnished in the ordinary meaning of that phrase. Practically everything was provided which the tenant would require. Also I must consider the probable cost to the tenant of the purchase or hire of similar furniture, if such was readily, or at all, available, the high rates prevailing in 1946 for such articles, and the greatly increased cost of maintenance and possible removals. I find that the value to the tenant in respect of the use of the furniture is a substantial portion of the contractual rent, and that the room was let furnished within the meaning of the Rent Acts.

It seems to me to be plain from those passages that the learned county court judge was applying the principle which under LORD SIMON's speech he had to apply, and that what is added to the 2s. 4d., in his opinion, makes the portion of the rent attributable to the furniture a substantial portion of the rent within the meaning of the section as properly construed. If that is right, *prima facie*, it could not be disturbed in this court, but counsel for the tenant takes the point that the learned judge has misdirected himself and has not quantified what I may call his final figure in pounds, shillings and pence. Counsel refers to the following passage in MORTON, L.J.'s judgment in *Palser v. Grinling* (1), which, he says, was not adversely commented on or impliedly modified by anything said in the House of Lords ([1946] 2 All E.R. 291):

Whatever method the judge employs, it seems to me that, having fully considered all the relevant circumstances, he must arrive at an actual figure in pounds, shillings and pence as being "... the amount of rent ... fairly attributable to the attendance ... regard being had to the value of the same to the tenant."

I think it is fair to point out that MORTON, L.J.'s general approach was one which more readily led to a precise quantification than some of the considerations which LORD SIMON said the tribunal of fact ought to take into account. No doubt, the county court judge must have his mind directed to a figure, which obviously is one of pounds, shillings and pence, when he is going to decide what would or would not be substantial, but I cannot think that MORTON, L.J., intended to place on the county court judge the burden of arriving at an actual figure in a case where, having considered all the proper matters, including such figures as there are before him, he is satisfied that on any view the case falls clearly on one side of the line or on the other. There might be a case where, assuming the maximum value for all the considerations which had to be taken into account, he was going to decide that the amount so arrived at was not substantial, and it seems to me that it might be intolerable if he had to quantify a lot of items and reduce them to pounds, shillings and pence. Equally, in another case, as here, having the figure which enters into the calculation—2s. 4d.—he might, and, I think, in this case he did, come to the conclusion that, having regard to the other factors which he had to take into account, the amount attributable to furniture came well over what he was entitled to regard as a substantial portion of the rent. There, again, I think it would be putting an undue burden on him to say: "You must as a matter of law in your notes of your judgment quantify and express in pounds, shillings and pence the final figure at which you arrive." I, therefore, think, as a matter of law, that that point fails. For those reasons, I do not think that counsel for the tenant can succeed in displacing the county court judge's finding that in this case the amount attributable to the furniture was a substantial portion of the contractual rent within the relevant provisions of the section, and on that view the landlord is entitled to the order for possession which the learned county court judge made in her favour.

The counterclaim depends on s. 9 of the Act of 1920 as modified by the schedule to the Act of 1939 in its application to what are called "1939 houses," that is to say, houses which were brought under control for the first time by the Act of 1939. This being a 1939 house, I will read the section as modified by that Act, and applicable to these premises:

Where any person lets, or has, since the beginning of the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1939, let any dwelling-house to which this Act applies, or any part thereof, at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the tenant that the rent charged is yielding or will yield to the landlord a profit in excess of the normal profit as hereinafter defined, the court may order that the rent, so far as it exceeds such sum as would yield such normal profit shall be irrecoverable, and that the amount of any payment of rent in excess of such sum which may have been made in respect of any period after the commencement of the Rent and Mortgage Interest Restrictions Act, 1939, shall be repaid to the tenant. (2) For the purpose of this section "normal profit" means the profit which might reasonably have been expected from a similar letting in the year ending on the 1st September, 1939.

That section introduced a code by which tenants of furnished lettings might seek to get their rents reduced. In 1946 there was further legislation dealing with furnished lettings, and a different procedure was set up for enabling tenants of

furnished lettings to get their rents reduced. That was contained in the Furnished Houses (Rent Control) Act, 1946, and it set up special tribunals before whom those who wished to make applications under the Act could go. The tribunal had power to reduce the sum paid by the tenant, and there was a provision for a register in which the premises were entered with the reduced sum which the tenant had to pay. By s. 7 :

A Sections 9 and 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (which relate respectively to limitation on rent of houses let furnished and to penalty for excessive charges for furnished lettings), shall not apply as regards the rent charged for any house or part of a house entered in the register under the provisions of this Act in respect of any period subsequent to such registration, but save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

B The premises in the present case were originally let on August 19, 1946, at £1 5s. 0d. a week. That was reduced, and from November, 1946, until April 17, 1947, the rent was £1 3s. 0d. Some time before the latter date the tenant in this case had applied to the Hackney, Islington and Stoke Newington Rent Tribunal, who had reduced the rent which she had to pay to 14s. 0d. a week as from April 17. The counterclaim, having set out those facts, says :

C The said charges—that means the 25s. 0d. and the 23s. 0d.—were, by s. 9 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by sched. I to the Rent and Mortgage Interest Restrictions Act, 1939, excessive in that they yielded to the [landlord] a profit in excess of the normal profit thereunder. The [tenant] says that a proper charge would have been 14s. 0d. per week.

D That counterclaim was delivered on Sept. 5, 1947, when the amount which the tenant was paying was 14s. 0d. a week, a sum which it is not suggested in the counterclaim is excessive. The question is whether, having regard to the provisions of the two sections which I have read, a tenant can make an application in respect of a period ending before the date of the application in a case where at the date of the application it is not sought to say that the rent is excessive within the meaning of s. 9.

E Section 7 of the Act of 1946 clearly does not prevent an application in respect of a period before the house was entered in the register. At least, there are no express words to that effect, because the section says expressly that s. 9 of the Act of 1920 “shall not apply as regards the rent charged for any house or part of a house entered in the register under the provisions of this Act in respect of any period subsequent to such registration.” The tenant is not seeking to do that. I agree with the submission of counsel for the landlord, though it may not be necessary to decide it, that the natural meaning of the expression “rent charged” in that section is the amount which the tenant actually has to pay after the rent tribunal have come to their finding, and the matter has been entered in the register. Having gone to one tribunal, summoned the landlord and witnesses there, and got his rent reduced by that procedure, it would obviously be oppressive if the tenant could then go to the county court to see whether he could get the reduced figure further reduced by an application under s. 9. As it seems to me, s. 7 is silent as to the point which we have to decide, and, indeed, counsel for the landlord based his argument on the wording of s. 9 of the Act of 1920, as amended. He is seeking, in my view, to read the words “on the application” as if they were “at the time of the application.” If it was necessary for a tenant to show that at the time of his application the rent charged was in excess of the normal profit, and if the words “the rent charged” there mean the sum which he is actually paying on that day, then the tenant would fail in this case because the sum he was paying at the time he filed his counterclaim was 14s. 0d.—the sum which he puts forward in his counterclaim as a fair sum to pay for the premises over the period. I cannot myself construe the words “on the application” as meaning “at the time of the application.”

H Section 9 confers a right to relief in two different forms. The applicant can get his rent reduced and he can also get repaid the sums in respect of the unreduced rent which he has previously paid to his landlord. I think, unless there are express words which negative it, where one finds that a person is entitled to relief of that kind, he can do as the tenant has done here, and claim in respect of a period ending before the time when the application is filed. The court will look at what was happening in that period, and if it finds that in that period a sum

yielding a profit in excess of the normal profit was being paid, the section will apply and the tenant will be entitled to be repaid the amount of rent in excess of the reduced sum over the period in question. That is the view which the learned county court judge took. He said :

As to the point raised as to the effect of s. 9 of the Act of 1920, I hold that the sub-section applies to past and future lettings, and the counter-claim is maintainable.

Counsel for the landlord based an argument on the words "is yielding or will yield" in the sub-section, and it is quite true that one does not find in it the words "has yielded." I think the explanation is a simple one. It is normally the case that people can, by legal proceedings initiated on a certain date, claim in respect of any relief to which they may be entitled over a past period, whereas it is unusual that a person can resort to a court before the injury which is being dealt with has actually descended on him. Therefore, I think it may well have been thought necessary to put in express words dealing with the future, because under those words, if there were a progressive rent and the tenant wanted to say that a rise two or three months hence would bring him within the section, as I read the sub-section, he could apply and complain that the rent to be charged in the future would yield an excessive profit to the landlord. The draftsman intended that the section should be applicable in certain circumstances to future events, and in that case one would expect to find express words conferring that right. For these reasons, I think that the appeal and cross-appeal fail and that the learned judge's order should stand.

TUCKER, L.J. : I am so completely in agreement with the result of the appeal and cross-appeal as stated by SOMERVELL, L.J., and with his reasons for arriving at that result that I desire to add very few observations of my own. With regard to the cross-appeal, there is nothing that I wish to add.

In this case the 2s. 4d. allocated to the furniture represents a percentage of some 10 per cent. of the total rent, but, as stated by my brother, I think that it is clear that this 2s. 4d. only represents the first stage of the calculation which was described in MORTON, L.J.'s judgment in *Property Holding Co., Ltd. v. Mischeff* (1) ([1946] 2 All E.R. 297), where he said :

He should first consider what, upon the evidence, was the capital value, at the date when the lease was executed, of the furniture included in the demise . . . He should then consider what percentage of that capital value should be regarded as the amount of rent fairly attributable to the furniture, taking into account such matters as the loss of interest by the landlord on his capital expenditure and the probability of depreciation and any other matters which he thinks it proper to take into account . . . Next the judge must have regard to "the value of the same to the tenant." These words raise difficult questions in some cases. In my view, if a dwelling-house is *bona fide* let to any tenant at a rent which includes payments in respect of certain articles of furniture, then *prima facie* those articles are of the same value to that tenant as they would be to any other tenant, and the burden lies on the tenant to show that by reason of some special circumstances those articles should be treated as being worth less to him than they would be to any other tenant . . . No such circumstances were proved in the present case.

I think that MORTON, L.J.'s judgment tended to indicate, at any rate, that, unless the tenant could show some reason for reducing the figure of 2s. 4d. in this case, *prima facie* 2s. 4d. would be the percentage which would prevail. When *Mischeff's* case (1) reached the House of Lords I think LORD SIMON's speech shows that there are other counter-balancing considerations to be taken into account from the landlord's point of view. LORD SIMON said this ([1948] 1 All E.R. 10) :

It is the value to the tenant of the landlord's covenant to provide furniture which mainly controls the figure to be arrived at, and not the cost of such furniture to the landlord, though the latter in many cases may also be a relevant factor. If the tenant provided the furniture himself, he would have to suffer the loss due to wear and tear, whereas, if the landlord provides the furniture, the burden of wear and tear (in the absence of an express covenant) falls on him. On the other hand, it must not be overlooked that when the landlord lets the use of furniture he does not, apart from special agreement, undertake to repair it or to renew it from time to time when it becomes worn out . . . What the judge of fact has to do is to take the furniture as it is and to fix a fair rental for it, having regard to its value to the tenant, remembering that old furniture wears out sooner than new and that the landlord (apart from special covenant) does not undertake to repair or renew it. These balancing considerations are not capable of being precisely quantified and the judge of fact has in the end to

arrive at a figure which he considers in the result fairly allows for the relevant matters to be taken into account.

I think that the learned county court judge has obviously studied LORD SIMON'S speech very carefully, and has applied it properly, with the result that he added something, and something valuable, to the 10 per cent. which would be represented by the 2s. 4d. and I think there was ample material to justify him in arriving at that figure.

- A With regard to the passage in MORTON, L.J.'s judgment which has been quoted, indicating the necessity of the judge stating his finding with regard to the portion of the rent in the form of pounds, shillings and pence, and bearing in mind the passage which I have just read from LORD SIMON'S speech where he said "the judge of fact has in the end to arrive at a figure which he considers in the result fairly allows for the relevant matters to be taken into account," I think that, generally speaking, it would be desirable in these matters for county court judges to indicate what final conclusion they arrive at with regard to the portion, which I think can generally be done by taking a broad view of the matter, but I do not think that the mere fact that in the present case the county court judge has not stated in black and white the precise arithmetical result at which he has arrived after making some addition to the 10 per cent. invalidates his judgment or would justify us, in view of the very careful consideration which he obviously gave to the evidence in this case, in sending the case back to him to state the precise proportion at which he arrived. I agree that the appeal and cross-appeal fail.

- D **BUCKNILL, L.J. :** I agree. I would like to add that the room in this case was completely furnished, including such things as a bed, a chest of drawers, a cupboard, curtains, two chairs and an easy-chair, a table, a gas-fire and a gas-stove. To suggest that the value of those things to a tenant was only 2s. 4d. a week, if one takes into consideration what it would cost to buy those things, even second-hand, or to hire them, seems to me to indicate that that 2s. 4d. is not a sound basis upon which to work. I agree that the appeal and cross-appeal should be dismissed.

Appeal and cross-appeal dismissed: costs to follow the events.

- E Solicitors: *H. B. Wedlake, Saint & Co.* (for the landlord); *J. S. I. Rabin & Co.* (for the tenant).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

RIORDAN v. MINCHIN.

- F [COURT OF APPEAL (Tucker, Bucknill, and Somervell, L.JJ.), July 29, 1948.]

Rent Restriction—Furnished letting—Recovery of excess rent—Applicant no longer tenant at time of application—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 9 (1) (as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), sched. I).

- G The plaintiff, who was tenant of a house within the Rent and Mortgage Interest Restrictions Act, 1939, applied to a tribunal under the Furnished Houses (Rent Control) Act, 1946, who reduced his rent from 30s. to 10s. 6d. a week. On May 19, 1947, he was evicted after an order for possession had been made against him, and thereupon he ceased to be a tenant of the house. On June 20, 1947, he applied to the county court, under s. 9 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended by the Rent and Mortgage Interest Restrictions Act, 1939), for a repayment of the excess rent paid by him to the defendant (the landlord) while he was tenant of the house.

- H HELD: he was not debarred from obtaining an order for the repayment of the excess rent by the fact that at the time of the application he was no longer tenant of the house.

Roppel v. Bennett (p. 627, ante), applied.

Case referred to:

(1) *Roppel v. Bennett*, [1948] 2 All E.R. 627.

APPEAL by the plaintiff from a decision of His Honour JUDGE TOPHAM sitting at Farnham, Surrey, County Court, dismissing the plaintiff's application for repayment of excess payments of rent on the ground that the plaintiff was not the tenant of the premises in question when he made the application. The Court of Appeal now allowed the appeal. The facts appear in the judgment of SOMERVELL, L.J.

The plaintiff appeared in person.
Barry Sheen for the landlord.

A

TUCKER, L.J. : I will ask SOMERVELL, L.J., to deliver the first judgment.

SOMERVELL, L.J. : This is an appeal by Captain Riordan against a decision of His Honour JUDGE TOPHAM sitting at Farnham, Surrey, County Court. The case concerns a house of which Captain Riordan was the tenant, and in respect of that house an application was made on Oct. 29, 1946, to the Furnished Houses Rent Tribunal, as a result of which the rent was reduced from 30s. a week to 10s. 6d. Subsequently, an order for possession was made, leave to proceed was obtained, and, on May 19, 1947, Captain Riordan was evicted, and this appeal proceeds on the basis that as from that date he was neither a contractual tenant nor a statutory tenant. Although the house was a furnished house within the Furnished Houses (Rent Control) Act, 1946, it was also within the Rent Restrictions Acts, that is to say, it had been held in other proceedings that the amount payable in respect of furniture was not a substantial proportion of the rent within s. 10 of the Rent and Mortgage Interest Restrictions Act, 1923.

B

On June 20, 1947, an application was made by Captain Riordan to the county court under s. 9 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939. This is a "1939 house," and the section, as amended, provides :

C

Where any person lets, or has, since the beginning of the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1939, let any dwelling-house to which this Act applies, or any part thereof, at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the tenant that the rent charged is yielding or will yield to the landlord a profit in excess of the normal profit as hereinafter defined, the court may order that the rent, so far as it exceeds such sum as would yield such normal profit shall be irrecoverable, and that the amount of any payment of rent in excess of such sum which may have been made in respect of any period after the commencement of the Rent and Mortgage Interest Restrictions Act, 1939, shall be repaid to the tenant.

D

Captain Riordan was not asking to have the rent reduced because at the time of his application, he was no longer a tenant of the premises, but he was applying for repayment of the rent which he had paid in excess of the 10s. 6d. a week fixed by the rent tribunal.

E

A similar point came before this court in the recent appeal of *Roppel v. Bennett* (1). In that case the applicant was still tenant at the date of the application to recover the excess rent, but the rent at that time had already been reduced to a sum of which he was not complaining and he was seeking to recover arrears of rent in respect of a period before the rent was reduced. The county court judge found that he was entitled to recover the excess and this court affirmed the decision. Some observations were made with regard to the words "is yielding" or "will yield," for an argument had been based on the fact that there were no words which expressly referred to the past, and it was pointed out in the judgment that under our general procedure it is normal that a plaintiff claims relief and damages in respect of something which has happened in the past and does not need any express words in the statute which gives him a remedy to enable him to claim in respect of the past. Therefore, we held that the applicant could claim.

F

G

H

In the present appeal, the learned county court judge dismissed Captain Riordan's application on the ground that at the time of his application he was not a tenant. Counsel for the landlord relied on the words "on the application of the tenant." I do not think that means that the applicant has to be a tenant at the time he files an application at the county court. I think it means that he must have been the tenant during the period in respect of which the application is made. Of course, an applicant would not be able to make an application for repayment except in respect of a period during which he had been a tenant

and was paying rent. That is, in my view, the natural construction of the section, and I can see objections which might well arise if the section were construed as counsel asks us to construe it. I, therefore, think that the learned county court judge was wrong in holding that this application fails because the applicant was not the tenant at the time the application was filed. The appeal must be allowed. Captain Riordan is entitled to the excess as from a certain date. What is the actual date can be decided later.

A TUCKER, L.J.: I agree. The recent decision of this Court in *Roppel v. Bennett* (1)—where we held that the words “is yielding” or “will yield” are applicable to a period of time which had passed when the application was made to the county court—really decides this appeal, because, if the words “is yielding” means “yields at the material time” (as we so held), the fact that this relief can only be given on the application of the tenant does not assist counsel’s argument. The natural meaning of the words “tenant” and “landlord” in an action of this kind is the person who was the tenant or landlord at the time the matter in issue arose. For those reasons, I agree that this appeal succeeds.

BUCKNILL, L.J.: I agree.

Appeal allowed with costs.

C Solicitors: *Stevens & Bolton*, Farnham (for the defendant).
[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

Re BORTHWICK (deceased). BORTHWICK v. BEAUVAIS.

D [COURT OF APPEAL (Lord Greene, M.R., and Asquith, L.J.), July 23, 1948.]
Family Provision—Discovery—Special circumstances—Net value of estate—Practice—R.S.C., Ord. 54F, r. 14.

E R.S.C., Ord. 54F, dealing with applications under the Inheritance (Family Provision) Act, 1938, provides by r. 1 that an application to the court under s. 1 of the Act shall be made in the Chancery Division by originating summons *inter partes*, and r. 14 provides that the ordinary practice and rules in the Chancery Division, in so far as they are not inconsistent with the Act or R.S.C., Ord. 54F, shall apply to proceedings under the Order.

F The plaintiffs, the widow and infant child of the testator, had issued an originating summons under the Act and applied for discovery of various documents relating *inter alia* to the net value of the estate. They were unable to indicate any ground for doubting the valuation (which had been accepted by the Estate Duty Office), but sought discovery in order to facilitate a critical examination thereof.

HELD: there was no such right to discovery as was conferred by the Rules of the Supreme Court in relation to matters conducted by pleadings, and, having regard to the wide power of the court on such applications, under Ord. 54F, r. 3 (2) (a) and r. 9, to secure any further evidence which might be necessary, discovery would not be ordered.

G Decision of ROXBURGH, J., in *Re Borthwick*, *decd.* (p. 179, *ante*), affirmed.

[FOR R.S.C., ORD. 54F, see THE YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 1096-1099.]

H APPEAL by the plaintiffs, the widow and an infant child of a testator, from a decision of ROXBURGH, J. (p. 179, *ante*), who dismissed their application for discovery of documents in connection with an originating summons under the Inheritance (Family Provision) Act, 1938. The Court of Appeal dismissed the appeal. The facts appear in the judgment of LORD GREENE, M.R.

Lightman for the plaintiffs.

A. C. Nesbitt for the defendant executors.

Parbury for certain beneficiaries.

Danckwerts for the Attorney-General.

LORD GREENE, M.R.: The appellants are plaintiffs in an application under the Inheritance (Family Provision) Act, 1938, they being respectively

the widow and daughter of the testator. Under that Act, in considering applications of this kind, the net value of the estate is clearly a relevant matter. In the present application the plaintiffs, with a view to testing an estimate of the values which the executors placed on the estate, sought to obtain an order for discovery in relation to certain shares in a private company.

When the Act was passed and was about to come into operation, the Rules Committee made a series of rules with regard to applications under the Act. They are contained in Ord. 54F. Speaking quite generally about those rules, they appear to me to be drafted for the particular purpose of providing, in relation to this novel and very special type of jurisdiction, a scheme of procedure which would enable the judge exercising that jurisdiction to have the fullest control over the proceedings and to secure that all material evidence which appeared to him to be material should be brought before him. The jurisdiction, of course, is a peculiar one, and anyone familiar with it knows that, if the procedure were to be abused and not kept under proper control, it might lead to litigation of the greatest acrimony and the threshing out of a lot of irrelevant material which would not be in the public interest. With that object in mind, it appears to me, these rules were made. I need not go through them in detail, but it is left, for instance, under r. 3 (2) (a) to the judge on the appointment for directions to "require the plaintiff and defendant to supply such information as shall be deemed necessary." Under r. 9, which is not in terms limited to the appointment for directions :

The court or a judge may require evidence in regard to any matter which the court or a judge considers to be relevant to the application and may direct any party to the proceedings or any person on whom notice of the proceedings has been served to attend on the hearing of the application and give evidence orally or to be cross-examined on any affidavit made by him.

The extent of the jurisdiction there conferred is, of course, very wide and goes far beyond the ordinary jurisdiction of a judge of the High Court. Without suggesting that Ord. 54F contains a comprehensive and exhaustive code, it must, in my opinion, be taken into careful consideration when such an application as we have here is made. The application is made in reliance on r. 14 of the Order which provides as follows :

The ordinary practice and rules in the Chancery Division in so far as they are not inconsistent with the Act or this Order shall apply to proceedings under this Order. It was argued before ROXBURGH, J., and was suggested before us, that that rule imported into this Order the rules of Ord. 31 relating to discovery, and, in particular, that they imported the ordinary rule in which in an action the parties, I will not say automatically but very nearly automatically, are entitled to an order for discovery. ROXBURGH, J., took the view that the ordinary practice and rules in the Chancery Division referred to in r. 14 meant the ordinary practice and rules in that Division in relation to procedure by originating summons. That is the form of procedure which, under Ord. 54F, is required in these cases. I see no reason for differing from that view of the learned judge. In the procedure by originating summons where the issues are not defined in the way in which they are defined in pleadings, but are shown in general affidavits in which the relevant evidence appears, affidavits which can, if necessary, be cross-examined to, there is really no room in practice for the application of the rather strict rules relating to discovery which take place in ordinary actions conducted with pleadings.

The view that ROXBURGH, J., took, and I think rightly took, was that the discovery in proceedings in the Chancery Division by originating summons ought only to be ordered in very special cases where the facts are such as to justify such an order being made. The application which was made to ROXBURGH, J., was an application, not under this code contained in Ord 54F, but for discovery under the general jurisdiction of the court. The judge had no hesitation in saying what, in my opinion, is right—that there is in this case no such right to discovery as is conferred by the Rules of the Supreme Court in relation to matters conducted by pleadings. He took the view further that an application for a special order for discovery in proceedings of this kind on originating summons ought to be by a specific application, and that it should be supported by a special affidavit setting out the reasons why it is said discovery

should be granted. No such special application or affidavit being before him, he dismissed the application.

A We took the view that, on this appeal, the plaintiffs could properly be allowed, without the necessity at this stage of producing a special form of application or a special affidavit, to ask this court to act on the material which was available to them before the learned judge and which the learned judge in his insistence on a special affidavit did not look at. We accordingly considered the material and also at some subsequent material which came into existence or became available subsequently to the hearing of the application by the judge. The case of the plaintiffs boils down simply to this. They do not put forward a single shred of fact or suggestion casting doubt on the fairness or accuracy of the executors' evidence on the subject of value. Indeed, their complaint is this: "We cannot do that without some materials, and the reason why we want discovery is to enable us to test what the executors have said and to see whether or not we can find something on which to attack their estimate." In ordinary litigation the ordinary rules of discovery enable litigants to conduct such an examination, but this is a very special jurisdiction under a very special Act governed by very special rules. The judge has ample power, if he is not satisfied or if he thinks there is a reasonable ground for doubting the accuracy of such an estimate as this, to require further evidence on the point, to summon the executors before him, to put questions to them and to subject them to cross-examination. If he thought that was the proper course, or if the matter was a matter of doubt or if suspicion was aroused, that, no doubt, would be the course that he would take, but here we have what on the face of it is sworn testimony by reputable people, the accuracy of which has been subjected to the not too easy test of an investigation by a government department. Everybody who has a little experience of these matters knows that the valuation of shares in private companies is often an extremely difficult matter, and also I think everybody knows that where such shares come up for valuation for death duty purposes they are a subject-matter on which the death duty officials are particularly vigilant and particularly inquisitive. A judge who is asked to exercise his discretion in a case of this kind has to weigh in his mind those considerations. Here are plaintiffs who cannot suggest any doubt about this *prima facie* reliable method of arriving at the valuation, who merely ask for the instrument of discovery to be put into their hands to enable them to see if they can find something on which to attack it. If ever there was a case where a judge should decline to exercise a discretionary jurisdiction to grant an order for discovery, I think this is such a case. If any reasonable suggestion of doubt could be raised, I have no doubt the judge in his discretion under the power given to him by these specific rules would require further information. Indeed, there is one point at which he may at the hearing, or before the hearing, require some further information, and it is this. A great point was made that the Inland Revenue valuation relates to the date of the death. The value of the estate for the purpose of administering this Act must be ascertained as at the date of the order which the court makes under the Act. Time will have elapsed in the ordinary case between those two dates, and it may well be that the judge may require that the evidence of value shall be brought up to date. He may call on the executors to bring their valuation up to date and to say whether they wish to modify it in any way in the light of what has happened since the death. It may or may not be that he may wish that to be done. The result may be to raise or to lower the value of the estate I do not know, but that the instrument of discovery should be used for a purpose like that when the court has ample power to secure for itself any further evidence which may be necessary, appears to me to be an idea which is wholly wrong and contrary to the whole spirit of these rules.

H In the result, therefore, it appears to me that no ground has been put forward which would justify this court in interfering. It falls to this court to exercise its discretion because the judge declined to entertain the application on the ground that it was not in the right form and was not supported by the appropriate evidence. We have looked at the evidence, we have allowed the submission to be made, and it is for us to decide whether or not we will exercise the discretion which I have said I think exists technically to grant an order for discovery. In my opinion, the circumstances are not such as, in this very

special jurisdiction and having regard to the very special rules which have the effect of legislation, should lead us to exercise our discretion. In the result, the appeal must be dismissed.

ASQUITH, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Steavenson & Couldwell*, agents for *Gosschalk & Austin*, Hull (for the plaintiffs and certain beneficiaries); *Atkey & Sons* (for the defendant executors); *Treasury Solicitor*.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re PRESS CAPS, LTD.

[CHANCERY DIVISION (Roxburgh, J.), July 29, 1948.]

Company—Discovery—Scheme for transfer of shares—Acquisition of shares of dissentient shareholders—Application by shareholders to court—Discovery of documents relating to value of shares transferred—Companies Act, 1948 (c. 38), s. 209.

Dissentient shareholders in a "transferor company" applied to the court under s. 209 of the Companies Act, 1948, for an order that they were not bound to transfer their shares to a "transferee company" whose offer had been accepted by the holders of more than nine-tenths in value of the shares affected. The applicants alleged that the purchase price of the shares had been arrived at as the result of an under-valuation of the transferor company's assets and applied for discovery of the documents relating to that matter which were or had been in the possession of the transferee company.

HELD: in the absence of special circumstances an order for discovery would not be made.

[AS TO DISCOVERY OF DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 364, 365, para. 441; and FOR CASES, see DIGEST, Vol. 18, pp. 72-74, Nos. 286-295.]

Case referred to:

(1) *Borthwick, Re, Borthwick v. Beauvais*, [1948] 2 All E.R. 635.

MOTION.

A scheme for the transfer of the ordinary shares in Press Caps, Ltd., to Metal Box Co., Ltd., having been approved by 96.85 per cent. of the shareholders of Press Caps, Ltd., Metal Box Co., Ltd. gave notice to the dissenting shareholders under s. 209 of the Companies Act, 1948, that it desired to acquire their shares. The dissenting shareholders, by originating summons, asked for a declaration that Metal Box Co., Ltd., were not entitled to acquire their shares under the section, it being alleged that the offer of Metal Box Co., Ltd., was based on an under-valuation of certain assets of Press Caps, Ltd., and so was inadequate. These shareholders now applied for an order of discovery of the documents which were or had been in the possession of Metal Box Co., Ltd., relating to the matters in dispute. The registrar having refused to make the order, the applicants appealed to the judge, who dismissed the appeal.

Hesketh for the applicants.

T. D. D. Divine for the respondent company.

ROXBURGH, J.: This is an application by the holders of a very small proportion of the share capital of a company called Press Caps, Ltd. A large majority of the shareholders have agreed to sell their shares to the Metal Box Co., Ltd., and the Metal Box Co. are anxious to apply to the applicants the provisions of s. 209 of the Companies Act, 1948. That section gives to any dissenting holder who receives a notice that the company requires his shares, a right to apply in order to escape from the obligations of the section. The applicants have applied and have properly made the application by originating summons. In the present application they are asking for an order for discovery. It is, so far as I am aware, the first application under s. 209 to obtain an order for discovery.

The unsuccessful applicant in *Re Borthwick* (p. 635, ante), a case under the Inheritance (Family Provision) Act, 1938, appealed to the Court of Appeal before the commencement of this summons. There are special rules which apply to

cases under the Inheritance (Family Provision) Act, which have no application to the present case. After dealing with those rules, LORD GREENE, M.R., said (pp. 635, 636, *ante*) :

The view that ROXBURGH, J., took, and I think rightly took, was that the discovery in proceedings in the Chancery Division by originating summons ought only to be ordered in very special cases where the facts are such as to justify such an order being made. The application which was made to ROXBURGH, J., was an application, not under this code contained in Ord. 54F, but for discovery under the general jurisdiction of the court. The judge had no hesitation in saying what, in my opinion, is right—that there is in this case no such right to discovery as is conferred by the Rules of the Supreme Court in relation to matters conducted by pleadings. He took the view further that an application for a special order for discovery in proceedings of this kind on originating summons ought to be by a specific application, and that it should be supported by a special affidavit setting out the reasons why it is said discovery should be granted.

Counsel for the applicants in the present case has armed himself with special affidavits, but the question still remains whether a special case has been made out. Counsel's main argument was that, if he did not have discovery on a question of fact, his client's hands would be tied behind his back, but that comment is applicable to every case in which a litigant sues by way of originating summons and a question of fact arises in the course thereof. I think it is not unimportant to notice the nature of the essential facts relied on. They are facts relating to the value of particular assets. Having regard to the subject-matter of s. 209, the value of the assets of a company must be a common factor in most applications under this section. Accordingly, if the mere fact that there is a dispute as to the value of the assets of a company is a sufficient ground for ordering discovery, discovery would have to be ordered in most cases under this section.

I do not feel able to say that any special circumstances have been disclosed which would justify an order for discovery in this case. In reaching that conclusion I have taken into account not only the matters which I have specially mentioned, but also the nature of the section under which this application is being made, s. 209 of the Companies Act, 1948. I have also taken into account, as I think I ought to take into account, the serious consequences which might follow if the holder of one per cent. of the shares of a company should in any large number of cases become entitled by making an application under this section to obtain an extensive investigation of the company's affairs. That remark is not directed to this particular application, but is intended to be of general application. Accordingly, I dismiss this motion with costs.

Solicitors : Tyrrell Lewis & Co. (for applicants) ; Reynolds, Gorst & Porter (for respondent company).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

HARTHAN v. HARTHAN.

[COURT OF APPEAL (Lord Merriman, P., Bucknill, L.J., and Hodson J.), July 17, 18, 21, 22, 26, 1948.]

Nullity—Impotence—Petition by impotent spouse—Competency—Need of repudiation of marriage by potent spouse.

Provided that there are no circumstances which bar him or her, *e.g.*, knowledge of the defect at the date of the marriage, an impotent spouse is entitled to petition for a decree of nullity, and the right to do so is not conditional on the repudiation of the marriage by the other spouse.

Norton v. Seton (1819) (3 Phillim. 147), explained.

Dictum of the LORD PRESIDENT (NORMAND) in F. v. F., (1945 S.C. 202, 208), approved.

[AS TO IMPOTENCE AS A GROUND FOR NULLITY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640-645, paras. 937-945 ; and FOR CASES, see DIGEST, Vol. 27, pp. 265-272, Nos. 2328-2407.]

Cases referred to :

(1) *G. v. M.*, (1885), 10 App. Cas. 171 ; 53 L.T. 398 ; 27 Digest 351, 3339.

(2) *Horton v. Horton*, [1947] 2 All E.R. 871 ; [1948] L.J.R. 396.

(3) *R. v. Millis*, (1844), 10 Cl. & Fin. 534 ; 27 Digest 43, 222.

(4) *Proctor v. Proctor*, (1819), 2 Hag. Con. 292 ; 27 Digest 369, 3549.

- (5) *Hope v. Hope*, (1858), 1 Sw. & Tr. 94; 27 L.J.P. & M. 43; 31 L.T.O.S. 138; 22 J.P. 308; 27 Digest 369, 3559.
- (6) *R. v. St. Edmundsbury & Ipswich Diocese (Chancellor) and Another, Ex parte White and Another*, [1947] 2 All E.R. 170; [1948] K.B. 195; 177 L.T. 488.
- (7) *C. (otherwise H.) v. C.*, [1921] P. 399; 90 L.J.P. 345; 125 L.T. 768; 27 Digest 268, 2362.
- (8) *Norton v. Seton (falsely called Norton)*, (1819), 3 Phillim. 147; 27 Digest 266, 2340.
- (9) *Ray v. Sherwood & Ray*, (1836), 1 Curt. 193; *affd.*, *sub nom.*, *Sherwood v. Ray*, (1837), 1 Moo. P.C.C. 353, P.C.; 27 Digest 376, 3647.
- (10) *Pickard v. Sears*, (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 21 Digest 290, 1032.
- (11) *Sottomayer v. De Barros*, (1879), 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 27 Digest 36, 127.
- (12) *Mordaunt v. Moncrieffe*, (1874), L.R. 2 Sc. & Div. 374; 43 L.J.P. & M. 49; 30 L.T. 649; 39 J.P. 4, H.L.; *revsq.*, S.C., *sub nom.*, *Mordaunt v. Mordaunt*, (1870), L.R. 2 P. & D. 109, 382; 27 Digest 384, 3770.
- (13) *Moss v. Moss*, [1897] P. 263; 66 L.J.P. 154; 77 L.T. 220; 27 Digest 36, 128.
- (14) *Wilson v. Wilson* (Arches 1795).
- (15) *Miles v. Chilton (falsely calling herself Miles)*, (1849), 1 Rob. Eccl. 684; 6 Notes of Cases, 636; 27 Digest 376, 3646.
- (16) *B—n v. B—n*, (1854), 1 Ecc. & Ad. 248; 23 L.T.O.S. 99; *sub nom.*, *B—n v. M—e* (falsely calling herself *B—n*), 2 Rob. Eccl. 580; 27 Digest 265, 2329.
- (17) *A. v. A. (sued as B.)* (1887), 19 L.R. Ir. 403; 27 Digest 266, *s.*
- (18) *G. v. G. (falsely called K.)*, (1908), 25 T.L.R. 328; 27 Digest 268, 2360.
- (19) *S.G. v. W.G.*, 1933 S.C. 738.
- (20) *F. v. F.*, 1945 S.C. 202; Digest Supp.
- (21) *G. v. G.*, [1912] P. 173; 81 L.J.P. 90; 106 L.T. 647; 27 Digest 266, 2345.
- (22) *H. v. H. (otherwise N.)*, (1929), 98 L.J.P. 155; Digest Supp.
- (23) *Davies (otherwise Mason) v. Davies*, [1935] P. 58; 104 L.J.P. 9; 152 L.T. 264; Digest Supp.
- (24) *McM. v. McM., McK. v. McK.*, [1936] I.R. 177; Digest Supp.
- (25) *B. v. M. (falsely called B.)*, (1942) Q.W.N. 5; 2nd Digest Supp.
- (26) *B. (otherwise C.) v. B.*, (1942), Q.W.N. 23; 2nd Digest Supp.
- (27) *Cuno v. Cuno*, (1873), L.R. 2 Sc. & Div. 300; *sub nom.*, *Mansfield (falsely called Cuno) v. Cuno*, 42 L.J.P. & M. 65; 29 L.T. 316; 27 Digest 350, 3338.
- (28) *L. v. L.*, 1931 S.C. 477; Digest Supp.
- (29) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100.

APPEAL by the husband in an undefended suit from an order of Mr. Commissioner Eddy, dated Oct. 10, 1947, dismissing his petition for nullity on the ground of his wife's wilful refusal to consummate the marriage or, alternatively, on the ground of his own impotence. The appeal was allowed and a decree *nisi* granted on the ground of impotence. The facts appear in the judgment of LORD MERRIMAN, P.

H. J. Phillimore for the husband.

Simon for the King's Proctor.

Cur. adv. vult.

July 26. LORD MERRIMAN, P., read the following judgment. This is a husband's appeal against the dismissal on Oct. 10, 1947, by Mr. Commissioner Eddy of his petition for nullity of marriage. The suit was undefended.

By his petition, dated Mar. 10, 1947, the husband alleged that the non-consummation of the marriage was due to the wilful refusal of the wife to consummate the same, and, alternatively, that he was at the time of the ceremony of marriage and has ever since been incapable of consummating the same, that at the time of the ceremony of marriage he was unaware of his incapacity, and that the wife has repudiated the relationship of wife and the obligations of the marriage contract. Much of the difficulty in this case has been caused by the mutually inconsistent character of these allegations, one of which assumes that the husband was capable of consummating the marriage and that its non-consummation was owing to wilful refusal on the part of the wife, while the other asserts that the husband was, and still is, impotent. This, in my opinion, is an embarrassing form of pleading which should not be encouraged.

The parties went through a ceremony of marriage on Apr. 27, 1925. There appears to be no doubt that the marriage has never been consummated. At the time of the ceremony the husband was in holy orders and the evidence, which the learned commissioner accepted, shows that he had no experience in sexual matters. From the first, except on rare occasions, the spouses occupied separate rooms. Such attempts as the husband made to consummate the marriage

failed entirely as he was unable even to obtain an erection. Soon after the marriage he consulted a doctor who gave him some tablets to stimulate him. It is not clear how long he persisted in his unsuccessful attempts, save that it is clear that they had been abandoned before he went with his wife to China in 1931. Twelve months later the wife returned to England for reasons of health and they were necessarily separated until his own return to this country in 1937. They lived together again until the husband joined the Royal Air Force as a chaplain in 1939. In 1940 he resigned both from the Royal Air Force and from the church and became a probation officer. Meanwhile the wife had joined the Women's Auxiliary Air Force with the result that, until she was demobilised in March, 1946, they saw very little of each other. The husband was living in rooms in Chelsea and they met occasionally for meals when she was on leave, but did not stay together. In May, 1946, the husband, having learnt through his welfare work that his sexual difficulties might simply be psychological, consulted Dr. Sharp. On Dr. Sharp's advice he resumed cohabitation with his wife in a furnished flat, but they still occupied separate rooms. During that time the husband said that he made three or four further attempts to consummate the marriage and that on several occasions he succeeded in obtaining an erection, having begun to realise as the result of Dr. Sharp's advice that he "was not so abnormal after all," and that with co-operation on his wife's part he thought he would have consummated the marriage, but he added that he had not a great deal of confidence in himself alone and did need co-operation. He described his wife's attitude in these words: "By that time she wanted to have nothing to do with the sex side of marriage. She said we had gone so many years without it and she was not going to start now with me." He described her lack of co-operation by saying that at least on one occasion she simply turned over on her side away from him. He again consulted Dr. Sharp in June or July and on his advice went to see Dr. Miller in Harley Street on July 24, 1946. Dr. Miller said that he found the husband physically normal apart from some under-development of the testicles, but that on examination semen was found to be markedly deficient in sperms. He considered that there was no reason to believe that the husband could not obtain an erection, but that it was extremely improbable that he could become a father. After that, according to the husband's evidence, he made one more attempt, but the wife said quite definitely that she was not going to start that side of married life and suggested that they might as well live apart, to which the husband added that he felt too that that was perhaps the better thing to do. After the medical evidence had been given the husband was recalled so that he might have an opportunity of amplifying his evidence about the attempts he made in 1946. Describing the resumption of cohabitation he said that he had told his wife that he had come to the conclusion that he was probably not impotent after all and that they must try and recapture the part of life that they had missed for so long, adding that in the first instance the wife did not say very much in reply. The three or four attempts came down to two or three between April and July, with regard to all of which the husband said that he did not force himself on his wife, that he got into her bed and tried to make love to her and to get her into the mood, but that she just did not want to have anything to do with him. From the beginning she turned away from him and after about the third attempt said: "We have not had this part of life over all these years and I do not propose to begin now," to which he just said, "It is rather a pity when I have found out that all this trouble is rather a psychological one." He could not say that all this occurred in one conversation, it was probably two. Finally, after some more discussion, the wife said: "I think you should go and live on your own if you really want that part of life because I do not." It is to be observed that apart from the general statement that on these occasions he tried to make love to his wife and to get her into the mood he gives no detailed description of his attempts. On his own description, even assuming that he was capable of effecting penetration, his efforts do not appear to have been resolute enough to overcome the natural reluctance of a wife who had been accustomed for over twenty years to be deprived of the sexual side of marriage life. Even assuming that he was right in saying that he could obtain an erection it is by no means certain that he could have maintained it so as to effect penetration, and it is to be observed that Dr. Sharp only suggested that, if penetration

could be effected by one means or another, the result would be to cause an erection inside the vagina.

On this evidence the learned commissioner was pressed, as in the first instance this court was pressed, to find that non-consummation was due to the wife's wilful refusal to consummate. I need not pause to consider certain observations made by the learned commissioner on the question of the husband's acquiescence in a life which did not imply sexual relations, for, in my opinion, that question does not arise. I am not prepared to hold that the husband had such knowledge of all that it was material for him to know, not only as to the facts but as to the law, as to raise an estoppel based on approbation of the marriage in accordance with the test laid down by LORD SELBORNE in *G. v. M.* (1) (10 App. Cas. 171, 186). Apart from this the learned commissioner quite rightly said:

Moreover before I could hold that the marriage was not consummated owing to the wilful refusal of the respondent to consummate it, I should have to be satisfied that at least in the summer of 1946 the husband was himself capable of consummating it. I have given full weight to the opinion of the two doctors who were called before me but I feel bound to say that I cannot bring myself to hold that I feel certain that the husband was or is in fact capable of consummating the marriage. I do not myself see how anyone can be confident that what the husband had hopelessly failed to achieve in years gone by he could suddenly achieve in 1946. Having regard therefore to all the facts in this case I am of opinion that the first contention that the marriage was not consummated owing to the wilful refusal of the wife to consummate it fails.

Apart from the question to be discussed shortly whether the learned commissioner's doubts about the husband's capacity should not have gone further, I find it impossible to differ from his conclusion. It must be remembered that on this branch of the case the burden lies on the husband to prove affirmatively that the marriage has not been consummated owing to the wilful refusal of the wife to consummate it. Even assuming that the husband had satisfied the learned commissioner that, coupled with whatever he meant by co-operation on the part of the wife, he could on the occasion of one or other of these attempts have consummated the marriage, he would at most have proved that the marriage had not been consummated owing to his own impotence, accepted as a fact both by himself and the wife for over twenty-one years, coupled with the wife's expressed unwillingness, which seems to me not unreasonable in the circumstances, to make trial whether the husband's belated hope that he had become potent in the twenty-second year of the marriage was well founded: see *Horton v. Horton* (2) ([1947] 2 All E.R. 871, 874), per LORD JOWITT, L.C. It must be a question of degree, and, therefore, of evidence, whether in a case where potency has been acquired or restored after marriage, (whether by operation or by some psychological change), the effective cause of non-consummation at a given date is the refusal of the respondent, but in what I have said I must be taken to be dealing only with the facts of this case and not expressing any opinion about causation in general.

Being entitled to draw any inference of fact which the court below should have drawn, I think that the true inference is that in relation to his wife, at any rate, the husband always was, and still is, impotent, and that the learned commissioner should have made an express finding to this effect instead of basing his judgment on the failure to discharge the onus of proof. It is only fair to the learned commissioner to say that I appreciate the difficulty which was created by the embarrassment of the alternative pleading and the husband's insistence on the allegation of wilful refusal. Moreover, in drawing the positive inference on a matter which the learned commissioner decided on the onus of proof I am not over-ruling any finding of fact based on his estimate of the credibility of witnesses whom he saw and heard. Having arrived at this conclusion, there remains the difficult question of law whether an impotent spouse can, in any event, petition for nullity of marriage on the ground of his own incapacity to consummate the marriage, and, secondly, it being expressly admitted, as I think rightly, that there was no evidence that the wife had repudiated the marriage, whether in the absence of such repudiation on her part the husband is entitled to a decree. We have already held that the husband is entitled to petition for nullity on the ground of his own impotence and that his right to do so is not conditional on the repudiation of the marriage by the wife. Further, in view of the time that has elapsed since his petition was

heard and dismissed, we decided to grant him a decree *nisi* at the conclusion of the hearing, but to reserve the reasons for our decision because of the importance of the questions of law involved.

A The real issue in this appeal having become apparent, we were made aware that a petition, pending in the provinces and raising precisely the same point, had been referred to the King's Proctor for his assistance on these questions of law and that the case had been adjourned for the decision of this appeal. We, therefore, adjourned the appeal for a few days in order that we might hear counsel on behalf of the King's Proctor. We have had the advantage of hearing an admirable argument on both sides of the question and are greatly indebted to counsel for their assistance. Unlike nullity on the ground of wilful refusal to consummate, which is a creature of the Matrimonial Causes Act, 1937, nullity on the ground of impotence does not depend on any statute, save insofar as s. 22 of the Matrimonial Causes Act, 1857, directs the court, in all suits and proceedings other than those to dissolve any marriage, to act and give relief on principles and rules which, in the opinion of the court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts had theretofore acted and given relief. The origin of the jurisdiction of the ecclesiastical courts in this respect is unquestionably to be found in the canon law, but it is essential to bear in mind the limitations on the effect to be given in this country to the canon law of Europe. On this point it is unnecessary to do more than refer to the well-known opinion of TINDAL, C.J., in tendering the advice of the judges to the House of Lords in *R. v. Millis* (3) (10 Cl. & Fin. 534, 680) :

C But that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law. LORD HALE defines the extent to which it is limited very accurately. "The rule," he says, "by which they proceed is the canon law, but not in its full latitude, and only so far as it stands uncorrected either by contrary Acts of Parliament or the common law and custom of England; for there are divers canons made in ancient times, and decretals of the Popes, that never were admitted here in England."

D On p. 681 he quotes LORD COKE as saying :

E So, albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved and allowed here, by and with a general consent, are aptly and rightly called "The King's Ecclesiastical Laws of England."

It was sought, however, to deduce from the use of the word "proved" in this last passage that the onus of showing that any part of the canon law has been received and adopted in this country lies on those who assert that it is so, and that if the matter is left in doubt it must be assumed that it has never been so adopted and received. I do not think that this is a question of the onus of proof at all. In *Proctor v. Proctor* (4), discussing the question whether a husband's suit based on the adultery of the wife was barred by his own subsequent adultery, SIR WILLIAM SCOTT said (2 Hag. Con. 292, 300) :

G If the canon law is to be taken as the guide, there is certainly an end of all question on the subject. If it be not, then the question must rest upon modern decisions of our own (which, I am sorry to say, no diligence of myself, or others, have been able to produce); and if *they* are wanting, recourse must be had to the general principles of reason, morality, and public convenience, applicable to such a case.

I In *Hope v. Hope* (5) a wife brought a suit for divorce against her husband by reason of his adultery. The husband recriminated the wife's adultery, and the suit was dismissed on the ground that both parties were proved guilty of adultery. The wife subsequently instituted a suit for restitution of conjugal rights, to which the husband pleaded in bar the previous suit and sentence. In his judgment DR. LUSHINGTON, having found that by the canon law an adulterous wife was entitled to be received by her husband if he had also been guilty of a similar offence, concluded as follows (1 Sw. & Tr. 94, 108) :

I do not find any instance in which the law so laid down has been adopted and acted upon as part of the ecclesiastical law of this land. I find a *dictum* of SIR W. WYNNE that, under such circumstances, a suit for restitution would probably be dismissed, and there is ground for inferring that such was the opinion of LORD STOWELL. The Court of Queen's Bench, in two cases occurring after an interval of thirty-five years, expressly declared that such was the law prevailing in the Ecclesiastical Court. In my humble judgment, that rule is sound in principle, and calculated to prove beneficial

in its operation. I have therefore come to the conclusion, that the suit for restitution in this case cannot be sustained, and that the husband must be dismissed.

Bearing in mind that, although the common law courts prohibited any usurpation of jurisdiction by the ecclesiastical courts they have no right to correct error within the jurisdiction properly belonging to the ecclesiastical courts: *R. v. St. Edmundsbury & Ipswich Diocese* (6) ([1947] 2 All E.R. 170, 173, 174), it seems to me that the true position is that in the absence of precedent it was the duty of the ecclesiastical courts to determine as a matter of principle whether a particular doctrine of canon law should be accepted as part of the ecclesiastical law of this country. When, in 1857, jurisdiction in suits of nullity of marriage was transferred to the new court for divorce and matrimonial causes, s. 22 of the Matrimonial Causes Act, 1857, imposed on that court in turn the duty and the right to form an opinion whether any principle on which it was invited to act and give relief was as nearly as might be conformable to the principles on which the ecclesiastical courts had theretofore acted and given relief, a jurisdiction which is now, by ss. 32 and 103 of the Judicature Act, 1925, vested in the High Court and the Court of Appeal. This is not the same thing as to say that the court cannot act or give relief unless an exact precedent is found for the particular relief sought.

No records of the decisions of the ecclesiastical courts before the Reformation, or, indeed, for many years afterwards, are available, but there appears to be no reason to doubt that the right of the impotent spouse to sue, whatever were its origin and limits, was accepted in this country, but it is also clear that the canon law recognised two notable exceptions—first, where the petitioner himself, being aware of his own impotence, had knowingly deceived the other spouse into contracting the marriage; and, secondly, where one entered into matrimony with a spouse whom he knew at the time to be impotent. In neither case could he afterwards be heard to set the marriage aside. These doctrines accord with the general principles that a man must come into court with clean hands, and that he cannot take advantage of his own wrong, or rely on that as a grievance which he has voluntarily accepted with his eyes open. In one form or another the argument that the right of the impotent spouse to sue is unknown in English law was based on the maxim that a man cannot be heard to take advantage of his own wrong. It will be necessary to examine the application of this doctrine more closely; but it seems to me at the outset to be necessary to bear in mind the distinct classes of case in which impotence may arise. On the one hand, there is the class where impotence is due to some physical defect, which in turn may be plainly manifest to the impotent spouse as, *e.g.*, where there is a complete absence of genitalia, or may be quite unknown, as, *e.g.*, a malformation of the vagina which is not necessarily apparent at all until after marriage. Between these extremes there will be a variety of gradations. On the other hand, there is the class of defect which to all outward appearance are purely psychological, of which *ejaculatio praecox* on the part of the male, and vaginismus in the case of the female, are typical examples. In spite of the physical defects already referred to it is plain that in this case the husband's disability is mainly psychological. It is possible that psychological disabilities may be absolute rather than relative, and may be known to the party before the marriage, but, generally speaking, they are defects *quoad hunc* or *quoad hanc*, as the case may be, and were recognised as such by the canon law. Suffice it to say that such defects may often exist solely in relation to the particular marriage, or, at least, that it may, in the circumstances of any given case, be impossible to prove otherwise (see *C. v. C.* (7) ([1921] P. 399, 401-402), *per* LORD BIRKENHEAD, L.C.), and that when this is so it is difficult to attribute the so-called fault or wrong to one spouse alone. It may be no more than a misfortune common to both. The same observation applies with added force to the case, of which an example is to be found in the authorities to which I must refer, where non-consummation is due to the physical fact that in relation to each other the male organ is too large and the female too small, although it is impossible to attribute to either spouse an absolute or general incapacity to perform the sexual act. In such circumstances, assuming the absence of deceit on the part of the petitioner, it is clearly necessary to be cautious in basing a conclusion on the supposed analogy with the doctrine forbidding a suitor to take advantage of his own wrong. It being clear that the husband in contracting the marriage was wholly innocent of any deceit, it is common ground that the

consideration of the authorities may begin with the assumption that before the Reformation this marriage could have been annulled at his instance.

The leading case on the point is *Norton v. Seton otherwise Norton* (8) decided in the Court of Arches in 1819, the headnote of which reads (3 Phillim. 147) :

A man not allowed to plead his own natural impotency as a ground for sentence of nullity of marriage.

A It will be necessary to examine closely the reasons for this decision of SIR JOHN NICHOLL, but for the moment I am concerned with the report of the argument of counsel. Doctor *Adams* and Doctor *Dodson* in objection to the libel argued that this was a novel suit which could not be entertained. They stated that they found no express law that a man might or might not complain on this ground but this was probably because no one could contemplate such a case. They called attention to the doctrine of the canon law that a person was not entitled to a divorce who knowingly contracted marriage with an impotent person and argued *a fortiori* that a person knowing of his own impotency could not make it the foundation for a suit for nullity of marriage. Doctor *Phillimore* and Doctor *Lushington*, on the other hand, argued that no doctrine of the canon law was clearer than that a man might sue for a nullity of marriage by reason of his own impotency. After citations from the commentaries, to some of which it will be necessary to refer, they admitted the doctrine that a man, who knowingly contracted marriage with an impotent person was not entitled to a divorce, but argued that the very same books laid down that he might allege his own impotency as a ground of divorce. SIR JOHN NICHOLL thereupon adjourned the hearing in order to examine the authorities to see what was the doctrine of the canon law, and how far it had been adopted in this country, and ordered a search to be made whether there had been any precedent for such a suit, adding (p. 151) : "If the defect is such as has been pleaded it seems as if the marriage must have been contracted *scienter* . . ." He also stressed the length of the cohabitation before the party came to annul his own contract. At the resumed hearing Doctor *Phillimore* (p. 151) pointed out the difficulties attending the search from the want of reported cases and the inaccurate manner in which the Arches books had been kept. It was stated (pp. 156-7) that the result of the search was that there were many instances of suits having been brought many years longer after the marriage than in the present instance, but none in which the party seeking redress had been the party labouring under the infirmity. Counsel, however, asserted that there had been undoubtedly many suits of which no traces could then be found.

On the basis that no precedent for such a suit in the ecclesiastical courts had been discovered counsel on behalf of the King's Proctor argued that the right of an impotent spouse to sue had never been accepted in this country after the Reformation, or that, if it ever had been accepted, it must have lapsed by desuetude over 200 years ago, since the earliest set of ecclesiastical reports, those of the judgments of SIR GEORGE LEE by Doctor *Phillimore*, carry the position back about seventy years before Doctor *Phillimore's* own reports. He developed this argument on two distinct lines of reasoning. The first argument was based on the nature of the canon law itself. By the canon law marriage was held to be one of the sacraments, but this doctrine was formally repudiated by art. 25 of the Articles of Religion. Moreover, by the canon law a marriage between impotent spouses was absolutely void, for the canon law recognised no distinction between void and voidable marriages, and thus it was possible for third parties, even after the death of one of the spouses, to attack a marriage on this ground. But, as appears from *Ray v. Sherwood* (9), the Court of King's Bench prohibited the ecclesiastical courts from exercising jurisdiction to annul a marriage on this ground after the death of either spouse. Doctor *Lushington* points out (1 Curt. 173, 188) that this was the origin of the distinction in English law whereby, in contrast with marriages absolutely void, such as bigamous marriages and the like, a marriage which has not been consummated owing to the impotence of one of the spouses is merely voidable, and then only at the instance of one or other of the spouses. From these considerations it was sought to draw the conclusion, based on the maxim *cessante ratione cessat ipsa lex*, that the right of the impotent spouse to sue cannot have been accepted in English law. I do not think it follows that the right

of a spouse to rely on his own impotency is necessarily dependent in the canon law either on the sacramental character of marriage or on the distinction between void and voidable marriages. Secondly, it was argued that the doctrine would be so repugnant to English law that it cannot have been accepted after the Reformation. This was put in either of two ways : a marriage, being a contract of which the capacity to consummate it was an essential condition, the impotent party must necessarily be in default ; or, alternatively, by entering into a contract of marriage, the husband must be deemed to have represented himself as capable of consummating it and would thereby be estopped from seeking to annul the marriage by asserting the contrary : *Pickard v. Sears* (10) (6 Ad. & El. 469, 474). On the assumption however that such a suit is maintainable at all it was argued that it could only be maintainable if the marriage had been repudiated by the other spouse, and that, as there was admittedly no evidence of repudiation in this case, the petition must fail.

Although the status of marriage results from a contract it is well settled that, as was said by LORD HANNEN in *Sottomayer v. De Barros* (11) (5 P.D. 94, 101) : "Very many and serious difficulties arise if marriage be regarded only in the light of a contract." Nowhere was the suggestion that marriage was nothing but a contract, subject to all the legal incidents of an ordinary contract and giving rise to the like legal remedies, more emphatically repudiated than in the judgment of LORD PENZANCE in *Mordaunt v. Mordaunt* (12) (L.R. 2 P. & D. 109, 126-129). I will quote but one sentence on p. 129. He sums the matter up by saying :

When the analogy of legal remedies in other cases of contract is put forward for adoption the answer is that the analogy does not exist.

The fact that the decision of the Full Court, of whom LORD PENZANCE was one, was overruled by the House of Lords in *Mordaunt v. Moncrieffe* (12) does not detract from this part of LORD PENZANCE's judgment. On the contrary, the report in 43 L.J.P. & M. 49, shows that in advising the Lords both BRETT, J., at p. 53 and KELLY, C.B., at p. 61, were in complete agreement with LORD PENZANCE in this respect. The same point is made by SIR FRANCIS JEUNE, P., in *Moss v. Moss* (13) ([1897] P. 263, 267) where he says :

While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a mere contract, or into investing it with all the qualities and conditions of ordinary civil contracts.

This brings me to an examination of the authorities. In the introduction to AYLIFFE'S *PARERAGON* (1726) the learned author expressly says that one of the designs of the work is to illustrate the force and practice of the canon law as far as it has been received and is now observed amongst Englishmen. In the body of the work at the end of the section headed : "Of divorce, and the several causes thereof" occurs this passage (p. 230) :

The husband may pray a separation of matrimony on the account of a matrimonial impediment, though such impediment proceeds and arises from himself : as from his own impotency and frigidity ; but if he knowingly marries a woman that cannot render him his due, he is (notwithstanding) bound to maintain her, and shall not be divorced from her ; for he ought to impute it to himself.

The next is OUGHTON'S *ORDO JUDICIORUM* (1738) Title CXCIH *De Causis Matrimonialibus*. In s. XVII, after referring to impotence, frigidity, malformation and the like as rendering a marriage null, the author says that these natural impediments may some times occur as well in the wife as in the husband. To this passage there is a footnote adding the quotation from the ancient manuscript "*Et pars gravata agere potest, in causa nullitatis matrimonii.*" This may mean that the party aggrieved may sue, but may also be translated "the party afflicted may sue." Perhaps the former is the more natural construction, but as it is impossible to resolve the doubt it must be left there.

Next in order is an opinion of SIR WILLIAM WYNNE dated 1777 quoted in the report of *Norton v. Seton* (8) (3 Phillim. 147, 149, note (f)) :

I think a woman may institute a suit of nullity of marriage against her husband on account of impotency or incapacity in herself to perform the duties of marriage ; and I think that if the persons appointed by the court to inspect her (which is the method of proof upon which these cases always proceed) should certify that she appeared to them, from a defect in the natural formation of her body, to be absolutely incapable

of being carnally known by a man ; upon this proof the marriage must be pronounced null and void.

That brings me again to *Norton v. Seton* (8). As appears from SIR JOHN NICHOLL's judgment (*ibid.*, 159) the libel pleaded that the marriage took place in June, 1812, that the husband was a bachelor aged 45 years and the wife a spinster aged 23, that they cohabited till June, 1819, that they were both in health, but that the husband was incapable, from bodily defect, to consummate the marriage, and that his defect was incurable by art, as would appear upon inspection by medical persons. In the judgment SIR JOHN NICHOLL said (*ibid.*, 158) :

The first objection is, that the suit is of a novel kind. After the best and most diligent search no instance has been found of a party bringing a suit to set aside a marriage on account of his own incapacity ; the party complaining has always been the injured party, and generally the suit has been brought by the wife ; there has been but one suit in my recollection brought by the husband, *Wilson v. Wilson* (14). The next circumstance is the age of the man. It is incredible that he should have lived forty-five years, and be ignorant of his own bodily defect, which he alleges to be apparent upon inspection. I do not see how his ignorance could be proved ; it is incapable of direct evidence. The presumption is in favour of the marriage ; besides there was a subsequent cohabitation of seven years before the suit was brought ; at all events he must have discovered it some time before he applied for his remedy.

Later, at p. 160, SIR JOHN NICHOLL says : " Ignorance of the fact is not only not to be presumed, but is almost incredible." He says (at p. 161) that the sole authority in support of the suit is the text quoted from the canon law and that it was necessary to examine how far that law applied to the case and how far it had been received in this country. He refers to the Decretal of Pope Gregory (X, 4, 15, 1) which is given in the margin of the PARERGON as the authority for the passage already quoted. At p. 162 SIR JOHN NICHOLL says :

But let us examine how the text and commentators apply to the present case. The text applies to frigidity, which may be unknown before trial ; but here the bodily defect is stated to be apparent . . . If the marriage was contracted *scienter* ; the party knew of the defect, and he could not be heard. The assertion of the defect in himself raises the presumption that he contracted the marriage *scienter*, that he cohabited *scienter*, and defrauded the woman. If the canon law is to govern the case, the text referred to does not come up to the point ; even if it did, something more would have to be shewn, namely, that it has been received as the law in this country ; it might not be necessary for this purpose to shew a case precisely similar ; it would be sufficient to shew that it is according to the general rules observed here. But it is a strong, and almost a conclusive, presumption against the present proceeding that no suit appears ever to have been brought by any but the injured party.

At p. 163 he deals with SIR WILLIAM WYNNE's opinion by saying :

Another authority has been cited from the opinion of counsel ; but that was on the case of a woman. The opinion of any person of higher authority cannot be produced than of that person : but it cannot be considered as an authority applying to this case. The court does not mean to lay it down in no possible case, or under no circumstances, a woman may not be allowed to bring such a suit. But even if the canon law is direct on the point—is it according to the law of England to receive such a suit ? It is a maxim that no man shall take advantage of his own wrong ; it is the principle of the canon law itself, the principle of reason and justice.

I have refrained from quoting passages from the judgment relating to the length of the cohabitation and the enjoyment of the wife's property and the impossibility of drawing corroboration from inspection of the wife owing to her pregnancy which also weighed with SIR JOHN NICHOLL, but it is evident that his judgment is founded in the main on his belief that the husband entered into the marriage well knowing his physical defects and so deceived the wife into marrying him. This, indeed, offended the principle that no man shall take advantage of his own wrong, and that this was a principle of the canon law itself appears from SANCHEZ DISPUTATIO CXIV (1626 ed., p. 404). It is not surprising, therefore, that no precedent for a suit of that kind had been found, but that does not dispose of the general point. In view, however, of the passage in the introduction to the PARERGON, to which reference has already been made, I am unable to accept SIR JOHN NICHOLL's dismissal of the PARERGON on the ground that the learned author merely referred to the text of the canon law. It is true

that that is the sole authority cited, but the book professes to be a commentary on the canon law of England. SIR JOHN NICHOLL's qualified acceptance of SIR WILLIAM WYNNE's opinion that a woman may institute a suit of nullity of marriage against her husband on account of impotency or incapacity in herself to perform the duties of marriage seems to me to show that SIR JOHN NICHOLL cannot have meant that an impotent spouse could in no circumstances put forward his own incapacity. Indeed, he expressly stated, at p. 163, that he did not mean to lay it down that in no possible case or in no circumstances a woman might not be allowed to bring such a suit. By this I think he must have meant to draw the distinction, which appears earlier in this judgment, between the case of a man and a woman in respect of physical defects, *i.e.*, defects which, in the nature of things, would be apparent in the case of the man before marriage but not necessarily in the case of the woman. However this may be, it is sufficient to say that *Norton v. Seton* (8) does not purport to deal with a case, such as the present, where the disability is of a kind which, as SIR JOHN NICHOLL recognised (at p. 162) is not necessarily apparent before marriage and of which the petitioner was wholly ignorant. The decision itself can clearly be supported on the ground of deceit.

POYNTER in his DOCTRINE AND PRACTICE OF THE ECCLESIASTICAL COURTS (1824 ed., p. 131) says :

Until a recent case, it is said that there was no instance on record of a party having brought a sentence of nullity by reason of his or her own infirmity.

The learned author quotes the passage from the PARERAGON already referred to and adds :

In such a case, the party proceeding is more particularly bound to a strict proof of all necessary facts.

He then deals with the instance alluded to, which was *Norton v. Seton* (8), showing that he regards the case as having been decided both on the absence of the corroboration by inspection of the wife and on the ground of *scienter*. It is clear, however, that he does not regard that decision as overriding the general proposition accepted in the PARERAGON. In *Miles v. Chilton* (15) (1 Rob. Ecc. 684, 695), DOCTOR LUSHINGTON, who had appeared for the husband in *Norton v. Seton* (8), distinguished it from the case, with which he was dealing, of a marriage absolutely void as being bigamous. He clearly regarded *Norton v. Seton* (8) as being founded on the fact that the husband knew of his own defects at the time of the marriage (p. 697), but even in this respect he did not hesitate to say (on p. 699) that he thought there were grounds which should have induced SIR JOHN NICHOLL to admit the libel. Again in *B. v. B.* (16) DOCTOR LUSHINGTON, as Judge Ordinary, said (1 Spinks Ecc. & Ad. 248, 254) :

I do not consider it necessary to travel through the case of *Norton v. Seton* (8). It is sufficient to say that it was a suit in which the husband, the party complaining, alleged his own impotency, though by the canon law that circumstance may not be an obstacle to the suit, provided the complaining party was at the date of the marriage ignorant of the defect ; still if the marriage be contracted *scienter*, as SIR JOHN NICHOLL in *Norton v. Seton* (8) considered to be the case, the party will not be permitted to take advantage of his own fraud.

This judgment was affirmed by the Privy Council (*ibid.*, 257), but without reference to this particular passage. The real point in that case was whether the right of the potent spouse was barred by delay. In DR. BISHOP'S NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION, 1891, vol. I, s. 792, p. 341, the learned author deals with the question of the grievance as follows :

Whether impotent party sue : One who, being in fact impotent yet ignorant of his condition, enters into a marriage, especially with a competent person, is injured, and not the less so because of the greater injury which he inflicts on the other. Therefore in just principle he, as well as the other, is entitled to the suit for nullity. For only through actual choice and knowledge should any person be held in this painfully embarrassing relation, as uncongenial to the impotent spouse as to the other. But whether or not under any circumstances the law, as viewed from the standpoint of authority, will sustain a suit by the impotent party is a question upon which opinions are conflicting ; and as it will not often arise in practice, it is deemed sufficient simply to cite the authorities. It is pertinent to ask how, if this sort of suit is not maintainable, the marriage in a case of equal "impotence *versus hanc*", is to be dissolved.

I find it difficult to answer this very pertinent question except on the footing that in the absence of actual choice or knowledge it is open to either spouse to sue.

This brings me to an examination of the modern cases. In *A. v. A., sued as B.* (17) the impotent spouse was granted a decree after a demurrer to the petition had been overruled both by WARREN, J., and by the Irish Court of Appeal. It is plain that the judgments in the Court of Appeal on the demurrer are based on the finding that the wife had repudiated the marriage. I will return to this point later. That case was followed in *G. v. G. otherwise K.* (18). There the marriage had been celebrated in accordance with the rites of the Armenian Church but was not in conformity with the form prescribed by the Registration Act, 1836. Five years after the marriage the wife returned to her parents and refused to resume cohabitation, and, thereupon, the husband brought a suit of restitution to which the wife alleged, in her answer, that the marriage was invalid owing to the omission of the requisite forms, the husband, in reply, pleading that the omission was not wilful within the meaning of the Act. The wife then presented a cross-petition for nullity on the alternative grounds that there was no valid marriage as to form and that the marriage had not been consummated owing to the incapacity of the husband. The husband denied the non-consummation. LORD GORELL, P., decided to try the nullity suit first and found that there had been no consummation of the marriage, but expressly guarded himself from suggesting a general condition of incompetence against the husband, the condition existing only relatively to the wife. It was a case in which the relative sizes of the parts had prevented consummation and the wife had declined to undergo an operation which might have been successful. Unfortunately, there is only a brief report of the judgment in the Court of Appeal, and, in spite of the fact that LORD COZENS-HARDY, M.R., said (25 T.L.R. 328, 329) that the appeal was of some importance as being without precedent in the English courts, the case is not reported elsewhere. LORD COZENS-HARDY, M.R., said that the President had acted wisely and within his powers in trying the issue of fact before the issue of law. On the point as to jurisdiction he desired to adopt the principle of the Irish courts laid down in *A. v. A., sued as B.* (17), in which a strong court had decided that a decree of nullity might be granted at the suit of an impotent person. He added, however, that this was a discretion which the court should exercise very carefully. In upholding the President's finding of impotency, the MASTER OF THE ROLLS said that this implied no reflection on either party as each could, no doubt, contract marriage with another person. It was true that an operation might make the wife *apta* to this man, but the court could not require it to be done. He added that he did not think it right that these persons should be compelled to live together in those circumstances. He thought that the order of the President should be affirmed, but in a modified form so as to avoid any reflection on the general capacity of the husband. FLETCHER MOULTON and FARWELL, L.J.J., agreed, FARWELL, L.J., adding that he did not think the wife guilty of a wrong because she declined to submit to an operation. It was argued that by adopting the principle laid down in *A. v. A., sued as B.* (17) the Court of Appeal must be taken to have decided that a petition by an impotent spouse is only admissible if the respondent has repudiated the marriage. In my opinion, the Court of Appeal decided nothing of the kind. The case was one of physical incapacity, relative and mutual. It was the wife who was the petitioner for nullity and she had refused to submit to an operation which would probably have been successful, although this was held not to debar her from petitioning. The husband, on the contrary, so far from repudiating the marriage was asserting his own capacity which, except *quoad hanc*, was found in his favour, and was actually suing for restitution of conjugal rights. That being so, the decision to grant the wife, who was herself impotent *quoad hunc*, a decree based on the corresponding impotence of the husband had no connection whatever with any repudiation of the marriage by the husband. On the contrary, it seems to me to be an excellent example of the dilemma posed by DR. BISHOP in the passage already quoted from his work. The fact that a physical, rather than psychological, disability was involved is irrelevant, since the mutual disability was merely in relation to the other spouse and not general, nor was it suggested that either spouse was aware of it at the time of the celebration.

In *S.G. v. W.G.* (19), in answer to the wife's action for declarator that there had been a lawful marriage *per verba de praesenti* at Gretna Green, the husband not only denied that a contract of marriage had been entered into, but averred that, at the date of the alleged marriage, he was and still remained impotent and that any ceremony of marriage entered into by the parties was on that account null and void. The averment of impotency was held to be irrelevant as a defence in respect that, by the law of Scotland, a marriage was not void but only voidable on the ground of impotency; but the court expressly reserved the question whether an action of nullity of marriage on the ground of impotency is competent at the instance of the impotent spouse. On this issue there are some very useful passages in the judgments, but I do not think it necessary to quote them in view of the decision of the question by the Court of Session in *F. v. F.* (20) to which I will refer later. It is, however, important to notice that the ground of the decision itself was that in Scots law, as in English law, a marriage is not void but only voidable on the ground of impotency.

In *G. v. G.* (21) each spouse alleged that the admitted non-consummation arose through the incapacity or physical defect of the other. According to the report of the medical inspectors, the husband was anatomically well formed and normal in every respect and was, apparently, capable of performing the act of generation. The wife was found to be *virgo intacta* and there was no impediment on her part to prevent consummation of the marriage. BARGRAVE DEANE, J., said ([1912] P. 173, 174) that it was manifest that the marriage had not been consummated and could not be consummated, but he was not prepared to say whether it was the fault of the man or the woman. He added:

I see no reason to hold that either one or the other has been guilty of perjury. Their stories are absolutely inconsistent; but that is immaterial, if I am satisfied that, *quoad hunc et quoad hunc*, these people cannot consummate the marriage. If for some reason which is not quite clear, but in fact, the court is satisfied that the marriage cannot be consummated, then the court is entitled to annul the marriage and not tie the two people together for the rest of their lives in a state of misery. Therefore I am prepared to pronounce a decree in this case, not on the petition of either of them, but on the petition of both of them, leaving either of them to apply to make the decree absolute, both, if possible.

Apart from the distinction that the disability was psychological and that each spouse was petitioning and was granted a decree, the principle of the decision is essentially the same as that of the Court of Appeal in *G. v. G.* otherwise *K.* (18), since the learned judge was prepared to grant a decree to each spouse as the petitioner, although he or she may have been impotent *quoad* the other, and although he was not able definitely to find impotence proved against either spouse as the respondent to the other's suit. In my opinion, the case cannot be discounted merely as an instance of each petitioner succeeding on the ground of the impotence of the other. It was followed by SWIFT, J., in *H. v. H.* (22), where the wife was allowed to amend her answer to the husband's petition for nullity by adding a cross-prayer for nullity. In *Davies (otherwise Mason) v. Davies* (23) LANGTON, J., based his decision in favour of the impotent wife in respect of that which he described as a "misfortune" on the repudiation of the marriage by the husband while expressly reserving the question whether apart from the repudiation the wife could have sued.

In *McM. v. McM.* (24), an Irish case, the husband petitioned for nullity on the grounds of his own impotence and of the repudiation of the contract by the wife. HANNA, J., having made a full and useful review of the canon law and of the authorities, held that the wife had not repudiated the contract and that consequently the husband could not rely on his own impotence and accordingly decided that the petition must be dismissed. I do not find it easy to understand the principle first introduced by the Irish cases that the repudiation of the marriage by the respondent gives the impotent spouse a remedy to which he or she is not otherwise entitled. The hypothesis is that by reason of the petitioner's wrong or default, defect or misfortune, as it has variously been described, he or she is not entitled to sue, but that, if there is added the circumstance that, for this very reason, the respondent has repudiated the marriage, there is a cause of action. This question is dealt with very fully by HANNA, J., in *McM. v. McM.* (24) in two passages. After referring to the passage in LORD SELBORNE'S judgment in *G. v. M.* (1) (10 App. Cas. 171, 186), dealing with estoppel by

approbation of the marriage, he says ([1936] I.R. 177, 205):

It is quite logical that there may be conduct on the part of the person opposing the petition, which would estop that person from denying "the just cause," and support the ground of the petition by creating a further moral equity in the petitioner's support. In other words, a petitioner, while relying upon his own impotence as a ground for showing that there is no *verum matrimonium*, may show conduct on the part of a respondent which estops or precludes him or her from justly controverting the primary allegation that there is no *verum matrimonium*. This seems to be the underlying principle.

At pp. 219, 220, HANNA, J., says:

To sum up finally on this difficult question of law, and having considered the argument advanced in its three branches, I have formed a definite opinion that the decree for nullity of marriage cannot, according to the principles of the ecclesiastical law as administered in our matrimonial courts, be granted to a petitioner on the ground merely of a petitioner's own impotence, but it is clearly established that if a petitioner can, in addition to proof of his own impotency, satisfy the court that there had been, and is, conduct on the part of the respondent which has destroyed the *verum matrimonium*, e.g., by a genuine and deliberate repudiation of the marriage contract and its obligations, the court may *ex justa causa* grant the relief.

To base the principle on estoppel of the respondent clearly leads to difficulties if the argument that the petitioner cannot sue because he is estopped from denying his own implied representation of capacity is accepted, for this would lead to the position that each party in turn was estopped from suing. Moreover, I do not find it easy to deduce from the cases in which repudiation by the respondent has been relied on any principle by which to determine whether there has been such a repudiation as to entitle the impotent spouse to sue. In *McM. v. McM.* (24) the finding that the wife had not repudiated the marriage, although she had refused to return to her husband, partly on account of his violence and partly on account of what is described as his neurasthenic condition over sexual matters, is based on the finding (at p. 199) that she would not, in any way, repudiate the marriage contract (which to her was a sacrament) save under a decree of her own church though she herself had refrained from instituting any such proceedings. The decision, therefore, appears to turn on the wife's motive for her action rather than on the action itself. On the other hand, in *A. v. A.*, *sued as B.* (17) the repudiation by the wife, whose motives may have been equally good, was based on her having instituted proceedings in the church courts though she had declined to proceed in the High Court for nullity. Likewise, in *B. v. M.* (25) the wife, having left Australia for the United States of America, obtained a decree of nullity there. In *B. v. B.* (26) an impotent wife, who had refused to submit to an operation which would probably have cured the defect, obtained a decree about eight months after the marriage ceremony on the grounds that the husband had repudiated the marriage because in consequence of her incapacity he had struck her in the face and deserted her some six weeks after the marriage. In *Davies (otherwise Mason) v. Davies* (23) the husband's repudiation was based on the allegation that he had not provided a home for the wife or contributed anything to her support, had had no concern for her welfare when ill, and had said that he had lost all desire for intercourse after efforts to consummate the marriage during the first year had failed and that he had said that he had no intention of living with the wife and she could go her own way.

Manifestly, the strongest support for the inference of repudiation is afforded by the institution of proceedings to annul the marriage by the potent spouse. Yet in such a case the petitioner is merely seeking the relief to which he or she is justly entitled for a grievance which the impotent spouse is assumed not to have suffered. How, then, can this give the impotent spouse the right to sue? In my opinion, the sounder view is that the reaction of the respondent to the situation created by the impotence of the petitioner should be taken into account in considering whether the circumstances of the case as a whole, including the respondent's attitude, are such as to debar the impotent spouse from suing. It is manifestly impossible to speak otherwise than in general terms, for the circumstances will vary infinitely. The real antithesis, it seems to me, is between saying, on the one hand, that the impotent spouse has no cause of action unless the other spouse has repudiated the marriage, whatever that phrase may mean,

and, on the other hand, allowing the impotent spouse the right to sue unless in the circumstances of the case it is unjust that he or she should do so. In any given case the court will naturally bear in mind LORD SELBORNE'S admonition in *Cuno v. Cuno* (27) (L.R. 2 Sc. & Div. 300, 301), that it would be a great error on the part of judges to suffer their feelings of compassion to prevail over the principles which ought to govern them in dealing with this class of case, and that to open the door to lax and easy declarations of nullity would be a grave public mischief.

That brings me to the latest authority on this difficult question, the decision of the Court of Session in *F. v. F.* (20). This was a husband's action for declarator that the marriage was null and void by reason of his own impotency. There was no appearance for the wife. The husband averred that he had resided with the wife from the date of the ceremony in August, 1943, until April, 1944, when he left her; that during this period he had attempted to have sexual relations with her, but had found he was unable to do so; and that he was incapable, by reason of physical deformity, of having sexual relations and had been so incapable at the time of the pretended marriage. The LORD ORDINARY (MACKINTOSH), on a motion by the husband for a proof of his averments, reviewed the authorities, expressed a doubt whether any reliable assistance was to be got from the decision of the Court of Appeal in *G. v. G. otherwise K.* (18), and indicated that except for the case of *S.G. v. W.G.* (19) he would have dismissed the action as incompetent; but that as the question of competency now arising was in that case expressly left open he thought it proper not to deal with the motion before a proof but to report the case to the Inner House. Thus, the question was dealt with by the Inner House as a pure question of law; and they decided to instruct the LORD ORDINARY that the instance was good and that the action should be allowed to proceed. In spite of the husband's averment that his incapacity was due to physical deformity the case appears to have been argued on the footing that the husband was not aware of his impotence until after the marriage ceremony. Before dealing with the judgment of the LORD PRESIDENT (NORMAND) I wish to refer to a passage in LORD MONCRIEFF'S judgment where he says (1945 S.C. 202, 210):

The decision of the Court of Appeal in England in the case of *G. v. G.* (21) is directly in point and is unambiguous. I remain of the opinion which I expressed in my report in *L. v. L.* (28) that the consistorial law of Scotland should not consult English decisions. In cases in which the question to be determined is, however, a broad humanitarian question which is independent of proper consistorial law, I think that our courts are entitled, and may do well, to accept guidance from what has been decided by learned judges in England.

Conversely, it was argued by counsel for the King's Proctor that no attention should be paid to this decision because of the greater authority of the canon law in Scotland. It is indisputable that there are divergences between the laws of the two countries in relation to divorce. The case of desertion is the clearest example, and others are to be found in connection with condonation, collusion and connivance, but counsel was unable to point to any essential difference in the law of the two countries as regards nullity, and, as has already been seen, it is well settled in both countries that impotence merely renders a marriage voidable and not void.

Seeing that the Court of Appeal assumed in *De Reneville v. De Reneville* (29) that the residence of both parties, as distinct from domicile, might be sufficient to found jurisdiction in the case of nullity, it would obviously be in the highest degree inconvenient if the law of the two countries were to differ on the question now under discussion unless that is inevitable. This brings me finally to the judgment of the LORD PRESIDENT (NORMAND). I need not quote from his review of the authorities, to many of which I have already referred. His conclusion is expressed in the following passage (1945 S.C. 202, 208):

In principle any person who has a title and interest in the subject-matter of an action is a competent pursuer, and it is a general rule of our law that title rests upon interest. There are exceptions to this general rule, but I know of none which bears relevantly on the present question. Taking the general rule as a useful test, it can hardly be questioned that the impotent spouse has an equal interest with the potent spouse in a question which vitally affects his or her status. The bond of a marriage which cannot be consummated, it may be added, can be as irksome and humiliating to the impotent

as to the other spouse. If, therefore, the impotent spouse is to be denied the remedy, it is necessary to inquire what is the supposed ground for this denial. LORD FRASER speaks of the potent spouse as the party aggrieved. But, with respect, both alike are aggrieved; and to treat the potent spouse as alone aggrieved is to imply that the impotent spouse is in some sense a defaulter, as though he or she had failed to implement a contract and was debarred from founding on his or her default . . . Where the incapacity results from a physical or temperamental condition, for which the sufferer is not responsible, he cannot be debarred from the remedy on the ground that he has defaulted in his obligations. There may, of course, be circumstances which will bar the impotent spouse. If, for example, he or she entered into marriage knowing the defect, the other spouse would indeed be entitled to complain, and to plead the *suppressio veri* in bar of the action. But the report in the present case does not mention any facts suggestive of a plea of personal bar, and it is not necessary to consider further what circumstances would properly give rise to it. The only other ground for refusing the remedy to the impotent spouse that has been put forward is that it is contrary to public policy that the remedy should be open to anyone but the potent spouse. But I cannot see any reason for thinking that the public interest is injured by allowing the impotent spouse an equal right to sue, and on this I agree entirely with the opinion of LORD MURRAY.

The reference is to *S.G. v. W.G.* (19) (1933 S.C. 728, 735).

I find myself in complete agreement with this conclusion which exactly expresses my own view of the matter. In my opinion, there is no reason in principle or on authority why the same should not be declared to be the law of England.

BUCKNILL, L.J.: I agree.

HODSON, J.: I agree.

Appeal allowed. Decree nisi.

Solicitors: *Kenneth Brown, Baker, Baker* (for the husband); *Treasury Solicitor* (for the King's Proctor).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ATKINSON v. GOODLASS WALL & LEAD INDUSTRIES, LTD.

[KING'S BENCH DIVISION (Singleton J.), July 8, 1948.]

Income Tax—Income from foreign possessions—New source in year of assessment—

Shares in foreign company—Shares purchased between 1932 and 1936—First payment of dividend in 1943—Finance Act, 1926 (c. 22), s. 30, proviso (ii).

By the Finance Act, 1926, s. 30, proviso (ii): "If in any year of assessment [in respect of profits or income chargeable under *inter alia* Case V of sched. D] any person acquires a new source of any such profits or income or an addition to any source of any such profits or income, income tax in respect of the profits or income from that source or from the addition to that source shall be computed separately . . ."

A company owned the whole of the issued ordinary shares in a foreign company, these shares being issued between 1932 and 1936. In January, 1943, the foreign company declared a dividend for the first time on its ordinary shares. The sterling equivalent of the amount of this dividend received by the company was £7,434, and an additional assessment in this sum was made on the company under sched. D, Case V.

HELD: the words "in any year of assessment" in s. 30, proviso (ii), meant "in the year of assessment for which tax is then being computed," and, therefore, tax was not to be computed, under s. 29 (1) (b) of the Act of 1926, "as respects the year of assessment in which the income first arises, on the full amount of the income arising within that year," and the assessment must be discharged.

[FOR THE FINANCE ACT, 1926, s. 30, proviso (ii), see HALSBURY'S STATUTES, Vol. 9, p. 670.]

Case referred to:

- (1) *Diggines v. Forestal Land, Timber and Railway Co.* [1931] A.C. 380; 100 L.J.K.B. 145; 144 L.T. 514; 15 Tax Cas. 630; Digest Supp.

CASE STATED by Special Commissioners of Income Tax.

At a meeting of the commissioners on July 18, 1946, Goodlass Wall & Lead Industries, Ltd. (hereinafter called "the company") appealed against an additional assessment to income tax made under sched. D, Case V, in the sum of £7,434 for the year ending April 5, 1943. The company owned the whole of the issued ordinary shares in Goodlass Wall y Cie, a company incorporated in the Argentine Republic. These shares were issued as follows :—1932 : nominal value, \$500,000 ; 1933 : nominal value, \$100,000 ; 1934 : nominal value, \$200,000 ; 1936 : nominal value, \$100,000. The company held shares in other foreign companies from which it received dividends in 1942/43 and in the preceding year and was assessed to income tax thereon. At the time when the assessment for 1942/43 was made in respect of the income from these shares the inspector of taxes did not know that the appellant company had received any income from the shares in the Argentine company. In January, 1943, Goodlass Wall y Cie declared a dividend for the first time on its ordinary shares. The sterling equivalent of the amount of this dividend received by the company after deduction of Argentine income tax was £7,434. The assessment in question was intended to comprise this sum. It was contended on behalf of the company that the source of the income of £7,434 in respect of which the additional assessment was made for 1942/43, was not acquired in 1942/43, and, that, therefore, the assessment should be discharged. It was contended on behalf of the inspector of taxes that, even if the shares in the Argentine company were an addition acquired by the appellant company in a year of assessment before 1942/43 to a source of income chargeable under Case V of sched. D, nevertheless under s. 30, proviso (ii), of the Finance Act, 1926, the income from the shares in the Argentine company had to be computed separately and the provisions of proviso (b) of s. 29 (1) of the said Act applied, with the result that, as respects the year of assessment in which income from the Argentine shares first arose, namely 1942/43, income tax had to be computed on the full amount of the income arising within that year namely, £7,434. The commissioners discharged the assessment and the inspector of taxes appealed. SINGLETON, J., now dismissed the appeal.

The Solicitor-General (Sir Frank Soskice, K.C.) and R. P. Hills for the Crown. Donovan, K.C., and Graham-Dixon for the company.

SINGLETON, J. : Section 29 (1) of the Finance Act, 1926, provides :

Such enactments in the Income Tax Acts as provide that income tax under sched. D shall in certain cases be computed on the full amount of the balance of the profits or gains, or on the full amount of the income, upon an average of three years, and so much of rr. 1 and 2 of the Rules applicable to Case IV of sched. D as provides that income tax under that Case shall be computed on the full amount of the income which arises, or which has been or will be received in the year of assessment, shall cease to have effect, and any income tax in respect of profits or gains or income chargeable under Case I, Case II, Case IV, or Case V of sched. D which would but for the foregoing provisions of this section have been computed as aforesaid shall be computed, subject to the provisions of this Part of this Act and subject as hereinafter provided, on the full amount of the profits or gains or income of the year preceding the year of assessment.

Proviso (b) to s. 29 (1) provides :

In the case of income tax chargeable under Case IV or Case V of sched. D—(i) income tax shall be computed, as respects the year of assessment in which the income first arises, on the full amount of the income arising within that year.

I confess that I thought, when my attention was first directed to that, that the problem was a comparatively simple one. I could not see why s. 29 (1), proviso (b) (i), did not apply. It appeared to me that this income, having been received in the year of assessment, first arose in that year and ought to be included in the full amount of the income arising in that year. It was pointed out, however, that that proviso does not apply to this case unless it is brought in by virtue of s. 30. The reason is that some time ago a question of this character was considered in the House of Lords in *Diggines v. Forestal Land, Timber and Railway Co., Ltd.* (1) and the decision is stated in the headnote as follows : (15 Tax Cas. 630) :

The respondent company was in receipt of dividends from foreign companies in various countries. The point at issue was whether the consequent liability to Income

Tax, sched. D, under Case V, for the years 1921-22 to 1926-27 should be based on the average amount of the whole of the dividends arising to the company from foreign companies in the three years of average, or upon the footing that each of the holdings of shares was a separate source of income separately assessable. *Held*, that the liability should be based on the average amount of the whole of the dividends.

I notice that ROWLATT, J., expressed his regret at not being able to deal with the question as he felt himself bound by a decision of the Scottish Courts, as did the majority of the Court of Appeal, but their decision was upset by a unanimous decision of the House of Lords to the effect that I have read.

Before the year of assessment the company had income from foreign investments, so the income did not first arise within that year. That is common ground between the parties. So one has to go to s. 30, which says :

All profits or income in respect of which any person is chargeable either under r. 1 of the Rules applicable to Case III of sched. D, or under Case IV of sched. D or under Case V of sched. D may respectively be assessed and charged in one sum . . .

That is the block assessment, as counsel for the company called it, and, as he said, the word "may" is almost, if not quite, equivalent to "shall." Proviso (i) to s. 30 is not directly relevant, though it was used before me to illustrate an argument, and I shall refer to it by and by. Proviso (ii) is in these terms :

If in any year of assessment any person acquires a new source of any such profits or income or an addition to any source of any such profits or income, income tax in respect of the profits or income from that source or from the addition to that source shall be computed separately, and in the case of profits or income chargeable under r. 1 of the Rules applicable to Case III the provisions of para. (1) of r. 2 of those rules shall apply, and in the case of profits or income chargeable under Case IV or Case V of sched. D the provisions of proviso (b) to sub-s. (1) of the last preceding section of this Act shall apply.

If I may try to put it shortly, if in any year of assessment any person acquires a new source of such income, the income from that source shall be computed separately and the provisions of proviso (b) to s. 29 (1) shall apply. It is in that way that the proviso to s. 29 (1) is brought in. It is on the true construction of proviso (ii) to s. 30 that the parties differ. There is only one difference between them, and it is as to what is the true meaning in the sub-section of the words, "If in any year of assessment. . ."

The submission of the learned SOLICITOR-GENERAL was that the words, "If in any year of assessment," meant "If in any year," or "If at any time," and that the word "any" must be read as inconsistent with the limitation suggested by the other side. His submission was that there had been a new source of income, a source acquired some years back, but still a new source of income acquired in some year of assessment, and, therefore, it was within the words, "If in any year of assessment." Counsel for the company, on the other hand, submitted that if one were reading the words, "If in any year of assessment," in their natural and ordinary sense one would regard them as referring to the year in respect of which income or tax was being computed. He referred to the first proviso to s. 30 as showing how one must read the like words in that proviso, and he asked : "Why should one give the words a different meaning in proviso (ii) from that which they must have in proviso (i) ?" Proviso (i) is :

If in any year of assessment any person charged or chargeable in respect of any such profits or income as aforesaid ceases to possess any particular source of any such profits or income or any part of any such source, income tax in respect of the profits or income from that source or that part shall be computed separately, and the provisions of the section in this Part of this Act which relates to the discontinuance of a trade, profession or vocation, shall, subject to the necessary modifications, apply in any such case as if the cesser of the possession of the source or part were the discontinuance of a trade.

The section in that Part of the Act which relates to the discontinuance of a trade, profession or vocation is s. 31, which provides :

(1) Where in any year of assessment a trade, profession or vocation is permanently discontinued, then, notwithstanding anything in this part of this Act—(a) the person charged or chargeable with tax in respect thereof shall be charged for that year on the amount of the profits or gains of the period beginning on April 6 in that year and ending on the date of the discontinuance. . . .

Counsel claimed that that section, and, in particular, the words "for that year," showed that when one is interpreting the words "in any year of assessment" in the first proviso to s. 30, the meaning must be "in any year of assessment in respect of which one is computing tax or income," and his submission was that the words in proviso (ii) to s. 30 must be read in the same way.

The SOLICITOR-GENERAL reinforced his point strongly by his reference to the other provisos in s. 29 (1) (b). He pointed out that it was difficult to see how the later provisos, (b) (ii), (iii) and (iv), could work if the company's submission in regard to the meaning of proviso (i) was right. Counsel for the company submitted that those provisos could be worked, and said: "Once a company comes within proviso (ii) to s. 30 it falls within the provisos to s. 29 (1) and stays there until each of those provisos is exhausted." It is a little difficult for me to see how they can work, but I appreciate that there is an argument on that matter.

It is to be remembered that s. 30, proviso (ii), deals with a new source of income, not with increased income from an old source nor with new income from a new source. If proviso (ii) of s. 30 applies, it brings in the provisions of proviso (b) (i) of s. 29 (1), with the result that under proviso (b) (i) income tax on the £7,434 would be computed in respect of the year of assessment. I was referred to various other sections, in particular, to certain definitions in the Income Tax Act, 1918, and to one or two sections of that Act which are made applicable by s. 37 of the Finance Act, 1926. Section 2 of the Income Tax Act, 1918, is:

Every assessment and charge to tax shall be made for a year commencing on April 6 and ending on the following April 5, except where under the provisions of this Act weekly wage-earners are to be assessed and charged [half-yearly].

By s. 237 :

In this Act, unless the context otherwise requires : . . . "Year of assessment" means, with reference to any tax, the year for which such tax was granted by any Act granting duties of income tax.

I think that lends force to the argument when it is read with s. 2 of that Act. The SOLICITOR-GENERAL directed my attention to the words "unless the context otherwise requires," and he submitted that here the context did otherwise require—if it was necessary to go as far as that—because of the terms of s. 29, provisos (b) (ii), (iii) and (iv). I was also referred to the usual form of grant of tax which, for the year in question, the year 1942, was in s. 21 of the Finance Act, 1942 :

Income tax for the year 1942-43 shall be charged at the standard rate of ten shillings in the pound . . .

I do not pretend that this is an easy case, but on the whole, faced, as I am, with the task of interpreting the words in s. 30, proviso (ii), of the Finance Act, 1926 : "If in any year of assessment any person acquires a new source of any such profits or income or an addition to any source of any such profits . . ." I express the view that that means : "If in the year of assessment with which the taxing authority is then dealing," or "If in the year for which tax is then being computed." That view is strengthened by the terms of the interpretation section of the Income Tax Act, 1918, and still more by those of proviso (i) of s. 30 and the considerations thereunder. I cannot see why one ought to be asked to read the words "in any year of assessment" in any different sense in proviso (ii) of s. 30 from that which applies in the case of proviso (i). The result is that the argument put forward by the learned SOLICITOR-GENERAL on behalf of the Crown fails and this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the Crown) ; *Linklaters & Paines* (for the company).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

Re BAINBRIDGE (deceased). DARELL v. BAINBRIDGE.

[CHANCERY DIVISION (Harman, J.), July 28, 1948.]

Will—Construction—Power to tenant for life to appoint to issue—Exercise during life of tenant for life—“As well the capital as the income . . . with such future or other trusts . . . and such provisions for their respective advancement . . . at the discretion of . . . my trustees” as the tenant for life should appoint.

A By his will, dated Aug. 6, 1910, a testator, who died on May 11, 1911, gave his residuary estate to his trustees to hold a share thereof on trust to pay the income arising from such share to his daughter D. for her life, without power of alienation or anticipation, and “from and after the death of my daughter D. as to as well the capital as the income thereof upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of my daughter D. (such remoter issue to be born and take vested interests within 21 years after her death) at such age or time or respective ages or times if more than one in such shares and with such future or other trusts for their benefit and such provisions for their respective advancement maintenance and education at the discretion of either my trustees or of any other persons or person and in such manner in all respects as my daughter D. whether covert or discoverd shall by any deed or deeds revocable or irrevocable or by will or codicil appoint . . .”

B There followed hotchpot directions in regard to participation in the unappointed portion of the said share. The will further authorised the trustees at any time or times after the testator’s death at their discretion to raise any part or parts not exceeding in the whole one half part of the then presumptive or vested share in any of the funds under the trusts thereinbefore declared of any minor and to pay or apply the same for the advancement or benefit of such minor in such manner as his trustees should think fit. By a revocable deed of appointment, dated Mar. 11, 1947, D., in exercise of her power in that behalf, appointed one moiety of the settled fund in trust for her son, born in 1910, and the other moiety in trust for her daughter, born in 1913, both appointments to be subject to D.’s life interest, but with power to the trustee at any time or times in D.’s lifetime at discretion as to each such moiety to pay or apply all or any part of the capital thereof not exceeding one half for the advancement or benefit of the child to whom the moiety was appointed. It was desired to advance certain sums to the said children during D.’s life.

E **HELD** : on the true construction of the will and in the absence of an expressed provision in that behalf, the powers of advancement conferred by any appointment could not be exercised during the life of D.

F **ADJOURNED SUMMONS** by which the tenant for life under a will and the beneficiaries under a deed of appointment made by the tenant for life pursuant to a power in the said will asked whether a power to advance the beneficiaries under the deed during the life of the tenant for life was authorised by the will. **HARMAN, J.**, held that it was not so authorised. The facts appear in the head-note.

G *Jennings, K.C.*, and *Wilfrid Hunt* for the plaintiffs, the tenant for life under the testator’s will and the beneficiaries under the deed of appointment.

J. V. Nesbitt for the first three defendants, the trustees of the will.

T. A. C. Burgess for the fourth and fifth defendants, infant children of the daughter of the tenant for life.

H **HARMAN, J.** (after stating the facts) : The question which I have to decide is whether under the appointment which Mrs. Darell has made in exercise of the power conferred by the testator’s will or under any future appointment she may make she has provided or can provide a right for the trustees in her lifetime to advance the second and third plaintiffs in whose favour the power was exercised. The will contains an express power to advance minors, but no power to advance adults.

This is a matter largely governed by the practice of conveyancers. The very verbose form of power in this will is introduced by the words, “from and after the death” of Mrs. Darell. The natural inference from these words is that the

power is not intended to apply during Mrs. Darell's lifetime. Such a power is often made so to apply by the addition of express words such as "after the death of the tenant for life or during her life with her consent." The question is whether in the absence of any such words the power extends to authorise the exercise of a power of advancement during the lifetime of a tenant for life. It is pointed out that the power extends to the creation of "such future or other trusts" and it is said that the antithesis to future is "present," but I think other probably means "executory" or some such word. It is contended that, as Mrs. Darell is authorised by the power to put in any appointment she may make during her life an express power to advance her children or issue, such a power must be exercisable during her lifetime. I do not think this is the true construction of this will for two reasons—(i) the reference to the period after the life tenant's death already alluded to, and (ii) that this will contains an express power to advance minors. It would be curious if by a kind of side wind that power could be extended so as to authorise an advance to adults. In the form in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 14th ed., vol. II, p. 887, words are inserted expressly authorising the exercise of the power of advancement during the lifetime of the donee of the power. Where any such words are omitted I do not think there is anything to enable me to say that it is nevertheless open to the donee of the power to provide that there shall be a power of advancement exercisable during her life. The omission of such words may have been deliberate. In the form in DAVIDSON'S PRECEDENTS IN CONVEYANCING, 3rd ed., vol. III, pt. II, p. 714, the power of appointment contains an express provision authorising the exercise of the power of advancement so as to over-reach the interests prior to the power. A similar provision appears in a form of will, vol. IV, p. 140: see also p. 278, note (j.) Mr. DAVIDSON'S view is reflected in the note in vol. III, pt. I, p. 160, where he says:

... as the life estates could not, except by express provision for that purpose, be over-reached by any exercise of the power of appointment, it is desirable that the terms of the power should authorise the life estates to be over-reached by an advancement.

His opinion, therefore, was that, in the absence of such express provision, a power of advancement could not be exercised during the lifetime of the donee of the power. The fact that other views expressed by DAVIDSON on this subject have not received judicial approval (see FARWELL ON POWERS, 3rd ed., p. 329, para. 4, and cases there cited), does not mean that his opinion on this matter is not correct. This is largely a matter of construction. I have come to the conclusion that, on the true construction of this will, powers of advancement conferred on the trustees of the will by any appointment cannot be exercised during the lifetime of Mrs. Darell.

Order accordingly.

Solicitors: *Maude & Tunnicliffe* (for the plaintiffs); *Torr & Co.*, (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

FIRST NATIONAL HOUSING TRUST, LTD. v. CHESTERFIELD RURAL DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Denning and Slade, JJ.),
July 26, 1948.]

Public Health—Dustbin—Provision—Owner of building required by local authority to provide—House subject to Rent Restrictions Acts—Dustbin originally provided by owner—No contractual obligation to provide—Owner's appeal to justices allowed—Transfer of "burden or liability" from landlord to tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 2 (3)—Public Health Act, 1936 (c. 49), s. 75 (1).

By the Public Health Act, 1936, s. 75 (1): "A local authority who, as respects their district or any part thereof, have undertaken the removal of house refuse may by notice require the owner or occupier of any building within the district, or, as the case may be, within that part of the district, to provide such number of covered dustbins for the reception of house refuse of such material, size and construction as the authority may approve . . . Any person aggrieved by a requirement of the local authority under this sub-section may appeal to a court of summary jurisdiction."

A The owners of certain houses to which the Rent Restrictions Acts applied provided a dustbin in each house when it was first let, although they were under no contractual obligation to do so. On notices being served by the local authority under the Public Health Act, 1936, s. 75 (1), requiring the owners to replace the dustbins by new ones of specified material, size and construction, the owners appealed to a court of summary jurisdiction under the sub-section on the ground that the notices were unreasonable because in the circumstances the occupiers of the premises, and not the owners, should have been required to replace the dustbins. The justices allowed the appeal on the ground that the notices were unreasonable in the circumstances. It was contended by the local authority that the effect of the justices' decision was to put the burden of replacing the dustbins on the tenants, which was contrary to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3), prohibiting the "transfer to a tenant of any burden or liability previously borne by the landlord," and, therefore, the justices had no jurisdiction to come to such a decision.

B HELD : (i) the words "burden or liability" in s. 2 (3) of the Act of 1920 referred to a burden or liability imposed by a contractual term or a term imported by statute, and did not affect the landlord's power to discontinue a privilege, facility or benefit which the tenant had previously enjoyed, but which was not included in the terms of the tenancy.

C (ii) the decision of the justices in allowing the owners' appeal did not mean that the justices had put on the occupiers the burden of replacing the dustbins, and the decision was within the jurisdiction of the justices under s. 75 (1) of the Act of 1936.

Croydon Corpn. v. Thomas ([1947] 1 All E.R. 239), *applied*.

[AS TO TRANSFER OF BURDENS FROM LANDLORD TO TENANT, see HALSBURY, Hailsham Edn., Vol. 20, p. 326, para. 387.]

D FOR THE PUBLIC HEALTH ACT, 1936, s. 75 (1), see HALSBURY'S STATUTES, vol. 29, p. 384.]

Case referred to :

(1) *Croydon Corpn. v. Thomas*, [1947] 1 All E.R. 239; [1947] K.B. 386; [1947] L.J.R. 484.

E CASE STATED by Eckington, Derbyshire, justices on an appeal by the owners of certain dwelling-houses subject to the Rent Restrictions Acts against notices by the local authority, under the Public Health Act, 1936, s. 75 (1), requiring the owners to provide regulation dustbins for the houses. The justices held that the orders were unreasonable having regard to (a) the rents paid by the tenants, (b) the fact that the owners had borne the whole of the expense of keeping the property in repair, especially at a time when the cost of such repairs was very high, and were unable to pass any part of such costs to the tenants, and (c) the fact that the local authority had not taken these matters into account before making the orders requiring the owners to provide dustbins. Accordingly, the justices allowed the appeal. The local authority appealed from the decision of the justices, but the Divisional Court now dismissed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Hallis for the local authority.

G *Crispin* for the owners of the houses.

LORD GODDARD, C.J.: This is a Case stated by justices for the Eckington Division of Derbyshire who, sitting as a court of summary jurisdiction, decided an appeal brought by the owners of certain property under the Public Health Act, 1936, s. 75, in respect of a notice served on them by the local authority to furnish the houses named in the various notices with dustbins made in a particular manner and of a particular size, and so forth. The notice against which the appeals were brought is in these terms :

H We, the said council, by this notice under the Public Health Act, 1936, s. 75 (1), do require you, within 28 days from the service of this notice upon you, to provide such building with one covered dustbin for the reception of house refuse, of the material, size and construction specified hereunder: Each dustbin shall be of 24ins. x 18ins., 28lbs. weight, vertical, corrugated sides, with tight fitting conical cover and handles.

The Public Health Act, 1936, s. 75 (1), provides :

A local authority who, as respects their district or any part thereof, have undertaken the removal of house refuse may by notice require the owner or occupier of any building

within the district, or, as the case may be, within that part of the district, to provide such number of covered dustbins for the reception of house refuse of such material, size and construction as the authority may approve . . . Any person aggrieved by a requirement of the local authority under this sub-section may appeal to a court of summary jurisdiction.

Sub-section (2) provides that, if a person fails to comply with a notice under sub-s. (1) he is liable to a penalty, and the authority may provide the dustbins and recover the expense from the person who ought to pay for them. Sub-section (3) is :

A local authority may, as respects their district or any part thereof, in lieu of requiring the owners or occupiers of buildings to provide and maintain dustbins for the reception of house refuse, undertake themselves to provide and maintain such dustbins as may be necessary and, so long as such an undertaking is in force, the authority may make in respect of each dustbin provided by them such annual charge not exceeding 2s. 6d. as they think proper.

There follows a provision that that 2s. 6d. may be added to the general rate in respect of the premises and recovered.

It is argued in this case by counsel for the local authority that, as the justices have allowed the owners' appeal, they have, in effect, decided that the obligation is on the occupier, and they have no jurisdiction to do that because the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3), prohibits the transfer to a tenant of any burden or liability previously borne by the landlord. The facts as found by the justices show that this is a comparatively new housing estate, and when the houses were first let there was provided in each house what is commonly called a sanitary dustbin. Whether it was of the make or dimensions of the character contained in the notice does not appear. From time to time the owners have renewed these dustbins which, I pause to say, are mere chattels, and it is not contended that they were under a contractual obligation to supply a dustbin or, still less, to supply any particular make of dustbin. If they were under any contractual obligation to supply some receptacle as a dustbin, it seems to me that it would be left entirely to the landlords to decide what sort of receptacle they would provide. They could provide a wooden box, as far as I know, or something like that. There is certainly no contractual obligation on them to provide a galvanised iron dustbin or a dustbin of any particular size. It is conceded that the landlords were not under any contractual obligation to provide a dustbin, and in *Croydon Corp'n. v. Thomas* (1) LORD GODDARD, C.J., said ([1947] K.B. 386, 390) :

One thing which seems to me to be clear in this case is that the section does not purport in any way to vary the terms of the contract of tenancy or the lease between the landlord and tenant.

Therefore, if the effect of what the local authority has done or of what the justices do, either in upholding or dismissing the appeal, is to put on the tenant a burden, obligation or liability which ought by the terms of the contract to be discharged by the landlord, it may very well be—and, I should think, it would be the case—that the tenant would have an action against the landlord to recover any expense to which he was put.

That, however, is not, in my opinion, the case we have to decide. The case we have to decide is whether the justices were in any way limited in their discretion or whether they came to a wrong determination in point of law—because in this form of appeal we can only deal with a point of law—in coming to the conclusion that the landlords were aggrieved by this notice. I pause once more to say that by deciding in favour of the landlords in this case it is not the fact that the justices have decided that the tenants are to bear the expense. They have simply decided that the landlords are not to. It may be—I do not want to take too fine a point—that the practical result will be that the local authority may consider that, as the landlords have not to provide the dustbins, the tenants must, or the local authority may decide that they will do it themselves, and then there will come the question whether, if they do it themselves and recover the 2s. 6d. a year for having done it, the landlord or tenant will have to pay. That may have to be decided hereafter, but in the *Croydon* case (1) this court emphasised that, in giving the right of appeal from the local authority to the justices, s. 75 (1) of the Act of 1936 meant exactly what it said—a “ person aggrieved,” i.e., a person who is ordered to do something, has a right

of appeal, and if he has a right of appeal, the court of summary jurisdiction to which he appeals can allow the appeal if they think fit, provided that they act judicially. I cannot see any ground here for saying that the justices did not act judicially, unless the contention of counsel for the local authority is right, that the justices have impliedly disregarded the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3), which prohibits the transfer of a burden or liability from the landlord to the tenant except on the terms there mentioned.

Section 2 (3) is :

Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as the result of such a transfer, the terms on which a dwelling-house is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased, whether or not the sum periodically payable by way of rent is increased . . .

In the first place, the mere fact that the landlord did originally provide a sanitary dustbin, and has from time to time renewed it, does not seem to me to be a burden or liability on him. Whether there is any distinction to be drawn between burden and liability, whether the word "burden" is put in *ex abundanti cautela*, or is merely tautologous, I need not inquire. I merely say that I do not understand how a burden can be transferred, with the result that the terms of the tenancy are less favourable, unless the burden is a contractual burden. As it is admitted that there is no contractual burden or liability on the landlord in this case, I cannot see that, by reason of what the justices have done, there has been any transfer of the burden to the tenant. Moreover, as neither the justices nor the local authority have power to vary the terms of the tenancy, if in fact what has been done varies the terms of the tenancy, it seems to me that is a matter to be discussed in an action. As it does not appear to me that the justices have taken into account anything that they ought not to have taken into account, or have not taken into account that which they ought to have taken, but have applied their minds to the question whether the obligation was one which ought fairly to fall on the landlords, I think, applying the principles which were laid down in the *Croydon* case (1), we are bound to dismiss this appeal. I think the justices have acted strictly within their jurisdiction in coming to the conclusion they have. Whether we should have come to that conclusion on the same evidence is not a matter with which we are concerned. I can find no fault in point of law with the decision of the justices, and I again repeat that the mere fact that they have decided in favour of the landlords in this case does not mean that the justices have put the burden on the tenant. In fact, they have no power to do so. If this matter had been present to the mind of the draftsman or Parliament, some provision might have been made for all parties to be brought before the court in cases of this description, where a liability might be thrown on one party or the other. There is no such provision in the Act, and there is no provision by which the tenants could have been brought before the court in this case. Under the provisions of the Act the only parties to the appeal are the owners or the occupiers, as the case may be, according to whichever is served, and the local authority and the justices must come to the fairest decision they can on the material before them as between those two parties. In my opinion, their decision was right, and this appeal must be dismissed with costs.

DENNING, J. : I agree. In my opinion, the words "burden or liability" in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3), refer to a burden or liability imposed by a contractual term or a term imported by statute, such as in s. 2 (5). They do not refer to, or affect, the landlord's power to discontinue a privilege, a facility or a benefit which the tenant has previously enjoyed so long as it is not part of the terms on which the tenant holds. I agree that the appeal must be dismissed.

SLADE, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Lewin, Gregory, Torr, Durnford & Co.*, agents for *Jones & Middleton, Chesterfield* (for the local authority) ; *Gregory, Roucliffe & Co.*, agents for *Neal, Scorah, Siddons & Co.*, *Sheffield* (for the owners of the houses).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

HOLLING AND ANOTHER v. YORKSHIRE TRACTION CO., LTD. AND OTHERS.

[LEEDS ASSIZES (Oliver, J.), July 16, 19, 20, 22, 1948.]

Nuisance—Premises adjoining highway—Coke ovens—Smoke and steam escaping across highway.

The second defendants owned and operated coke ovens situate 50 yards away from a road. The process of manufacturing coke involved the production at intervals of clouds of smoke and steam which, under certain conditions of wind and weather, passed low over the road so as to obscure the view of passengers thereon. While one of these clouds was so passing a collision occurred between a motor car and a motor omnibus driven by a servant of the first defendants, both of which vehicles were travelling along the road, two passengers in the car sustaining fatal injuries. It was found that the omnibus was being driven negligently at the time of the accident.

HELD : the discharge of smoke and steam across the road on the occasion of the accident was a nuisance caused by the second defendants, and the second defendants were also guilty of negligence in not posting a man at each end of the area affected to warn approaching vehicles as soon as a discharge was imminent.

Dollman v. Hillman, Ltd. ([1941] 1 All E.R. 355), and observations of the **EARL OF BIRKENHEAD, L.C.**, in *Admiralty Commissioners v. S.S. Volute* ([1922] A.C. 129), applied.

[AS TO NUISANCE FROM USER OF PROPERTY, see HALSBURY, Hailsham Edn., Vol. 24, p. 49, para. 85; and FOR CASES, see DIGEST, Vol. 36, p. 186, Nos. 295-300.]

Cases referred to :

- (1) *Dollman v. Hillman, Ltd.*, [1941] 1 All E.R. 355; 2nd Digest Supp.
- (2) *Admiralty Commissioners v. S.S. Volute*, [1922] A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 41 Digest 780, 6417.
- (3) *Searle v. Wallbank*, [1947] 1 All E.R. 12; [1947] A.C. 341; [1947] L.J.R. 258; 176 L.T. 104.
- (4) *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205; 101 L.J.K.B. 679; 147 L.T. 404; Digest Supp.
- (5) *Maitland v. Raisbeck & Hewitt (R. T. & J.), Ltd.*, [1944] 2 All E.R. 272; [1944] 1 K.B. 689; 113 L.J.K.B. 549; 171 L.T. 118; 2nd Digest Supp.
- (6) *Castle v. St. Augustine's Links, Ltd.*, (1922), 38 T.L.R. 615; 36 Digest 186, 300.
- (7) *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; 2nd Digest Supp.
- (8) *Slater v. Worthington's Cash Stores, (1930), Ltd.*, [1941] 3 All E.R. 28; [1941] 1 K.B. 488; 111 L.J.K.B. 91; 2nd Digest Supp.
- (9) *Fritz v. Hobson*, (1880), 14 Ch.D. 542; 49 L.J.Ch. 321; 42 L.T. 225; 36 Digest 162, 48.
- (10) *The Eurymedon*, [1938] P. 41; 107 L.J.P. 81; 158 L.T. 445; *sub nom.*, *Corstar Owners v. Eurymedon Owners, The Eurymedon*, [1938] 1 All E.R. 122; Digest Supp.

CONSOLIDATED ACTIONS tried by OLIVER, J., without a jury.

The plaintiffs claimed damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, on the grounds of the negligence of the servant of the first defendants (the driver of the motor omnibus) and/or the negligence or nuisance of the second defendants and/or the negligence of the third defendant. The facts appear fully in the judgment.

Paley Scott, K.C., *Wrangham* and *Ogden Swift* for the plaintiffs.

Hinchcliffe, K.C., and *Stanley-Price* for the first defendants.

Hylton-Foster, K.C., and *Leslie* for the second defendants.

Fenwick, K.C., and *Alastair Sharp* for the third defendant.

Cur. adv. vult.

July 22. **OLIVER, J.**, read the following judgment. These consolidated actions were brought by two widows, and they claim damages under Lord Campbell's Act and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of loss they suffered by the death of their husbands, who were killed on Feb. 22, 1947, in a collision between the car in which they were being driven by the son of the first plaintiff with an omnibus, the property of the first defendants. The statement of claim alleges negligence against both the first and second

defendants and nuisance against the second defendants, the owners of coke ovens situate near the scene of the accident. On Dec. 23, 1947, the first defendants issued third party proceedings against the driver of the car in which the deceased were killed, claiming indemnity on the allegation that the accident was caused, or contributed to, by his negligence in driving the car. Thereupon both the plaintiffs amended their proceedings, and included him as third defendant.

A The accident occurred on the main road from Sheffield to Manchester. The motor omnibus was coming from the Sheffield direction and the car from the opposite direction. The collision took place a short distance on the Manchester side of some trees overhanging the road. Visibility was clear for a considerable distance in spite of the comparatively gentle bend just beyond which the accident occurred. The coke ovens, the property of the second defendants, have been in operation since 1919 and occupy a considerable stretch of land on the north side of the road. They are distant from the road 50 yards. On Feb. 22, 1947, during the middle of one of the severest winters in human memory, much snow had fallen and had been piled at the sides of the road so as to form a sort of wall. The normal carriage way was 23 feet, but this was reduced by the piled up snow to 18 feet. The width of the omnibus was 7 feet 6 inches, that of the car 5 feet. Allowing for the necessary space between each vehicle and the snow bank and the clearance necessary between two passing vehicles there would only be a few feet to spare if they were to pass safely. The surface of the 18 feet roadway consisted of a thin layer of closely packed snow and ice. It had been freezing all day and was freezing at the time. Such grit as had been put down on the road surface had become ineffective owing to fresh snow which had fallen upon it since. I find without hesitation that the surface of this roadway was extremely treacherous and dangerous, demanding the utmost care from drivers of vehicles upon it. Unless the speed of such vehicles was kept down to a very moderate one any sudden application of brakes would almost certainly precipitate a skid. The collision took place about 3 p.m. It was broad daylight, and I accept the evidence of the police officer, who was a most reliable witness, that visibility in the ordinary way was quite good. The process of manufacturing coke involves that as each oven is emptied the coke has to be quenched with water by means of hoses operated by employees of the second defendants. These quenching operations take place about every three-quarters of an hour throughout the day, and result in the production of masses of steam and smoke. The prevailing direction of the wind is from the west, but a wind from the north or north-east would carry the smoke and steam generated by the quenching across the road. In normal weather the clouds of vapour rise and where they blow over the road they do so at a height which causes no inconvenience to the traffic thereon, but I had before me a body of evidence, which I fully accept, that on fairly rare occasions the clouds of vapour pass low over the road so as to involve vehicles thereon.

On Feb. 22, according to an agreed meteorological report there was a light wind not exceeding 12 m.p.h. from the north-east blowing directly from the coke ovens to the road. The weather was extremely cold with very low clouds, these being ideal conditions for vapour clouds from the coke ovens to obscure the road itself. The collision occurred in the middle of a particularly dense cloud of grey smoke and steam following the quenching of coke. No witness actually saw the impact. The third defendant, driving the car, was so injured as to have no memory of the event whatever. Both his passengers, husbands of the respective plaintiffs, were killed. The driver of the omnibus deposed that he saw nothing of the car up to the collision. The case, therefore, has largely to be decided as between the two motor vehicles by inferences to be drawn from their position after the accident as deposed to by witnesses, particularly the police constable, and illustrated by photographs. [His Lordship dealt with the evidence regarding the two vehicles and continued :—] As between the two vehicles I find the third defendant altogether blameless, and I so indicated at the close of counsels' arguments. I find that the omnibus driver was negligent (a) in driving on his wrong side of the road, (b) in going too fast, (c) in failing to observe and guard against the vapour cloud in time to take effective action.

It remains to consider whether his employers, the first defendants, can escape liability by reason of the action of the second defendants in discharging vapour

over the road. The second defendants are employed for gain in producing coke. It is essential in the course of their operations that the coke should be quenched with water thereby discharging masses of steam and vapour into the air. Necessarily on occasions, albeit rare occasions, this cloud will travel over and, in various degrees according to the conditions, obscure the road. For them it was contended that they have no duty whatever to the public in the matter, that road users must take things as they find them and look after themselves, and, in short, that they must regard the vapour clouds, however dense, as part of the ordinary risks of travel. It will be convenient, first, I think, to examine the nature of the fog on the particular occasion. It was described by various witnesses as amounting to complete obscurity. The omnibus driver could not see the car even after he had run into it. Men at work at the ovens heard the crash, but could see nothing as the road was in an impenetrable fog. The police constable, who arrived a quarter of an hour after the collision, said that at least twice while he was there between 3.15 and 6.15 similar clouds came over the road; that they began as comparatively thin vapour, then became opaque, then thinned out again and passed away. At the time of opacity he could not see his hand when he outstretched his arm. The total duration of the cloud was about one and a half minutes. I find as a fact that the weather all that day was the same and that these clouds of vapour had been settled upon the road at intervals of about three quarters of an hour the whole day. It is quite true that no similar collision had ever happened during nearly thirty years. It is also true that it was only on comparatively rare occasions that the fog settled on the road. In the vast majority of instances it passed away from or high over the road.

I have to ask myself the question: "Was the discharge of vapour on the occasion of this accident a nuisance, and a nuisance caused by the second defendants?" I have come to the clear conclusion that it was a nuisance. Counsel strenuously argued that the production of the vapour was incident to a perfectly ordinary and lawful use of land and that it had no more significance than, for instance, a cloud of dust raised by the use of an agricultural implement and blown by the wind across a road. He further relied, among others, on cases which have laid down that the accidental failure of a tail lamp on a motor car through no negligence on the driver's part (provided the unlit condition was not allowed to exist for more than a reasonable time) does not cause the vehicle to constitute in law a nuisance [*e.g.*, *Maitland v. Raisbeck & Hewitt (R.T. & J.) Ltd.* (5)]. As I see it, however, such cases are quite apart from the case before me. The principle involved in those cases is that lawful users of the road, unless they do or permit something actively wrong, are not liable. To my mind, there is a world of difference between the position of a driver of a car who has suffered a misfortune on the road while a lawful user of it and the position of a defendant who, for his own profit, is flooding the road on occasions with an impenetrable fog of smoke and steam. He is not a lawful user of the road or anything approaching it. His artificial fog has no business on the road at all. In my opinion, this matter is really governed by *Dollman v. Hillman* (1). In that case the presence on the pavement of the piece of fat which had come from the butcher's shop of the defendant was held to be a nuisance. In the case before me these smoke clouds had been persisting all day. Their occurrence and recurrence was obvious to anyone in charge at the coke ovens 50 yards away, yet nothing whatever was done in the matter. It would have been perfectly simple, and, to my mind, right and reasonable in the particular weather conditions that day, to have posted a man at each end of the area affected to warn approaching vehicles as soon as a discharge was imminent. For this reason in addition to being guilty of creating a nuisance I find the second defendants were also guilty of negligence.

It remains to consider whether both the first and second defendants caused the accident jointly or whether either of them was the sole cause. Speaking for myself I have never been able to understand the distinctions which have been drawn in many of the reported cases between a *causa causans* and a *causa sine qua non*, and for myself I follow the view which, as I understand it, LORD BIRKENHEAD expressed in *The Volute* (2) ([1922] A.C. 129, 144) to the effect that the matter should be regarded from the point of view of plain common sense. In this case it can be most truly said that had there been no vapour cloud there

would have been no accident because the omnibus driver could have seen without difficulty the car, and that, on the other hand, if the driver had been driving with reasonable care, no accident would have happened. I cannot distinguish the effects of the coincident negligence of the two defendants, and I think it just that they should share the liability equally.

Judgment for the plaintiffs against the first and second defendants. Judgment for the third defendant against the plaintiffs.

Solicitors: *Younge, Wilson & Co.*, Sheffield (for the first plaintiff and all plaintiffs in the consolidated action); *Swann, Dodson & Co.*, Sheffield (for the second and third plaintiffs prior to their action being consolidated); *Raley & Sons* Barnsley (for the first defendants); *Raworth, Lomas-Walker & Co.*, Harrogate (for the second defendants); *Irwin Mitchell, Kershaw & Co.*, Sheffield (for the third defendants).

[*Reported by G. M. SMAILES, ESQ., Barrister-at-Law.*]

Distinguished. *HOSKING v. DE* *Applied.* *HAM RIVER GRIT CO., LTD.*
HAVILLAND AIRCRAFT CO., LTD. *v. RICHMOND RATING AUTH.* [1949]
 [1949] 1 All E.R. 540. 1 All E.R. 286.

COX v. S. CUTLER & SONS, LTD. AND HAMPTON COURT GAS CO.

[COURT OF APPEAL (Scott, Wrottesley, L.JJ., and Wynn-Parry, J.), July 6, 7, 8, 26, 1948.]

Factory—"Place" used for purpose other than processes carried on in factory—*Gas works*—Reconstruction of gas holder on site separate from gas works—*Site in exclusive possession of contractors*—"Article"—*Coal gas*—*Factories Act, 1937* (c. 67), s. 151 (1) (a) (c), (xiii), (6).

A gas company carried on its undertaking on two parcels of land separated by a public road. The east site contained all the buildings, machinery and equipment necessary for the manufacture of the gas and also two gas holders, while the west site contained one gas holder only, which was connected with the main site by means of underground pipes. The gas holder on the west site was destroyed by enemy action and the connecting pipes sealed up. Contractors were employed by the gas company to reconstruct the damaged gas holder, and by the terms of the contract were given exclusive possession of the west site for the period of reconstruction. On a frosty day a steel erector in the employ of the contractors, while engaged in rivetting the framework 20ft. above the pit, which was floored with a concrete dumping, was in the act of moving a board, which served him as a platform, when he slipped and fell on to the concrete dumping, thereby sustaining serious injuries. No staging or other means was provided to prevent such an accident occurring. In an action for damages the contractors and the gas company were held jointly and severally liable, the contractors for negligence at common law, and the gas company for breach of s. 26 (2) of the *Factories Act, 1937*. The gas company appealed.

HELD: coal gas was an "article" within s. 151 (1) (a) and (c) of the *Factories Act, 1937*, so that any premises in which it was made or adapted for sale were a "factory" within that Act; even if the gas holder on the west site had been part of the actual gas factory and had come within s. 151 (1) (xiii) of the Act, it had ceased to be so when the enemy destroyed it, because thereafter it neither held nor could hold gas, and *a fortiori* when the contractors took exclusive possession of the site; and, in any event, the gas company were protected by s. 151 (6) of the Act which provides that a place situate within the close, curtilage, or precincts forming a factory and solely used for some purpose (here, at the material date, for the purpose of engineering construction) other than the processes carried on in the factory is not to be deemed part of the factory.

[FOR THE FACTORIES ACT, 1937, ss. 26 (2), 151, see HALSBURY'S STATUTES, Vol. 30, pp. 221, 295.]

Cases referred to:

- (1) *Ramsay v. Mackie*, (1904), 7 F. (Ct. of Sess.) 106; 24 Digest 917, l.
- (2) *Lewis v. Gilbertson & Co., Ltd.*, (1904), 91 L.T. 377; 68 J.P. 323; 24 Digest 898, 4.

APPEAL, by a gas company, from an order of SELLERS, J., dated Nov. 24, 1947, whereby he held the company jointly and severally liable with contractors for injuries sustained by the plaintiff, an employee of the contractors, while employed on the reconstruction of one of the gas company's gas holders. The appeal was allowed. The facts appear in the judgments.

Stephen Chapman for the gas company.

Nelson, K.C., and *Marven Everett* for the contractors.

Edgedale, K.C., for the plaintiff.

Cur. adv. vult.

July 26. The following judgments were read.

SCOTT, L.J. : This is an appeal in an action against both defendants for damages for grave personal injuries suffered by the plaintiff from an accident when he was employed by the first defendants (hereinafter called "the contractors") on the construction of a gas holder, the property of the second defendants (hereinafter called "the gas company"). The learned judge held both defendants jointly and severally liable to the plaintiff in the sum of £7,624 as damages, the contractors for negligence at common law, the gas company for breach of s. 26 of the Factories Act, 1937. For the moment, I leave over the questions of costs. The gas company thereupon claimed from the contractors (a) complete indemnification under their contract with them for reconstruction, or, alternatively (b) contribution to the extent of 100 per cent. under the Law Reform (Joint Tortfeasors) Act, 1935. On the third party issues, the learned judge apportioned the liability as to three-quarters to the contractors and one quarter to the gas company. There is no appeal before us by the contractors from the judgment of common law negligence against them—and that is the only ground on which they were held liable—but the gas company do appeal from the judgment against them for breach of the Factories Act, 1937, on two grounds: (1) that for the purposes of that Act the site of the gasometer was no longer, if it ever was, within the "factory" of which they were the occupier, and, in addition, or alternatively, that they were protected by s. 151 (6), even if para. (xiii) of sub-s. (1) of that section would otherwise have brought them within the Act. They also appeal against the apportionment by the learned judge against them as joint tortfeasors of one-quarter of the liability incurred by the contractors to the plaintiff, their grounds for appeal being: (1) that no charge of common law negligence had been made against them; (2) that there could not be in law any charge against them for breach of duty under the Factories Act, 1937, and (3) that they were under a complete contractual indemnity from the contractors. Their appeal thus turns first on questions under the Act, and, secondly, under the contract.

The plaintiff was a rivetter in the employ of the contractors, who were then engaged in reconstructing a large gas-holder, the property of the gas company, under a contract with the latter for the sum of £14,646. All the terms of the contract were contained in a letter dated Mar. 19, 1945, from the contractors to the gas company, which incorporated a typewritten specification and also printed conditions known as the "Standard Conditions of Contract," recognised in the gas industry. The holder had been almost totally destroyed by enemy action. The gas company's works were separated from that holder by a public road, but were physically connected with it by underground pipes underneath the road, by which the holder had, before enemy interference, when in use for gas storage, received its supply of gas from the works. When the holder was put out of use by the enemy, these pipes were sealed off and remained sealed off throughout the process of reconstruction. On Dec. 9, 1945, when the site of the gasometer had been in the possession of the contractors for the purpose of the contract for nearly nine months, they were still in course of reconstructing the steel framework of the upper part of the holder. On that day there was a frost and the steel bars on which the plaintiff had to stand were slippery. His work was above the centre of the pit (into which a gasometer can descend as its gas is let out) at a height of some 20ft. above the concrete "dumpling" in the middle of the pit. While trying to move a plank, he slipped and fell on the dumpling, thereby suffering injuries. The case at common law against the contractors was that it was an unnecessarily dangerous system of working,

and the learned judge held them liable in negligence. There is, as I have said, no appeal from that finding.

The only way in which the gas company could incur liability is if the plaintiff could show that they were still the statutory occupier and had in that capacity broken some statutory duty. The learned judge held that the plaintiff succeeded in establishing that position. With great respect to the learned judge, I differ on these grounds: (1) that the gas company were not the "occupier" within the meaning of the Act; (2) that, even if they were, para. (xiii) of s. 151 (1) does not bring them in, and (3) that sub-s. (6) of that section lets them out. The whole case turns on the correct interpretation of the Act. I will deal with these three points separately.

So far as any issue in the appeal under the Act is concerned, the only person contingently capable on the facts before us of committing a relevant breach of the statute is the occupier of the particular kind of factory which is recognised in the case of gas works. We must, therefore, go straight to s. 151 which defines a factory. In my opinion, a gas factory is constituted by the first and more general part of sub-s. (1):

Subject to the provisions of this section, the expression "factory" means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:—(a) the making of any article or of part of any article; or . . . (c) the adapting for sale of any article; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control.

The word "article" is not defined either in that section or in s. 152, the general definition section. It must, therefore, be given its ordinary meaning in the English language. The SHORTER OXFORD DICTIONARY in its meaning No. 10 says: "Elliptical (=article of trade, etc.); a commodity." The CENTURY DICTIONARY, in meaning No. 6, says: "A material thing as part of a class, or, absolutely, a particular substance or commodity . . . Salt is a necessary article." Any chemical element, and many compounds and mixtures, may exist in any one of three states, solid, liquid or gaseous, depending solely on temperature. The OXFORD DICTIONARY defines coal gas thus: "The mixture of gases produced by the destructive distillation of coal, consisting mainly of carburetted hydrogen; purified of some of its ingredients, it is the common gas used for lighting and heating purposes." Oxygen gas and hydrogen gas are pure elements and not mixtures or compounds. All three gases, however, are made (in the sense of being commodities manufactured and sold) by various processes. I can see no reason for not regarding all three substances, whether in their solid, liquid or gaseous states, as "articles." So, too, with regard to water and steam. Aerated water is obviously an article. Steam under pressure can be supplied by appropriate pipes and sold. Coal gas is bought and sold. It follows that the geographical confines of "the factory," within that general definition, were constituted by the area in which persons were employed in manual labour in the named processes, and that those confines limited the ambit of the factory. That definition, which proceeds by logical connotation, would seem to exclude all the gas holders, or, at any rate, at the time in question, the one beyond the public road.

I suspect that s. 151 (1) (xiii), which proceeds by the opposite logical process (that of denotation) was added because Parliament construed the earlier part of the sub-section just as I do, namely, as excluding gas holders, because neither purpose (a), namely, "making," nor purpose (c), namely, "adapting for sale," covers mere storage or warehousing of the article. The later part of para. (c) of sub-s. (1) reads thus:

And (whether or not they are factories by reason of the foregoing definition) the expression "factory" also includes the following premises in which persons are employed in manual labour . . . (xiii) any premises used for the storage of gas in a gasholder having a storage capacity of not less than five thousand cubic feet.

That language does not cover a holder which once held, but no longer does or can yet hold, gas. Assuming, therefore, that the gas company could still be a potential "occupier" of the site where the gas holder had been, they would not, and could not, be held to blame for a breach of a Factory Act duty as an occupier, and that is the only capacity in which an action would lie against them.

Their defence that they no longer "occupied," in the Factory Act sense, is still further reinforced by the terms of their contract with the contractors. Clause 8 of the specification limited their functions during construction to this one obligation :

The gas company will empty and clean out the tank and keep same free of water during erection of the gasholder and also carry out any repairs that may be found necessary.

Clause 9 incorporated the standard conditions to which I have referred. Condition XV contained the following :

The contractors shall provide everything necessary for the commencement and proper execution of the work. The site shall be handed over to them in a fit and proper condition for the execution of the work and with sufficient and suitable access thereto and at such times as are specified.

The effect of that condition was to exclude the gas company, as building owner, from the site altogether, except in regard to their specific duties in regard to the tank, a matter that has no relevance. The word "occupier," as we know, is not defined in the Act and never has been in previous Acts, but LORD MACLAREN'S definition in 1904 in *Ramsay v. Mackie* (1), cited in REDGRAVE & OWNER'S FACTORIES, TRUCK & SHOPS ACTS, 15th ed., p. 90, is sufficient for present purposes. He said (7 F. (Ct. of Sess.) 106, 109) :

"Occupier" plainly means the person who runs the factory . . . , who regulates and controls the work that is done there, and who is responsible for the fulfilment of the provisions of the Factory Act within it.

Clearly, the gas company were not the "occupier," even if I am wrong in thinking that the skeleton of the future reconstructed gas holder—then under construction by the contractors—was not either a gas holder or part of a gas factory.

For these reasons, I am of opinion that the gas company never came within either definition contained in s. 151 (1), but, even if I were wrong in holding that *quoad* the gas company (i) the gas holder in question—a mere warehouse—had never been a part of the actual gas factory ; (ii) that, if it had been, and, in so far as it had come within s. 151 (1) (xiii), it had ceased to be so (a) when the enemy destroyed it, and (b), *a fortiori*, when the contractors took exclusive possession, sub-s. (6) of s. 151 has to be considered. That sub-section runs as follows :

Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes carried on in the factory, that place shall not be deemed to form part of the factory for the purposes of this Act, but shall, if otherwise it would be a factory, be deemed to be a separate factory.

In my opinion, this language is clear and unambiguous. I will assume (contrary to my own opinion) that, before the enemy blew it up, it was "a place within the close, curtilage, or precincts" of the gas factory (*e.g.*, covered by the connotative definition in s. 151), but that after that moment it was solely used, at first, for no useful purpose, and then, when the contractors took possession in order to turn it again in the future into a gas holder, for the purpose of engineering construction. While it was being so used, it was deemed by s. 108 of the Act to be a factory of which the engineering contractor was the sole "occupier."

I am, therefore, satisfied that the gas company was at no time in a position to commit as occupier any breach of the Factories Act, 1937. They were, therefore, not guilty of breaking s. 26 (2), which was the one and only provision of the Act which had any relevance to the fall of the plaintiff. Had that section been incorporated in s. 108, the contractors, as the notional occupiers under that section of a notional factory, would clearly have been liable, but that section was left out of the list of provisions made applicable to s. 108. I have considered all the cases cited, but there is no authority binding on this court which throws any light on the appeal, except *Ramsay v. Mackie* (1) to which I have referred. The appeal of the gas company will be allowed and judgment entered for them, as defendants to the plaintiff's claim, with costs here and below, and also on their claim as against the contractors on the third party proceedings, laid in contract on their indemnity and in tort under the Act of 1935. The order as to costs of third party proceedings will be varied by directing that the contractors, as third parties, pay to the gas company their costs of such proceedings here and below, whether laid in contract on their indemnity or in tort

under the Act of 1935. The gas company's costs here and below to be paid direct to them by the contractors. The sum of £96 5s. 0d. now in court to be paid to the contractors' solicitors without further authority. Order for payment out to the plaintiff's solicitor on the plaintiff's authority of the £7,000 in court.

WROTTESELEY, L.J. (read by WYNN-PARRY, J.): The gas company occupy extensive premises at Kingston on which they make gas and the ordinary residuals, and the gas when made on it is stored in gas holders. It appears from the agreed plan that they have two separate sites, one on the east side and the other on the west side of the Bushey Park Road. On the eastern or main site the retorts are situate, and it is here that all the processes are performed, and, in addition, they have here at least two gas holders. This site constitutes premises, subtended on two sides with highways, and, on the third side, by a railway, which may fairly be said to consist of a close or curtilage walled off from the two highways, within which persons are employed in manual labour in processes for, or incidental to, the making of gas. Since the work carried on on these premises is carried on by way of trade or for purposes of gain, and since the gas company which employs the labour has both a right of access and control, this site is a factory within the meaning of s. 151 of the Factories Act, 1937. The western or subsidiary site is also subtended on two sides by highways, one of which separates it from the main site. It, too, may fairly be said to consist of a close or curtilage walled off from the two highways. Moreover, when it was used for the storage of gas in a gas holder—having a storage capacity of not less than five thousand cubic feet, as was the case until the gas holder was collapsed by a bomb—it was a factory within the meaning of s. 151 (1) (xiii), although nothing was manufactured and no process performed on or in it. The gas was led from the gasworks to the gas holder on the western site by means of mains laid under the highway, which were cut off when the gas holder was destroyed.

On Jan. 7, 1945, this gas holder was blown up by enemy action. There followed an inspection and report by the contractors in February, a final report in March, and a tender on Mar. 19. Its components had fallen into the tank which had contained the water seal, so that the whole site ceased to be used in any way for the purposes of the gas works. Under the contract this site had to be, and, in fact, was, handed over to the contractors, who proceeded to erect mess huts, offices, store sheds and a telephone. In fact, they had control of the whole site, and proceeded to carry out the work, the subject of their contract with the gas company, viz., the removal of the whole of the three lifts from the tank, the reconditioning, and the work necessary to reconstruct the whole gas holder in its original form. It is clear from the inspection report of Feb. 13 that the whole gas holder had to be removed and reconditioned and re-erected. It is not suggested that any of the gas company's employees were at any time employed on this site, but the gas company's engineer or deputy was, under cl. XVIII of the standard conditions, at all usual times to be allowed to inspect the work in progress, whether on the site or on the contractors' own premises.

To quote from the judgment :

The morning of Dec. 7, 1945, was frosty and the framework was slippery, and as the plaintiff was standing with one foot on a girder and one on a purlin, in the act of moving a board into position to serve as a working platform for himself, he slipped and fell on to a concrete block over twenty feet below and received very serious injuries. The plaintiff seeks to recover damages for those injuries and consequential loss against the contractors on the ground that they required him to work (and particularly to do so under the frosty conditions prevailing) without providing staging from which he could work, or which would protect him from a fall of more than a few feet. The claim is also made against the gas company, and alternatively the contractors, as occupiers of the factory, and for failing to comply with s. 26 of the Factories Act, 1937.

The learned judge found that the contractors had failed in their duty at common law to the plaintiff who was, of course, their employee.

As regards the claim against both defendants that there had been a breach of s. 26 (2) of the Factories Act, 1937, that sub-section is as follows :

Where any person is to work at a place from which he will be liable to fall a distance more than ten feet, then, unless the place is one which affords secure foothold and, where necessary, secure hand-hold, means shall be provided, so far as is reasonably practicable, by fencing or otherwise for ensuring his safety.

That claim was resisted by the contractors on the ground that what was being carried on on the site was a work of engineering construction, and that s. 108 of the Act, which applied certain provisions of the Factories Act, 1937, did not apply s. 26. On this contention, the learned judge found :

They were carrying on works of engineering construction, and s. 108 of the Act does not impose on them the duties arising under s. 26, and, on the evidence, I do not find them to be occupiers of a factory at the site where this accident happened.

The site with which the learned judge was here dealing was the subsidiary or western site, and there is no doubt that it was at this time only a factory for the purposes of s. 108, and the section there applied, and the contractors were only occupiers of such factory within the same section. Section 26 of the Act, therefore, did not apply, but when he came to deal with a similar claim against the gas company, the learned judge held that the gas holder which had been destroyed and was now under construction was there as part of the factory premises and was under repair at the time of this accident. The duty to comply with s. 26 of the Act was, therefore, imposed on the gas company, and, as the duty was not fulfilled and as a consequence the accident occurred, the gas company too must be held liable. It will be seen, therefore, that for this purpose the learned judge now treats the two sites as one factory, not because gas was manufactured on either of them, but because gas of over 5,000 cubic feet was stored in the gas holder on the main site. Moreover, he appears to have found that the gas company's representatives used to walk up a runway on the crown of the gas holder which was being reconstructed, and that this showed that the company remained in occupation of the western site. In point of fact, there was no evidence that the gas company's representatives did come on the site at all, still less that the gas company occupied it. Indeed, the evidence was all the other way, namely, that the gas company handed over the whole western close or curtilage to the contractors, a thing which was the more easily done because of its isolated nature and because the gas company no longer carried on any sort of activity there.

I think that this case falls to be decided on the peculiar circumstances existing on the day of the accident, namely, that this was a physically separate site not occupied by the gas company at all and on which gas was neither being made nor stored. The gas company was certainly not regulating the work that was done on the site. To use the words of LORD MACLAREN in *Ramsay v. Mackie* (1) (7 F. (Ct. of Sess.) 106, 109) :

... "occupier" plainly means the person who runs the factory . . . , who regulates and controls the work that is done there.

Even on the footing that this was one factory and not two factories before the bomb damage, the gas company relied on s. 151 (6) which is as follows :

Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes carried on in the factory, that place shall not be deemed to form part of the factory for the purposes of this Act, but shall, if otherwise it would be a factory, be deemed to be a separate factory.

In answer to this the learned judge found that no exception had been made out to exonerate the gas company. Now, there may be instances where, for the purposes of the Factories Act, 1937, two separate closes and curtilages with their precincts may be properly held to be one factory, but I can see no reason in this case for disregarding the plain facts to be found on the plan. From the point of view of the employee—so long as the western site was used for storing the company's gas—it was a factory to which all the appropriate sections of the Act applied, but once it failed to qualify under para. (xiii) of s. 151 (1) it ceased to be a factory at all so far as the gas company was concerned. It had never qualified under the principal provisions of that section, since nothing had ever been made there, and it now became a site on which the contractors were carrying on a work of engineering construction and possibly building operations. In addition, even if this site could properly be regarded as having been part of the gas company's general factory, we have to consider sub-s. (6) of s. 151. The facts of this case seem to me to be even stronger than those in *Lewis v. Gilbertson & Co., Ltd.* (2). That was the case of a site in the middle of factory premises which was cleared, and the erection of an iron mill was under construction where formerly there had been a copperas mill. On it was placed, for the

purpose of making mortar and cement, an engine and mortar mill with an unfenced fly-wheel. It was held that this site—which was clearly defined—fell within sub-s. (6) being “solely used for some purpose other than the processes carried on in the factory,” namely, the erection of an extension of the iron mill. The general provisions of the Factories Act, 1937, therefore, had ceased to apply to this site. I am not prepared to say that that case was wrongly decided. These cases may depend on matters of degree, depending on how far the site is clearly separate from the factory, but on that score it is difficult to think of a clearer case than the one under appeal. I am not the less inclined to decide as I do in this case, seeing that the result accords with common-sense, and the gas company will not be found to have committed a breach of an Act with which they were never expected by anyone to comply so long as the contractors were in occupation of the site.

WYNN-PARRY, J. [after stating the facts]: The first question which arises is whether the premises on which the plaintiff was working at the time of the accident was a factory within the meaning of the Factories Act, 1937. For the plaintiff it was argued that the gas company have and always have had only one factory, and the circumstances that the western part of their land is physically divided by a highway from the eastern or main part of their land does not make that separated western land any less a part of the factory. On the other hand, the gas company submitted that prior to the damage by enemy action to the gas holder on the western land, they had two factories, one comprising the eastern land and the other the western land. The word “factory” is defined by s. 151 of the Factories Act, 1937 (so far as material) as follows:

(1) Subject to the provisions of this section, the expression “factory” means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:—(a) the making of any article or of part of any article; or (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article; or (c) the adapting for sale of any article; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control: And (whether or not they are factories by reason of the foregoing definition) the expression “factory” also includes the following premises in which persons are employed in manual labour, that is to say: . . . (xiii) any premises used for the storage of gas in a gasholder having a storage capacity of not less than five thousand cubic feet.

By s. 1 of the Interpretation Act, 1889, which applies to this definition, the singular includes the plural, and, therefore, the definition of factory in s. 151 of the Factories Act, 1937, includes premises which have more than one close or curtilage, and is, therefore, a definition which is apt to cover both the eastern land and the western land of the gas company within the single word “factory.” The second paragraph of that section opens with the words “And (whether or not they are factories by reason of the foregoing definition) the expression ‘factory’ also includes the following premises . . .” There is nothing in that language to make it necessary to treat as separate factories the several closes or curtilages which together constitute the premises, as that word is used in the first paragraph of s. 151. It follows that it must be a question of fact in each case, where several closes or curtilages have to be considered, whether or not the several closes constitute one factory or are each to be regarded as a separate factory. *Prima facie*, one would be inclined to regard the eastern and western parts of the gas company’s land as constituting one factory. To adapt the test put in by KENNEDY, J., in *Lewis v. Gilbertson & Co., Ltd.* (2) (91 L.T. 377, 380), if, prior to the damage occurring, the question had been put of a workman standing on the western land “Is he in the factory?”, *prima facie* the answer would have come, “Yes, he is.” The onus, in my view, is on the gas company to show, as a matter of fact, that that answer would not have been given, and, in my judgment, they do not discharge this onus by relying solely on the subsidiary definition in the second paragraph of s. 151 of the Act and sub-para. (xiii), which show no more than that, as the gas holder on the western land was of the requisite capacity, that land was qualified to be regarded as a separate factory. I, therefore, conclude that the gas company have failed to establish that the western land was a separate factory.

The second point taken on behalf of the gas company was that assuming that the two areas must be treated as one factory, then by virtue of sub-s. (6) of s. 151 of the Act in the events which happened, namely, the handing over by the gas company to the contractors of the western area and the work of reconstructing the gas holder carried on thereon by the contractors, the western area must be treated as a place situate within the close, curtilage or precincts of the factory, solely used for some purpose other than the processes carried on in the factory, and therefore deemed not to be a factory at the material time, *viz.*, when the accident occurred. The corresponding provision, namely, s. 149 (4) of the Factory and Workshop Act, 1901, was judicially construed in *Lewis v. Gilbertson & Co., Ltd.* (2). The headnote reads as follows (91 L.T. 377):

The respondents were occupiers of a factory for the manufacture of iron and tin plates, and by the side of their factory and within the curtilage thereof, upon a site which had been cleared for the purpose of creating a new mill thereon, there was a crushing machine driven by a steam engine and used solely for crushing stone and making mortar and cement for the new works intended to be erected on that site. Both the steam engine and crushing machine were upon that site. Upon an information under the Factory and Workshop Act, 1901, for not securely fencing the dangerous parts of this machinery, the justices were of opinion that the machinery was not securely fenced, but they decided that the place on which the engine and crusher stood, though within the close, curtilage, and precincts forming the factory, was a place solely used for a purpose other than the manufacturing process carried on in the factory, within the meaning of sub-s. (4) of s. 149 of the Act, and therefore could not be deemed to be a part of the factory, and was not a separate factory in itself, and they dismissed the information upon that ground. *Held*, that the justices having found that the site on which the machinery was was not a part of the area of the existing factory, but was a place or area separate and apart from the factory, they were right in law in holding that the case came within the exemption in sub-s. (4) of s. 149, as the machinery in this separate area was being solely used for a purpose other than the manufacturing process carried on in the factory.

In the course of his judgment, LORD ALVERSTONE, C.J., said (*ibid.*, 379):

Speaking for myself, I do not think that the words "place situate within the close, curtilage, or precincts forming a factory" in sub-s. (4) of s. 149, mean the area of the factory. I think the words "place situate within the close, curtilage, or precincts forming a factory" do point to a separate area—an area separate from the area of the factory—which is being solely used for some other purpose than the manufacturing process carried on in the factory in the sense that it is separate from the factory; otherwise I do not think that the words "within the close, curtilage, or precincts forming a factory" would have been used . . . I decide that we cannot interfere, because it seems to me that the magistrates have stated that this was a building site for a new factory and was no part of the existing factory, and was only within the first part of the definition "within the close, curtilage, or precincts forming a factory"; but did not come within the second part. I desire to repeat that, should the case come up to us of simply using a part of a large factory—an area in a large factory—which is not separated from the factory, except by the fact that it is used at the time for the particular purpose, I do not think that that comes within the protection afforded by sub-s. (4) of s. 149. I wish to prevent this judgment from being used as giving or recognising the right not to fence machinery, which is in fact within a factory, simply upon the ground that the area which it occupies is used for a purpose which is not a manufacturing process.

WILLS, J., said (*ibid.*, 380):

Therefore we are driven to ask ourselves what is meant by "place." Obviously, it is not necessary that the place should be inclosed on all sides. If it had been necessary the Act of Parliament would have said so; and, therefore, the absence of fencing on all four sides we cannot take as a test. But this place seems to be a place so entirely outside the factory altogether where the manufacturing processes are carried on, and to be so distinctly separated from it, that it may very fairly be considered to be a place—a definite spot, an area which is marked and defined and ascertainable, and which is dedicated, so to speak, to purposes quite other than those which are contemplated as a factory. This appears to me to be a spot which was marked out for the creation of a new building, and nothing else, and it would certainly, to my mind, be a very strained construction of this sub-section to say that that was the sort of place which was contemplated by this Act.

KENNEDY, J., said (*ibid.*):

I agree it is very difficult when we have in this sub-section the words "place" and

"used", as it has been found in other Acts of Parliament where the same words are used, to say what is a place and what is the user of a place, to which the sub-section refers; but I think that if the question was put to these magistrates, was A.B. in the factory? the answer would come, "No; he was on the site of the new sheet mills." A person on the new sheet mill site could not be described as being upon the factory, although he might have been upon the premises which are within the precincts and within the curtilage of the factory.

All three judgments proceed on the basis that "place" in the sub-section means an area outside the factory, though within the close, curtilage or precincts forming the factory. LORD ALVERSTONE, C.J., proceeded on the basis that the "place" was a place apart from the factory. WILLS, J., treated it as a place entirely outside the factory area. KENNEDY, J., held that a person on the new sheet mill site could not be described as being in the factory, although he might have been on the premises which were within the curtilage and precincts of the factory. No doubt, on the facts of that case, there was sound ground for holding that the site of the new sheet mill had never formed part of the factory, and that would be sufficient to support the decision, but, for myself, I have great difficulty in view of the language of sub-s. (6) of s. 151 of the Act of 1937 in accepting the view that in order that an area of land should qualify to be treated as a place within that sub-section, it must first be shown that it has never been part of the particular factory. The wording of the definition in sub-s. (1) makes the word "factory" include not merely the area comprised by the walls of a building in which a manufacturing process is carried on, but the whole area comprised within the boundaries of, *e.g.*, the close of the premises in question. This appears to me to be borne out by the wording of sub-s. (6) where the close, curtilage or precincts are described as forming the factory. In my view, it follows that any area which is within the close, curtilage or precincts of any premises, which are a factory within the definition of that word in s. 151, is qualified to be treated as "a place" under sub-s. (6), provided it satisfies the other conditions of the sub-section as to user. I can find no ground for concluding that the factory area, to employ the phrase used in *Lewis v. Gilbertson & Co., Ltd.* (2), is less than co-terminus with the area comprised in the phrase "close, curtilage, or precincts" of the premises, otherwise it would be difficult to give any effect to the word "deemed" in the sub-section. The use of that word indicates that the place postulated is part of the factory area and would be treated as such for all purposes of the Act but for the conditions of the sub-section being fulfilled. If, however, those conditions are fulfilled, the place, though part of the factory area, is deemed not to be a factory, so that the Act ceases to be applicable to it while the conditions of the sub-section continue to be fulfilled. In the present case, the western land is physically separated from the eastern land, and, in my judgment, it constitutes a place within sub-s. (6). As regards "user," it is to be observed that the verb is employed in the present tense, "is used," and I take it to refer to the time of the accident. The word "solely" refers, I think, only to the exclusive nature of the user at the material time and imports no element of period or permanency of user. As regards the nature of the user, the contrast is between "purpose" and "process," and clearly, in this context, "purpose" has a much wider meaning than "process." At the time of the accident, the western land was being used for the purpose of reconstructing the gas holder, and, in my judgment, that was a purpose within the meaning of sub-s. (6). This view is supported by the reasoning of all three members of the court in *Lewis v. Gilbertson & Co., Ltd.* (2).

The result is that the western land is to be deemed not to have been a part of the gas company's factory at the time of the accident. This would be sufficient to dispose of the appeal, but, as the further question was argued whether or not the gas company were in occupation at the time of the accident, it will be desirable to deal with it. The relevance of this question is that, if the gas company were not in occupation at that time, they are not liable. The contract between the gas company and the contractors provided that the gas company should hand over the site to the contractors, and the evidence shows that this was done. All employees of the gas company were withdrawn from the site: the contractors erected offices; store sheds and mess huts and laid on a telephone. In fact, they took possession. It is true that under the contract the engineer

of the gas company or his deputy had a right to enter, but only for the purpose of inspecting the work in progress, but this very right appears to me to be inconsistent with continued occupation by the gas company. The word "occupier" is not defined in the Act. In *Ramsay v. Mackie* (1) (1904) (7 F. (Ct. of Sess.) 106, 109) LORD MACLAREN said :

"Occupier" plainly means the person who runs the factory or warehouse, who regulates the work that is done there.

On the facts, it appears to me that over the material period the gas company were not the occupiers of the western land.

I have already stated that, in my view, prior to the destruction of the gas holder, the western land formed part of the factory. If the true view had been that s. 151 (6) did not apply in this case, I should still have been of the opinion that as the gas company were not in occupation of the western land they were not liable to the plaintiff, although they remained in occupation of the rest of the factory. I can find nothing in the Act which would compel me to the conclusion that, if the owner of a factory ceases to be the occupier of part of that factory, he remains liable under the Act in respect of an accident occurring on that part while he is out of occupation, merely because he remains the occupier of the remainder of the factory. Neither the policy nor the language of the section compel one to such a conclusion, against which one's common sense would rebel. For those reasons I would allow the appeal.

Appeal of the gas company allowed and judgment entered for them, as defendants, to the plaintiff's claim, with costs in both courts; also, on their claim as against the contractors on the third party proceedings, laid in contract on their indemnity and in tort under the Act of 1935. With regard to the costs of the third party proceedings, the contractors were directed, as third parties, to pay to the gas company, their costs of such proceedings in both courts, whether laid in contract on their indemnity or in tort under the Act of 1935. The gas company's costs to be paid direct to them by the contractors.

Solicitors: *L. Bingham & Co.* (for the contractors); *Carpenters* (for the gas company); *Shaen, Roscoe & Co.* (for the plaintiff).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

• AMPHLETT v. DORRELL.

[COURT OF APPEAL (Tucker, Bucknill and Somervell, L.JJ.), July 27, 28, 30, 1948.]

Rent Restriction—Standard rent—Apportionment—Application by tenant of whole property—Property, as a whole, outside Rent Restrictions Acts—Property comprising principal dwelling-house and a lodge—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (3).

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3): "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive."

By a lease, dated July 31, 1946, the landlord let to the tenant property comprising a principal dwelling-house and a lodge, at a rent of £200 a year for 3 years, subject to a sub-tenancy of the lodge, granted by a previous tenant of the property, at a rent of £104 a year. There had never been a separate assessment for rating purposes of the two houses comprised in the lease. On an application by the tenant under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3), for an apportionment of the rateable value and standard rent of the premises between the principal dwelling-house and the lodge for the purpose of ascertaining whether the Rent Restrictions Acts applied to the property:—

HELD : since, as between landlord and tenant, the rent and the rateable value of the property comprised in the lease were already fixed by the lease and the entry in the rate book respectively at figures in excess of the limits prescribed by the Rent Restrictions Acts, it was not "necessary to apportion the rent . . . or the rateable value" under s. 12 (3) of the Act of 1920, and, even if an apportionment were made, it would not bring either of the houses comprised in the lease within the Acts since the rent and the rateable value of the whole demised premises would remain the sum of the two apportioned figures; s. 12 (3) was inapplicable where the tenant applying for apportionment of the separate component parts of premises was the tenant of the whole premises; and, accordingly, there was no jurisdiction to make an order for apportionment.

Rider v. Rollit (1920) (36 T.L.R. 687) and *Langford Property Co., Ltd. v. Goldrick* ([1948] 2 All E.R. 439), approved.

Upsons, Ltd. v. Herne ([1946] 2 All E.R. 309), distinguished.

[AS TO APPORTIONMENT OF RENT, see HALSBURY, Hailsham Edn., Vol. 20, p. 313, n; and FOR CASES, see DIGEST, Vol. 31, pp. 570-572, Nos. 7182-7198.]

Cases referred to :

- (1) *Rider v. Rollit*, (1920), 36 T.L.R. 687; 84 J.P. Jo. 267; 31 Digest 557, 7038.
- (2) *Upsons, Ltd. v. Herne*, [1946] 2 All E.R. 309; [1946] K.B. 591; 115 L.J.K.B. 433; 175 L.T. 350; 2nd Digest Supp.
- (3) *Langford Property Co., Ltd. v. Goldrick*, [1948] 2 All E.R. 439; *sub nom. Langford Property Co., Ltd. v. Goldrick*, [1948] W.N. 257.

APPEAL by the landlord from an order of His Honour JUDGE LANGMAN, at Worcester County Court, on Feb. 16, 1948, whereby, on an application by the tenant under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3), the county court judge apportioned the rateable value and standard rent of premises comprising a principal dwelling-house and a lodge, the whole property being held by the tenant under one lease. The landlord appealed from the order and the Court of Appeal now allowed the appeal. The facts appear in the judgment of TUCKER, L.J.

Michael Browne for the landlord.

Smallwood for the tenant.

Cur. adv. vult.

July 30. The following judgments were read.

TUCKER, L.J. : This is an appeal from a declaration made by His Honour JUDGE LANGMAN at Worcester County Court on Feb. 16, 1948, whereby he apportioned the rateable value and standard rent of certain premises at Worcester comprising a dwelling-house known as "The Cedars" and the lodge adjacent thereto. The declaration was made on the application of the tenant of the whole property who held it under a lease dated July 31, 1946, from the landlord to the tenant. I think it is desirable to read the actual declaration as drawn up :

On the application of the said Geoffrey James Dorrell and upon hearing Mr. T. Tempest Dinen of counsel for the said applicant and Mr. Michael Browne of counsel for the said respondent, this court for the purpose of ascertaining whether the above mentioned Acts [the Rent Restrictions Acts] apply to certain property situate at Worcester and known as "The Cedars" Henwick Road Worcester demised to the applicant by a lease dated July 31, 1946, and made between the respondent of the one part and the applicant of the other part and comprising the following premises namely : the dwelling-house known as "The Cedars" Henwick Road aforesaid and the lodge adjacent thereto, and for the purpose of determining the respective standard rents of the said premises doth pursuant to the above mentioned Acts (i) Declare that the rateable value of the said property on Apr. 1, 1939, shall be apportioned between the said premises as follows, namely, £63 to the said dwelling-house known as "The Cedars" Henwick Road aforesaid and £17 to the said lodge adjacent thereto. (ii) Declare that by reason of the foregoing declaration the above mentioned Acts apply to the said property and that the rent at which the said property was let on Sept. 1, 1939, shall be apportioned between the said premises as follows, namely, £70 to the said dwelling-house known as "The Cedars" Henwick Road aforesaid and £20 to the said lodge adjacent thereto . . .

Then followed an order as to costs. I draw attention to the words "for the purpose of ascertaining whether the above mentioned Acts apply to certain property."

The relevant facts and the point of law involved are conveniently stated in the judgment of the learned judge from which I quote. He said :

Mr. Geoffrey James Dorrell, as the lessee of "The Cedars," holds the premises under a lease dated July 31, 1946, made between himself and the respondent, Mrs. Amphlett. It is subject to a rent of £200 for 3 years. The property which is comprised in the lease is defined in sched. I to the lease which reads "All the property comprised in and demised by the head lease the principal house erected thereon being now known as 'The Cedars' together with lodge and outbuildings and gardens the whole being numbered 224 Henwick Road in the parish of St. Clement in the city of Worcester subject nevertheless to but with the benefit of a sub-tenancy of the lodge aforesaid granted to . . . Cornfield by the previous tenant of 'The Cedars' at the rent of £104 per annum." So, therefore, it is quite clear that from the terms of the lease itself two individual houses were being let, namely, "The Cedars" and the lodge which was subject to a sub-tenancy. The applicant now comes before the court and asks the court to apportion the rateable value of these premises which he holds under this lease. I cannot help commenting on the fact that one of the covenants in the lease under his hand and deed in which he entered was this, "not at any time during the term, to make any application for any division of the rateable assessment of the premises into more than one assessment as it is now made." In spite of that he comes to the court and asks the court to make this assessment. He has taken advantage of the Rent Acts. It is obviously made, of course, with the intention of benefiting himself, but if the Acts allow him to get an apportionment made by this court then he is entitled, to ask the court to act accordingly. There is one rateable value [*viz.*, £80] for the whole of these premises comprising both "The Cedars" itself and the lodge. There has never been a separate assessment of the two properties and under those circumstances the applicant comes here to ask the court to apportion the whole assessment between these two properties. Fortunately, the court is not troubled by any figures, but the point that is at issue is whether the applicant has any right to ask the court for this to be done.

The learned judge then read the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3) and said :

Since that Act was passed there have been many cases dealing with the words "dwelling-house to which this Act applies." It is obvious that they have to be read in accordance with the more recent decisions. In other words, sub-s. (3) must now be read as giving power to apportion even where the dwelling-house is on the face of it not within the Acts. The effect seems to be this, that, whether the property is *prima facie* one to which the Acts apply or not, the court has a duty to apportion either the rent, or if necessary, the rateable value. Now it is contended here in this case by [counsel for the landlord] that, in spite of the decisions which have been referred to, nevertheless the court has no jurisdiction to apportion, because the applicant had a tenancy of one undivided holding, at an entire rent, which comprised both "The Cedars" and the lodge, and that he cannot himself split up the holding and come to the court and ask the court to sub-divide the rent, or to apportion the rateable value in such a way as to entitle him to say that he comes within the Act.

The learned judge then referred to *Rider v. Rollitt* (1) and *Upsons, Ltd. v. Herne* (2), and proceeded :

It seems that the present position is that either the landlord or the tenant can come to the court, even when two properties are comprised in one letting, even when rent in the head lease is far outside the rent which would bring the house within the Act—that the landlord or tenant can come to this court and ask the court to make an apportionment. With regret I conclude that the applicant is entitled to have the apportionments made.

He then proceeded to make the apportionments to which I have already referred when reading the declaration, the figures with regard to which had been agreed.

The question turns on the proper construction of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3), which is as follows :

Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive.

This difficult sub-section has been the subject of numerous decisions in the courts, but no case has been cited to us in which the tenant of the whole comprising premises has ever claimed against his landlord to have an apportionment of its separate component parts. In all the cases the tenant applying for appor-

tionment has at the material time been a tenant of one of the component parts of a larger comprising whole. In my view, the short answer to the present problem is to be found in the words :

... Where ... it is necessary to apportion the rent ... or the rateable value ...

A In the present case it appears to me to be quite unnecessary to apportion either the rent or the rateable value of the whole property, because, as between the landlord and the tenant, they are already fixed—the rent by the terms of the lease and the rateable value by the entry in the rate book—at figures in excess of the limits prescribed by the Act of 1920, and even if an apportionment is made it will not result in bringing either “The Cedars” or the lodge within the Acts since the rent and rateable value of the whole demised premises will remain the sum of the two apportioned figures. This is the result of the decision in *Rider v. Rollit* (1) and also accords with the view recently expressed by BIRKETT, J., in *Langford Property Co., Ltd. v. Goldrich* (3).

B In *Rider v. Rollit* (1) the headnote is as follows :

Where there is one letting of two flats at one entire rent, the letting is not divisible so as to bring each of the flats within the limit of rent below which dwelling-houses are brought within the Increase of Rent and Mortgage Interest (War Restrictions) Acts.

LUSH, J., in giving judgment said (36 T.L.R. 687, 688) :

C This case raises a question of novelty and of some difficulty. The defendant is the tenant of two suites of bachelor chambers, under an agreement dated Apr. 16, 1918. He has been there a good many years. He first had the lower suite in 1904 and the upper suite he took, as he says, with the object (as the plaintiff knew) of sub-letting. In the 1912 agreement there was clearly a letting of the whole at one rent of £104. In 1918 the rent was raised to £130. There was an agreement not to under-let without the plaintiff's consent. At the present time the upper floor is vacant. *Prima facie* the Acts do not apply, for the rent of the two floors together considerably exceeds the limit mentioned in the Acts. The rateable value also exceeds the limit. But the defendant says that these are two separate dwelling-houses, each of which is below the limit, and that it is not a letting of one suite of rooms, but two lettings of two sets. I do not think that it is possible here to say that there were two separate lettings. It was one letting at one entire rent, which issues out of every part of the premises.

D In *Langford Property Co., Ltd. v. Goldrich* (3) the facts show that on Mar. 24, 1940, the valuation list in question reduced the rateable value of flat No. 13 from £98 to £54, and of flat No. 15 from £92 to £52, in each case retrospectively as from Apr. 1, 1939. BIRKETT, J., in dealing with these two flats, which had been let to the defendant by an agreement of July 1, 1941, at a rent of £300 per annum, increased by subsequent agreements to £525 per annum, held that the combination of the two flats did not constitute a separate dwelling-house, and he concluded his judgment ([1948] 2 All E.R. 443) :

F In these circumstances, I must give judgment for the landlords. I hold that this letting of the separated flats with the garage was not the letting of a dwelling-house as a separate dwelling to which the Act of Parliament applies. I further hold that, if the dwelling is to be regarded as a separate entity at the appropriate day, Apr. 1, 1939, the rateable value exceeded the sum of £100 ... There must be judgment for the landlords on the claim and counterclaim.

G These decisions, with which I respectfully agree, do not, in my view, in any way conflict with the decision of this court in *Upsons, Ltd. v. Herne* (2), where the apportionment was made in favour of the tenant of flat 2A, which was one of the component parts of the comprising property which consisted of flat 2A, flat 2B and a shop. This court decided that flat 2A was first let when it was let together with 2B and the shop in 1911, and not when it was first let separately in 1925. I can find nothing in the judgments to suggest that, if at the material date the tenant had held all three properties under a lease from the landlord, he could have obtained an apportionment of the entire rent between the different parts of the demised premises. In my view, s. 12 (3) of the Act of 1920 is wholly inapplicable to a case such as this and there was no jurisdiction in the county court to apportion on the application of the tenant of the whole comprising property. For these reasons, I think this appeal should be allowed and the declaration set aside.

H BUCKNILL, L.J. : I agree.

SOMERVELL, L.J. : In all the cases to which we were referred the tenant applicant was tenant of a dwelling-house forming part of the property covered by the assessment or rent which he was seeking to have apportioned, and was not tenant of the remainder. In such a case it was clearly necessary to apportion in order to discover the rateable value of that of which the applicant was tenant. The section also contemplates that the standard rent may be an apportioned amount of a larger rent covering other property. When this is so, it is necessary to apportion in order to discover the standard rent of the dwelling-house. The present case is quite different. The tenant here is and will remain during the period of his tenancy tenant of property which it is agreed is as a whole outside the Acts. It contains two houses, the big house and the lodge. He seeks, first, to have the rateable value apportioned between the big house and the lodge, but, as between him and his landlord, this seems to me irrelevant. This, of course, is a first step in order to get the court to fix standard rents of the two houses based on an apportionment of the rent payable on Sept. 1, 1939. He then claims that the rent which he has to pay for the whole property is the sum of these two standard rents as so fixed. The two rents so added together will come to the rent payable on Sept. 1, 1939. The result is plain. Although the property of which he took a lease was outside the Acts, he is claiming to be treated in the same way as if it were inside the Acts, and to pay no more than the rent payable on Sept. 1, 1939, with, of course, additions, if any, to the standard rent allowable under the provisions of the Acts. I can find no justification in the words of s. 12 (3) of the Act of 1920 for this procedure. Counsel for the tenant relied on the words "by either party." These words, I think, mean that in the normal case, such as those which have come before the courts, either landlord or tenant can apply. A landlord who was splitting up premises previously let as one dwelling-house into two or more dwelling-houses might wish to know the proportions in which the original rent should be apportioned.

Counsel also relied on the hardship which, he submitted, would arise if the sub-lessee of the lodge applied as against the tenant for an apportionment of rateable value which would, it seems, clearly bring the lodge within the Acts. He would then apply to have his standard rent based on an apportioned amount of the rent payable for the whole property on Sept. 1, 1939. This would be very much less than the £104 in the expectation of receiving which the tenant agreed to pay £200. Assuming that the sub-tenant would succeed in such an application, one answer to the argument is that, if a man becomes tenant of property part of which is sub-leased, he takes subject to any statutory rights the sub-tenant may have under the sub-leases or any Acts of Parliament. It is unnecessary to consider whether, if the sub-tenant succeeded in reducing his rent below the sum named in the lease with which we are concerned, the tenant would have any rights. If at the time when a lease was negotiated it was realised that sub-tenants might successfully claim to reduce their rents, an express provision could be inserted providing for a *pro tanto* reduction of the rent payable by the tenant.

The county court judge, I think, was wrong in regarding *Rider v. Rollit* (1) as overruled by later cases. That case was not an application for apportionment, but, if the learned county court judge was right, s. 12 (3) could be used to enable a tenant to effect what he was held unable to do in that case. Counsel for the tenant relied particularly on *Upsons, Ltd. v. Herne* (2). That case does not seem to me to throw any light on the present problem. It was a type of case contemplated by the section in which the tenant applicant was tenant of part only of the property covered by the rent which he was seeking to have apportioned. I agree that the appeal should be allowed.

Appeal allowed with costs here and in the county court on scale "A."

Solicitors: *Robbins, Olivey & Lake*, agents for *Curtler & Son*, Worcester (for the landlord); *Peacock & Goddard*, agents for *Hulme & Parry*, Worcester (for the tenant).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

THE BELLAMAN. THE AGOSTINO BERTANI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.),
July 15, 16, 29, 1948.]

Prize Law—Condemnation—Claims arising out of “purported exercise of belligerent rights” barred by peace treaty—Ships aground in port—Capture of port—Ships formally boarded and certificate of prize signed four years after armistice, but before signing of peace treaty—Naval Prize Act, 1864 (c. 25), s. 16.

The Treaty of Peace with Italy, by art. 76, provides : “ 1. Italy waives all claims of any description against the Allied and Associated Powers on behalf of the Italian government or Italian nationals arising directly out of the war or out of actions taken because of the existence of a state of war in Europe after Sept. 1, 1939, whether or not the Allied or Associated Power was at war with Italy at the time, including the following : (a) claims for losses or damages sustained as a consequence of acts of forces or authorities of Allied or Associated Powers ; (b) claims arising from the presence, operations or actions of forces or authorities of Allied or Associated Powers in Italian territory ; (c) claims with respect to the decrees or orders of Prize Courts of Allied or Associated Powers, Italy agreeing to accept as valid and binding all decrees and orders of such Prize Courts on or after Sept. 1, 1939, concerning Italian ships or Italian goods or the payment of costs ; (d) claims arising out of the exercise or purported exercise of belligerent rights. 2. The provisions of this article shall bar, completely and finally, all claims of the nature referred to herein, which will be henceforward extinguished, whoever may be the parties in interest . . . 5. The waiver of claims by Italy under para. 1 of this article includes any claims arising out of actions taken by any of the Allied and Associated Powers with respect to Italian ships between Sept. 1, 1939, and the coming into force of the present treaty, as well as any claims and debts arising out of the Conventions on Prisoners of War now in force.” It is provided by the Treaties of Peace (Italy, Rumania, Bulgaria, Hungary and Finland) Act, 1947, and the Treaty of Peace (Italy) Order, 1948, that, *inter alia*, art. 76 shall be and have effect as law.

The “Bellaman” and the “Agostino Bertani” were two Italian vessels which at all material times were lying aground in Tripoli harbour, having been sunk by Allied action while the port was in enemy hands. On Jan. 23, 1943, Tripoli was captured by British troops. On Sept. 3, 1943, the Italian armistice was signed, and it was admitted by the Crown that the right to capture Italian merchant vessels was precluded by the terms thereof, but not the right to render effectual in the Prize Court captures made before the armistice. In 1944, a standing order was issued by the Commander-in-Chief Mediterranean to the effect that such vessels as might be salvaged should be seized in prize. Nothing was done, however, in relation to the vessels until Feb. 3, 1947, when both were boarded by an officer of the Royal Navy, who hoisted the White Ensign in each and signed a certificate that each had been seized in prize that day. The Treaty of Peace with Italy was signed on Feb. 10, 1947, the writs in prize were issued on May 5, 1947, and on Sept. 15, 1947, the Treaty of Peace came into force. It was contended by the claimants that the Crown’s possession of the ships was wholly unlawful, the Crown had no rights in prize and did not even purport to exercise any rights as captors in prize or otherwise until any right they might have had in this respect had lapsed by the terms of the Italian armistice, that, consequently, art. 76 did not apply, and, therefore, the claimants were entitled to the release of their ships.

HELD : (i) the claims of the owners arose out of the “purported exercise of belligerent rights” within art. 76, which operated to bar those claims.

(ii) the failure for four years to comply with the Naval Prize Act, 1864, s. 16 (which imposes a duty to deliver up every ship taken as a prize to the marshal of the court forthwith) did not rebut the presumption that the vessels were seized when Tripoli was captured, and they were, therefore, condemnable as good and lawful prize.

[AS TO VALIDITY OF CAPTURE, see HALSBURY, Hailsham Edn., Vol. 26, pp. 216-225, paras. 489-516 ; and FOR CASES, see DIGEST, Vol. 37, pp. 589-596, Nos. 258-327.]

Cases referred to:

- (1) *The Bathori*, [1934] A.C. 91; 103 L.J.P. 25; 150 L.T. 221; Digest Supp.
- (2) *The Progress*, (1810), 1 Edw. 210; 39 Digest 346, 330.
- (3) *The Roumanian*, [1916] 1 A.C. 124; 85 L.J.P.C. 33; 114 L.T. 3; 1 Br. & Col. Pr. Cas. 552; *affg.* [1915] P. 26; 37 Digest 593, 291.
- (4) *The Edward and Mary*, (1801), 3 Ch. Rob. 305; 1 Eng. Pr. Cas. 312; 37 Digest 674, 1395.
- (5) *The Pellworm*, [1922] 1 A.C. 292; 91 L.J.P. 102; 126 L.T. 780; (1922), 3 Br. & Col. Pr. Cas. 1053; *varying*, [1920] P. 347; 37 Digest 590, 266.
- (6) *The Anichab*, [1919] P. 329; 89 L.J.P. 47; 122 L.T. 249; 3 Br. & Col. Pr. Cas. 611.
- (7) *H.M. Procurator in Egypt v. Deutsches Kohlen Depot Gesellschaft*, [1919] A.C. 291; 88 L.J.P.C. 37; 120 L.T. 102; 3 Br. & Col. Pr. Cas. 264; 37 Digest 590, 273.
- (8) *Stowel v. Zouch (Lord)*, (1569), 1 Plowd 353; 42 Digest 635, 378.

ACTION IN PRIZE.

In this action for condemnation as prize the owners claimed to have released to them the two ships of which the Crown sought condemnation. LORD MERRIMAN, P., held that the claims by the owners were barred by the Treaty of Peace with Italy, art. 76, and that the ships were condemnable. The facts appear in the judgment.

Le Quesne, K.C., and *Quintin Hogg* for the Crown.
Gething for the owners.

Curr. adv. vult.

July 29. LORD MERRIMAN, P., read the following judgment. In these cases the Crown seeks condemnation of two ships, the "Bellaman" and the "Agostino Bertani" which at all material times were lying aground in Tripoli Harbour, having with many others been sunk there by Allied action while the port was still in enemy hands. When Tripoli and its harbour were captured by British troops on Jan. 23, 1943, the "Bellaman" was found lying in 22ft. of water not far from the quay. A photograph shows that her deck was well above water level. The "Agostino Bertani" was lying about the middle of the harbour. No photograph of her was produced, nor was it stated in what depth of water she was lying, but she is a vessel of 6,000 tons gross and 3,609 tons net and it was not disputed that in the case of a vessel of this size a considerable part of her hull would be above water. Both vessels are being salvaged by salvage contractors under an arrangement by which the contractors undertake to clear the harbour and to pay an inclusive sum for the right to keep for their own account such ships as can be made seaworthy. Except possibly on the question of the amount recoverable in the event of the claimants succeeding in their claim, it is not suggested that either the details of this arrangement, or the fact that the Admiralty have put salvage in the hands of contractors instead of salvaging the vessels themselves, are material to the questions at issue in this case. Moreover, the Procurator General has undertaken to bring into court, if called on to do so, the proper value of any particular ship, so as to ensure that her owner will not be prejudiced if she is sold by the salvage contractors at less than her true value.

The claimants, who are Italian nationals, are the respective owners of the two vessels. The Crown puts the case in two ways: first, that by the Treaties of Peace (Italy, Rumania, Bulgaria, Hungary and Finland) Act, 1947, and the Treaty of Peace (Italy) Order, 1948, it is provided that, amongst others, art. 76 of the Treaty shall be and have effect as law; that this binds the Prize Court: see the "*Bathori*" (1), with the result that, whatever rights the claimants might have had are barred, completely and finally; and, therefore, they have no *locus standi* to prosecute their claims. Alternatively, the Crown says that, on the merits, the ships are condemnable as good and lawful prize. The claimants, on the other hand, argue that the Crown's possession of the ships is wholly unlawful, that the Crown has no rights in prize at all, and did not even purport to exercise any rights as captors in prize, or otherwise, until any right they might have had in this respect had lapsed by the terms of the Italian armistice and, consequently, that art. 76 of the treaty had no application and they are entitled to the release of the ships *ex debito justitiæ*.

The material parts of art. 76 of the treaty are as follows:

1. Italy waives all claims of any description against the Allied and Associated Powers on behalf of the Italian government or Italian nationals arising directly out of

the war or out of actions taken because of the existence of a state of war in Europe after Sept. 1, 1939, whether or not the Allied or Associated Power was at war with Italy at the time, including the following: (a) claims for losses or damages sustained as a consequence of acts of forces or authorities of Allied or Associated Powers; (b) claims arising from the presence, operations or actions of forces or authorities of Allied or Associated Powers in Italian territory; (c) claims with respect to the decrees or orders of Prize Courts of Allied or Associated Powers, Italy agreeing to accept as valid and binding all decrees and orders of such Prize Courts on or after Sept. 1, 1939, concerning Italian ships or Italian goods or the payment of costs; (d) claims arising out of the exercise or purported exercise of belligerent rights. 2. The provisions of this article shall bar, completely and finally, all claims of the nature referred to herein, which will be henceforward extinguished, whoever may be the parties in interest . . . 5. The waiver of claims by Italy under para. 1 of this article includes any claims arising out of actions taken by any of the Allied and Associated Powers with respect to Italian ships between Sept. 1, 1939, and the coming into force of the present treaty as well as any claims and debts arising out of the Conventions on Prisoners of War now in force.

In the "*Bathori*" (1), the vessel, in spite of the fact that she was sailing under a safe conduct, had been captured and sunk by the Royal Navy in September, 1914, and the question was whether her owners, a company carrying on business at Fiume, a Hungarian port, had the right to claim in prize for her loss under the terms of the Treaty of Trianon. Under annex III to arts. 163 and 169 of the treaty, the Hungarian government agreed on behalf of themselves, and so as to bind all other persons' interest, to waive all claims of any description against the allied and associated governments and their nationals in respect of the detention, employment, loss or damage of any Hungarian ships or boats, and by annex II to art. 232 it was provided:

No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or department of the government of such a power by Hungary or by any Hungarian national or by or on behalf of any national of the former Kingdom of Hungary wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war.

By an Order in Council, the above provisions of the treaty were to have full force and effect as law, but, because Fiume had been recognised as an independent state before the Treaty of Trianon came into force, the difficult question arose whether the treaty applied to the claim at all. No such issue, of course, arises in the present case. Delivering the advice of the Privy Council, LORD ATKIN said ([1934] A.C. 97):

Whether the plaintiffs were or were not Hungarian nationals at the effective date of the treaty, their Lordships have come to the conclusion that the clause in question plainly was intended to cover them . . . This, however, determines only the question of construction. If the treaty operated by international law only, the tribunal in Prize might well have had to determine how far Hungary's attempt to affect the rights of ex-nationals could be treated as effective. But for an English court, whether in Prize or not, this question is precluded by the terms of the Treaty of Peace (Hungary) Act, 1921. The Orders in Council made under it are to have effect as if enacted in the Act. The Order provides that the scheduled sections of the treaty are to have full force and effect as law. If, therefore, the clause in question bears the construction which has already been imputed to it, that construction must be enforced in British courts as law. It follows that the claim of the plaintiffs is barred by the clause.

The terms of art. 76 are not identical with the relevant clauses of the Treaty of Trianon, but I am unable to find any distinction in principle. Manifestly, therefore, if art. 76 applies, there is an end of the matter so far as the claimants are concerned. To see whether or not it applies, it is necessary to examine the course of events. It is admitted that, apart from the capture of the port itself, no overt act was done, at the time, in respect of either ship to denote that she had been seized in prize. On Sept. 3, 1943, an armistice between Italy and the Allies was signed between Marshal Badoglio and General Eisenhower by their respective staff officers, and on Sept. 29 Marshal Badoglio and General Eisenhower signed additional conditions headed "Instrument of Surrender of Italy." I do not think it is necessary to refer to the terms of these instruments in detail or to examine such authority as is to be found in text-books on international law regarding the right to capture enemy merchant vessels during an armistice, inasmuch as it was admitted on behalf of the Crown that the right to capture Italian merchant vessels was precluded by the terms of this armistice, but this admission expressly excepted the right to take such

incidental steps as might be necessary to render effectual in the Prize Court such captures as had been made before the conclusion of the armistice. Nor did the claimants contend that the armistice would prevent the Crown from proceeding to obtain condemnation of ships already seized. Their contention was that no attention was paid to these or any other ships lying sunk in the harbour, that seizure in prize was never contemplated, at any rate until long afterwards, and that, in effect, the ships were only regarded as obstructions to the harbour to be cleared away as soon as possible. But it is to be observed that in pursuance of instructions received from the Admiralty in November, 1943, and February, 1944, the Commander-in-Chief Mediterranean issued Mediterranean Shore Standing Order No. 9, which stated the Admiralty policy regarding the salvage, amongst other things, of ex-Italian merchant vessels lying in Libyan waters, in the following terms :

Such vessels [as] may be salvaged, or any gear, equipment or scrap which may be recovered therefrom, should be seized in prize and placed in the custody of the Admiralty Marshal's substitute for the area. While it is possible for the Admiralty to enter into contracts for the salvage of such ships, gear, etc., it is not possible to sell them without the authority of the Admiralty Marshal, who in turn must obtain an order from the court. The Custodian of Enemy Property is not concerned.

I am not informed of the precise date when this Order was issued, but I understand that it was some time early in 1944. In the light of this statement of policy which appears to regard vessels such as the two in question as being already subject to the jurisdiction of the Prize Court, I am unable to accept the contention that the steps I am about to mention were the result of a belated afterthought unconnected with any rights which the Crown might have acquired before the armistice.

Nothing was done, however, in relation to these vessels until, on Feb. 3, 1947, both were boarded by a lieutenant of the Royal Navy, who hoisted the White Ensign in each of them and signed a certificate that the vessel had been seized in prize that day. It is evident that this action was taken in view of the impending signature of the Treaty of Peace with Italy. This treaty was signed on Feb. 10, 1947. On Apr. 29 the Treaties of Peace (Italy, Rumania, Bulgaria, Hungary and Finland) Act, 1947, was passed, but, as is admitted, the treaty with Italy, under art. 90 thereof, only came into force on Sept. 15, 1947. Meanwhile, on May 5, 1947, writs in prize were issued in respect of both vessels. Thus, when art. 76 became law, it is indisputable that both vessels had been placed under the jurisdiction of the Prize Court by the Crown, and that each is now the subject of a claim in prize by an Italian national, though appearances were not in fact entered until Jan. 7 and June 9, 1948, respectively. It may be that it is unnecessary to say more ; but in view of the argument of counsel for the claimants that claimants in prize are in the position of defendants rather than of plaintiffs, and therefore that prize procedure and nomenclature should not be regarded as decisive, I prefer to base my judgment on broader considerations.

The "Progress" (2) was a case of prize salvage in respect of ships recaptured from the French at Oporto by the Allied army under Lord Wellington. To found the claim it was obviously necessary to show, first, that the enemy had captured the ships, and, secondly, that the captor had recovered the property. Dealing with these points, SIR W. SCOTT said (Edw. 210, 211) :

I think I may consider it as decided in fact, that the French had captured these ships, and were actually in possession of them ; it is not necessary to show that they had taken formal possession of each individual ship, because they had possession of the port itself ; and the taking of that which contained the vessels is in effect the same as taking bodily possession of the ships themselves. It is likewise clear in point of principle, that it is not necessary that it should be primarily the intention of the captor to recover the property.

In my opinion, the use of the word " likewise " in the last sentence is significant. This case was approved in *The Roumanian* (3). In *The Edward and Mary* (4), another case of prize salvage, SIR W. SCOTT, dealing with the question of capture, said (3 Ch. Rob. 306) :

... in this case the " Arethusa " came up for the very purpose of taking this French captor, if he is to be so considered, and actually took him ; and it is owing to this act of the " Arethusa " that this vessel was rescued from his grasp. The master, I must observe, has given an improper deposition, and very ill according with the entries in

his log-book. By that it appears that the French vessel brought him to, and declared herself a French privateer, and ordered him to lie to; but owing to the boisterous state of the weather, she did not send a man on board. I can by no means agree to what has been advanced in argument, that it was on this account *no capture*. The sending of a prize master on board is a very natural overt act of possession, but by no means essential to constitute a capture. If the merchantman was obliged to lie to and obey the direction of the French lugger, and await her further orders, she was completely under the dominion of the enemy; there was no ability to resist, and no prospect of escape.

Although he was unable to make an award of salvage under the terms of the Act of Parliament, he held (*ibid.*, 308) that salvage was recoverable under the general maritime law. This case was followed by the Privy Council in "*The Pellworm*" (5).

In "*The Anichab*" (6) LORD STERNDAL, P., dealing with a number of tugs, lighters and other craft and material belonging to a German shipping company in two ports of German West Africa which had been occupied by the Union forces, said (3 Br. & Col. Pr. Cas. 615):

When the Union forces took possession of these ports, I am satisfied that they also took possession of all these craft, which were then either afloat or beached above or below the high water line, and that, therefore, there was a seizure at that time of these craft.

In *H.M. Procurator in Egypt v. Deutsches Kohlen Depot Gesellschaft* (7), the Privy Council went behind the record of the Prize Court of Alexandria to examine whether there had in fact been a valid seizure of certain enemy tugs and lighters employed in coaling ships in the Suez Canal. In the event, their Lordships held that, although physical possession had not been taken of the individual craft, there had been a submission to treat the whole fleet as seized by consent, and that this sufficed, although the captors gave no further attention to the matter. I am not called on to consider any question concerning the limits of the port, for both vessels were clearly within the narrowest possible limits which could be drawn. Nor need I consider whether vessels lying in deep water, or hulks sunk to block the harbour entrance, can fairly be reckoned as vessels captured with the port. Such questions can be dealt with when they arise. Neither of these vessels was in any sense a total loss. The standing order already quoted shows that the salvage of vessels in their situation was contemplated, at least as early as 1944, on the basis that the salvage was the concern of the Admiralty Marshal. When, therefore, the White Ensign was hoisted in anticipation of the Peace Treaty, and prize writs were issued before the Treaty came into force, I find it impossible, whether the vessels were actually condemnable in prize or not, to hold otherwise than that these are claims arising, at the least, out of the "purported exercise of belligerent rights." In so holding I do not rely merely on the technical position of the claimants under the Prize Court Rules, though this would, doubtless, be present to the minds of the framers of art. 76. In *TERMES DE LA LEY*, adopting a definition by LORD DYER quoted in *Stowell v. Lord Zouch* (8), a "claim" is described as "a challenge by any man of the property or ownership of a thing which he hath not in possession but is withholden from him wrongfully." In the *OXFORD ENGLISH DICTIONARY* the primary meaning of the word is given as "a demand for something as due: an assertion of a right to do something." Seeing that art. 76 embraces "claims of any description," I have no doubt that these claims are included in its terms. I, therefore, hold that the claimants' right to sue is barred and their claims must be dismissed.

The disposal of the claims, however, does not necessarily involve the condemnation of the vessels in prize, whatever may be the rights of the Crown under the peace treaty. The right to condemnation depends on there having been a lawful seizure, *i.e.*, a seizure before the conclusion of the armistice. I have already indicated my opinion that there is a presumption that the vessels were seized when the port was captured, but, in considering whether there was an effectual seizure, the requirements of the Naval Prize Act, 1864, s. 16, must be borne in mind. By that section:

Every ship taken as prize, and brought into port within the jurisdiction of a prize court, shall forthwith, and without bulk broken, be delivered up to the marshal of the court. If there is no such marshal, then the ship shall be in like manner delivered up to the principal officer of customs at the port. The ship shall remain in the custody of the marshal, or of such officer, subject to the orders of the court. ("Nothing in this section shall apply to ships of war taken as prize.")

This duty, which is peremptory, could have been performed without difficulty in this case. Yet, as has appeared, nothing was done for four years by the captors to put themselves in order with the Prize Court. This laxity in the performance of a cardinal duty might well suggest that these vessels had never in fact been seized before 1947. On the other hand, as the Standing Order shows, the Admiralty were fully alive to their duty, but it is in connection with possible salvage that emphasis is laid on the necessity of placing vessels seized in prize in the custody of the Admiralty Marshal, and it may well be that those on the spot assumed that no action was required until the time came to undertake salvage operations. After all, there was no possibility of these vessels, aground as they were, escaping at any time, nor, short of a recapture of the port by the Germans, was there any prospect of a change in the situation after the surrender of Italy. In these circumstances I think that to draw from the failure to carry out the statutory duties of a captor the inference that no seizure had in fact taken place would be to ignore the realities of the situation. I find, therefore, that these vessels were seized when the port of Tripoli was captured, and hold that they are condemnable as good and lawful prize.

Decree of condemnation. No order as to costs.

Solicitors: *The Treasury Solicitor; Crawley & de Rega* (for the owners).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

WOODBURY v. WOODBURY.

[COURT OF APPEAL (Tucker, Bucknill and Somervell, L.JJ.), July 14, 15, 16, 30, 1948.]

Divorce—Connivance—Consideration of conduct as a whole—Corrupt intention—Letters written by distraught wife amounting to licence to continue adulterous association.

In 1940 the wife discovered that her husband had been carrying on an adulterous association with their child's governess and, while in a nervous, hysterical state as the result of the shock of the discovery, wrote to the husband and to his mistress letters which, in their literal meaning and when divorced from the circumstances in which they were written, amounted to a licence to the husband to continue his adulterous intercourse, which, in fact, the husband did. On a petition for divorce on the grounds of the husband's adultery, adultery was admitted, but it was contended on behalf of the husband that the wife had connived at his adultery by reason of the letters which she wrote on first discovering the association.

HELD: the court should not hold the wife guilty of connivance on the letters written by her while in a distraught and hysterical condition as a result of the discovery of the adultery, but her conduct as a whole over a reasonable period of time should be considered, and on this basis there was no evidence that the wife willingly consented at any future adultery.

Dicta of LORD MERRIMAN, P., in *Churchman v. Churchman*, [1945] 2 All E.R. 190, 194, 195, *applied*.

Per BUCKNILL, L.J.: Construing "corrupt intention" as meaning that she shows by her conduct that she willingly consents to the continuance of the adultery, a wife who, on discovering that her husband is carrying on an adulterous association with a woman, behaves with such corrupt intention in such a way as to promote or encourage the continuance of the adultery, is guilty of connivance, but, if she shows by her conduct that she greatly desires the adulterous association to cease, communicates the desire both to the husband and his mistress, and takes the best steps available and known to her to stop it, she is not guilty of connivance, although at the time she takes no active steps to leave the husband or divorce him and even suggests to the husband that he continue the association.

[AS TO CONNIVANCE AS A BAR TO RELIEF, see HALSBURY, Hailsham Edn., Vol. 10, pp. 674-676, paras. 995-999; and FOR CASES, see DIGEST, Vol. 27, pp. 326-332, Nos. 3052-3122.]

Case referred to :

(1) *Churchman v. Churchman*, [1945] 2 All E.R. 190 ; [1945] P. 44 ; 114 L.J.P. 17 ; 173 L.T. 108 ; 2nd Digest Supp.

APPEAL by the husband from an order of WALLINGTON, J., dated Nov. 27, 1947, granting to the wife a decree *nisi* on the ground of the husband's adultery. The Court of Appeal affirmed the finding of the learned judge that the wife had not been guilty of connivance. The facts appear in the judgments of BUCKNILL and SOMERVELL, L.JJ.

Fairweather for the husband.

Arthian Davies, K.C., and *Roland Adams* for the wife.

Cur. adv. vult.

July 30. TUCKER, L.J. : I will ask BUCKNILL, L.J., and SOMERVELL, L.J., to read their judgments first.

BUCKNILL, L.J. : This is an appeal from a judgment of WALLINGTON, J., granting a decree *nisi* to the wife on the ground of her husband's adultery with a woman named Sylvia Macintosh. The adultery is admitted, and the only point is whether the wife connived at the adultery. The trial judge held that there had been no connivance.

The parties were married in 1929, when the wife was 23, and her husband about 39 years old. One child, James, was born in 1931. In 1936 a Miss Macintosh was employed as governess to James, and the husband subsequently started to commit adultery with her, with the result that in 1939 she had a child who died shortly afterwards. The husband and the governess concealed their adulterous intercourse from the wife. When war broke out in 1939 the husband, who was living in London with his wife and James, sent Miss Macintosh to Ramsgate with James for his greater safety. In February, 1940, the wife, in consequence of an anonymous letter, went down to Ramsgate and asked the governess what were her true relations with her husband. Miss Macintosh confessed to the adultery. This was a great shock to the wife. She took James away from Miss Macintosh and brought him back to London with her. The wife also spoke to her husband about the adultery and begged him to give it up, but he refused. In consequence of this distressing shock the wife became ill, and about March consulted a Dr. Blake, who was called as a witness and said that she was at that time "very nervous and from the mental point of view in a very bad way, in a hysterical highly nervous tearful state." He said that she was not certifiably insane, but she was hardly responsible for her actions at that time. It was in these circumstances that the wife wrote certain letters to her husband and to Miss Macintosh to which I shall have to refer in detail, because it is argued on behalf of the husband that they amounted to connivance at the adultery. On May 2 the wife went into hospital for an operation in connection with her nose and remained there until May 27. Whilst she was there the husband, against the wife's wishes, took James back to Miss Macintosh at Ramsgate and continued his adulterous association with her. After the wife came out of hospital she got James back again and took him with her to stay with some friends in Wiltshire, and she also instructed her solicitors to start divorce proceedings against her husband. The wife then discontinued these proceedings because she was still fond of her husband and did not wish the marriage to be broken up, and she wrote to her husband and asked him to meet her in London. They met, and the wife then told the husband that he must choose between a divorce or a complete reconciliation with her, in which case she suggested they should live together again in the hope that she might conceive another child by him. At this time it was obvious that there were likely to be heavy bomb attacks on England and the husband and wife agreed that she should take James to America, where it was hoped she might give birth to another child. If the husband refused to be reconciled and to give up his mistress, then the wife said she would proceed with the divorce. The husband elected for the reconciliation, but did not tell his wife that Miss Macintosh was again pregnant by him. She, in fact, gave birth to a child in the following December. In pursuance of this arrangement the wife came to London on several occasions during the next few weeks and stayed with the husband and intercourse took place between them. On July 20 the wife and James and the husband went up to Liverpool where he stayed another two nights with her, and

she and James then set sail for the United States. In the following month the husband rejoined the Army. The wife stayed in America until October, 1947.

On Apr. 3, 1947, the wife filed this petition asking for a divorce on the ground of her husband's adultery with Miss Macintosh in 1940, 1941 and 1947. Adultery in 1940 and in 1947 was formally proved by inquiry agents. At the trial the husband did not go into the witness box and no evidence was called on his behalf. It was argued on behalf of the husband that the wife connived at the husband's adultery, not only by reason of the letters which she wrote to her husband in 1940, but also because, so it was said, she must have known that the husband would go on living with Miss Macintosh after his wife went to America. It was contended that the wife must have known of that probability and nevertheless continued to make her husband an allowance.

I must now refer to the letters which the wife wrote shortly after she learned about her husband's adultery, to him, or to Miss Macintosh. I do not propose to set them out in full. The learned judge in his judgment commented on the circumstances in which they were written as follows, and counsel for the husband did not criticise the statement :

The result of the statements made by the wife in regard to those letters—all of which I accept as being true, because I am satisfied that she was a credible witness—is that they satisfy me that in writing the things that she did write, including the letter on which reliance is placed by the husband, she was using every possible endeavour to induce her husband to give up this association—not to countenance, but to indicate the strongest possible objection to, the adultery that she had discovered was going on, and for some time after her first discovery of the horrible state of things she really was at her wits' end and was beside herself, and in the condition that the news produced on her she was trying to visualise the present and the future. She was trying to do the best for her husband and the boy and she was struggling, in every way she could conceive it possible to make a struggle, to induce this woman not to continue, but to discontinue, the adultery with her husband. I cannot imagine any more that this wife, in these particular circumstances, could have done to indicate her abhorrence of what her husband was doing in complete disregard of the marriage and in complete disregard of this woman's peace of mind . . . I am satisfied that her husband was bringing to bear upon her, cruelly, the greatest possible pressure at this time in order to appeal to her not only to consent to his adultery but also to consent to the boy remaining with the adulteress.

The high water mark of the husband's charge of connivance, if such a simile is suitable for such a case, is reached in two letters, written on Mar. 8, 1940, by the wife, one to the woman and the other to the husband. I will read the first part of the letter to Miss Macintosh :

Dear Sylvia, After a literally sleepless night and a long talk with my beloved husband I want to be big about it—he needs you as a lover and friend quite apart from his fondness for me, for whom he no longer feels any desire in the way in which you gratify him—so please go ahead, if you wish as friend and lover—it will not hurt me after all I have suffered but I cannot give you James as well—that situation is vile and you have lived this vileness for three years without your Scotch conscience forcing you to give up an indecent situation, but now you know that I know, you cannot bear it any longer, of this I am certain. James must become my son and you must not share him with my husband. Share everything else but not my legal heir and my dearly beloved only son. Your goodness to the boy has been perfection but that you could combine the roles was very far from God-like. I leave you the half which appeals to you most, the moral aspect of the whole affair is for God to judge and not for me to comment on.

The second letter was written by the wife to the husband and was as follows :

Terms for a peaceful settlement. (1) You share your son with his mother from this day on. (2) You continue with Sylvia as her friend and lover. (3) Is it (*sic*) clear that you can still have both James and Sylvia, but on different sides of your life, cleanly and happily, without agony to your son's mother. At last and for the last time I will not budge. Your wife. Show to Sylvia please.

Counsel for the husband argued that these letters amounted to a licence to the husband to continue his adulterous association with Miss Macintosh. They were certainly not intended as such by the wife, although they may be so regarded in their literal meaning and when divorced from the circumstances in which they were written.

The question then arises whether in these circumstances the wife was in law guilty of connivance at her husband's adultery. In so far as it is a question of fact, the learned judge has decided that the wife did not connive. On this aspect

of the case two questions in particular arise : (1) What are the circumstances in which a wife, who discovers that her husband is carrying on an adulterous intercourse, is guilty of connivance if he continues the adulterous intercourse ? (2) How far is the motive of the wife material, when considering her conduct towards her husband, which may appear to tolerate the continuance of adulterous intercourse ? As regards the first point, LORD MERRIMAN, P., when he delivered the judgment of the Court of Appeal in *Churchman v. Churchman* (1) said ([1945] 2 All E.R. 190, 194) :

The judge did not deal expressly with the question whether he regarded the connivance at the continuance of the adultery as amounting by ratification to connivance at the earlier adultery. It would seem that he regarded connivance at any stage of the adultery charged as fatal. The point is of importance because it is of the essence of connivance that it precedes the event and, generally speaking, the material event is the inception of the adultery and not its repetition, although the facts may be such that connivance at the continuance of an adulterous association shows that the husband must be taken to have connived at it from the first.

In the present case, once the adulterous intercourse had started without any fault on the part of the wife, her position, when she did discover it, was very difficult. If she, with a corrupt intention, then behaved in such a way as to promote or encourage the continuance of the adultery, to quote the words used by LORD MERRIMAN, P., in *Churchman v. Churchman* (1) in another part of his judgment (*ibid.*, 195), I think she would be guilty of connivance, but, in my opinion, " corrupt intention " would mean in this case that the wife showed by her conduct that she willingly consented to the continuance of the adultery. If she showed by her conduct that she greatly desired it to cease, and communicated the desire both to her husband and his mistress, and took the best steps available to her, as she thought, to stop it, I do not think she was guilty of connivance, although at the time she took no active steps to leave her husband or to divorce him and even suggested to him " to continue with Sylvia as her friend and lover." The principle which underlies the doctrine of connivance, that a spouse must come into court with clean hands, and the maxim *volenti non fit injuria*, seem to me inapplicable to such a case as this.

In my opinion, therefore, the letters written by the wife to her husband and Miss Macintosh after she discovered their adulterous intercourse did not amount to connivance at the husband's adultery during the few months in 1940 between the date of the discovery and the date when the wife forgave her husband and started to have marital relations with him again, on the assumption that the husband was not going to continue to commit adultery with Miss Macintosh.

It was argued before us that, assuming the wife did not connive at the husband's adultery in 1940, she nevertheless connived at his subsequent adultery after she went to America. It was suggested that this adultery, in fact, persisted up to 1947 when the wife started her petition, and that the wife must have known of it, and, by continuing to send her husband an allowance, encouraged or promoted it. In my view, there was no evidence that the wife knew of this further adultery. On this point counsel for the husband asked permission of the court to put in further letters from the wife to the husband during this period, but we refused permission. To do so might have involved a new trial. The husband gave no reasonable explanation why he had not produced the letters at the original hearing. They were in his possession then and he could have done so without difficulty. There was nothing in the letters produced at the trial by the husband from the time when the wife left England until 1947 to show that she knew that the adultery was continuing, and there was nothing in the husband's letters, which the wife produced, to indicate that he was committing adultery, and the husband did not go into the witness box to say that he told his wife that he was committing adultery with Miss Macintosh or that his wife knew about it. I, therefore, think that there is no evidence that the wife connived at any future adultery, which ended, so far as she knew, with the reconciliation in 1940, until she caused inquiries to be made through her solicitors in 1947. In my judgment, the wife rightly proved to the satisfaction of WALINGTON, J., that she has not at any time connived at her husband's adultery, and this appeal should be dismissed.

SOMERVELL, L.J. : The parties were married in 1929. In 1931 a boy was born, James. In 1936 Miss Macintosh, the woman named, was engaged as governess to the boy. It is plain that the wife formed a very high opinion of Miss Macintosh as governess and that they became personal friends. The wife was in America from the end of 1938 to March, 1939. When she returned she found to her surprise and regret that Miss Macintosh had left and the boy sent to a day school. In the summer of 1939 the husband and the wife had their summer holiday at Deauville and lived together as man and wife. They returned on the outbreak of war. The wife was naturally worried about the boy and the possibility of air raids and was delighted when the husband told her that he had arranged for Miss Macintosh to come back and look after the boy in a cottage which he had taken for them at Ramsgate. In February, 1940, the wife received an anonymous letter telling her that the husband had spent a summer at Dieppe with Miss Macintosh, at a time when the wife was away. This was a terrible shock to her. The husband at first denied the allegation. The wife went to Ramsgate to see Miss Macintosh, who told her that she had been the husband's mistress since 1937. She also said she knew it was very wrong. The wife was convinced that Miss Macintosh was deeply in love with the husband.

It is, I think, difficult to exaggerate the horror which the wife felt at this disclosure. She was deeply in love with her husband. That he should have carried on this adulterous association in the home with the governess to whom she was attached and whom she trusted implicitly, and that her son should have been at Ramsgate with his father and his mistress was more than could be borne. In her own words : " I was in a state of grief and misery beyond any description and memory of it." She brought the boy back with her to London. She had a hysterical conversation with her husband. She remembered that she begged him not to leave her. She believed that she could break up the association. At a date shortly after this she wrote a letter to her husband in which she is contemplating taking her life. We now come to the documents on which the charge of connivance is based. The husband had told the wife that he would not give up Miss Macintosh sexually. He seemed to see " no sin whatever in it." In the first letter relied on from the wife to Miss Macintosh she is urging her to go away as " the only honourable thing." The wife clearly took the view that her best chance was to appeal to Miss Macintosh. There is, I think, no element of connivance in this letter. The documents which raise the issue are two letters to Miss Macintosh of Mar. 8 and 10, 1940, and an undated document headed " Terms for a peaceful settlement." These documents suggested an arrangement which, if persisted in and acted on by the three parties concerned, would, in my opinion, have amounted to connivance. The husband was to continue with Miss Macintosh as her friend and lover ; the boy was never to be with them ; the wife was prepared to live with the husband as his friend.

The first point that is clear is that this suggestion was never accepted or acted on by the parties to whom it was made. The wife seems to have been unaware of her legal rights and clearly believed that she must somehow get the husband to agree not to take the boy with him when he went to commit adultery with Miss Macintosh. To secure this was the main point of the suggestion. Very shortly after this the wife had to go into hospital for an operation. The husband at once takes the boy with him to the cottage at Ramsgate where he stays with Miss Macintosh. The suggestion, therefore, was not accepted. It is plain that the husband was determined to continue sexual intercourse with Miss Macintosh, if she was willing, and the suggestion in no way contributed to his adultery. So far as Miss Macintosh was concerned, there is evidence in a letter she wrote later, on June 10, when the wife was considering divorce proceedings, that the wife's general attitude including this, if you will, dishonourably generous suggestion had made Miss Macintosh angry with the husband for bringing the boy. It is possible that in a half conscious way the wife put the suggestion forward hoping that it might bring home to Miss Macintosh the misery she was inflicting, and lead her to give up the husband. On May 1 the wife writes to the husband hoping that he will not continue " this crucifixion indefinitely," and not sacrifice all for sake of sexual relationship. On June 7 she writes to Miss Macintosh making a last appeal to her to give up the husband - if not, divorce proceedings will be taken. " The present conduct is wrong and damaging to all three souls. It must not continue." " If you do not give him up, I shall never see him again."

"It must be a clean break, one way or the other." All trace of connivance had disappeared.

Before considering the mental condition of the wife during these weeks the question may be put in this way. A wife, desperately anxious to get her husband back and away from his mistress, is convinced that at the moment anyhow this is hopeless. She says in effect: "I will connive if you will not take our son to your mistress." No attention is paid to the suggestion and a few weeks later she realises this is an impossible and wrong idea altogether. That the wife throughout this time was in a distraught and hysterical condition is clear from the letters themselves. The first letter in which the suggestion appears begins: "After a literally sleepless night." In her evidence she said she did not remember writing the memorandum. It was produced by the husband. She did not remember what she had done with it. "I must obviously have given it to my husband." "My grief and mental stress were so grave it had the still further effect of undermining my health, which had not been very good." On May 1 she had to go into hospital for an operation. "I began to pull myself together with prayer and thought." In cross-examination she said to the learned judge: "May I say again everything I wrote in that period was written in the most appalling distress, and that I would not stand by now." A doctor gave evidence and said, speaking of this time, that she was very nervous and "from the mental point of view she was in a very bad way . . . in a hysterical and tearful, highly nervous state . . . on one occasion she sobbed for a quarter of an hour without ceasing . . . she is not certifiably insane, of course . . . but I would say she was hardly responsible for her actions at all, at that time."

In the judgment of the court delivered by LORD MERRIMAN, P., in *Churchman v. Churchman* (1) ([1945] 2 All E.R. 190, 195) he says:

Much of the difficulty in dealing with the question of connivance arises from the fact that in the past judges have gone beyond the facts of the particular case in an attempt to lay down general principles of wider application. In our opinion it is of the utmost importance to bear in mind that the issue is whether on the facts of the particular case the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery . . .

I shall endeavour not to add to the difficulty referred to in the first sentence of this passage. The second sentence contains a concise definition of the essentials of connivance. Bearing this in mind and other statements of the law in cases cited to us and in other cases which I have considered, it might be sufficient to say I hold that the wife has satisfied me that she was not guilty of connivance. The facts which have led me to this conclusion are probably sufficiently apparent. Where a petitioner is in a distraught and hysterical condition as a result of the discovery of adultery I think he or she is entitled to have his or her conduct considered as a whole over a reasonable period of time. It would, therefore, in my opinion, be wrong to hold the wife guilty of connivance on the letters in March considered in isolation. She is entitled to be judged in the light of her initial reactions and the attitude she took up when she recovered from her operation. If it could be shown that, in spite of her condition, she had acted in a way which had, in fact, promoted adultery which would not otherwise have taken place, a question would arise which does not arise here. A case like the present where the wife on discovering the adultery does her utmost to stop it, where the conduct relied on is after she has realised that this is at the moment hopeless, and is against a background of hope that the husband will ultimately return—such a case is a long way from what I may call the primary conception of connivance. I am, however, not suggesting that as a matter of principle such facts might not be consistent with connivance. This is, I think, a good example of a case which turns on its own particular facts. I have not thought it necessary to set out the documents in full as they are to be found in the learned judge's judgment. Although the main argument on this part of the case is based on documents, the character and credibility of the wife is an important element and I would naturally have hesitated to differ from the learned judge who saw her examined and cross-examined. I agree with his conclusion and as will be seen for much the same reasons.

I have little which I wish to add to what BUCKNILL, L.J., has said on later events. At one meeting, although Miss Macintosh's name was not mentioned, the husband clearly assured the wife that he would give up Miss Macintosh. In the wife's

words: "I said to him 'Which will you have' and he chose." It would be unfair, as he gave no evidence, to doubt the sincerity of his intention at that time and on the subsequent occasions when they lived as man and wife. The letter from the wife written on board the ship on the way to America clearly shows that she believed she had been successful. Miss Macintosh had told her in February that if the husband had sexual relations with the wife she would have nothing more to do with him. There is, I think, no foundation for the submission that when she went to America she believed that the association with Miss Macintosh would revive. I agree that there is nothing in the letters from America which raise a suspicion of connivance. I agree that the appeal should be dismissed.

TUCKER, L.J.: I have had the advantage of reading the judgments which have just been delivered and I agree that this appeal fails for the reasons stated therein. The doctrine of connivance is based on the principle that the complaining spouse must come to the court with clean hands and that it would be unconscionable to give relief to one who had been willingly blind to or encouraged the adultery of his or her matrimonial partner. The conduct of the wife must, I think, be viewed as a whole and not by considering in isolation one or two letters in a large volume of correspondence. I agree with SOMERVELL, L.J., that the documents of March, 1940, if they stood alone, would clearly amount to connivance, but, viewed in their context, they merely reflect the mental reactions of the wife at one stage of her struggle to put an end to her husband's adulterous association and regain his affection. I venture to think that no reasonable person viewing the correspondence as a whole and accepting the learned judge's estimate of this wife could regard it as unconscionable that she should be granted the relief she claims. In coming to this conclusion I do not wish unduly to stress the state of the wife's health referred to in the medical evidence. She was naturally in great distress but the letters are not those of an hysterical woman. They display a high degree of clarity of thought and reasoning. Holding, as I do, that there has been no connivance, I desire to reserve the question whether connivance to adultery in 1940 would necessarily preclude the wife from relying on adultery with the same person in 1947.

Appeal dismissed with costs.

Solicitors: *Tarlo, Lyons & Co.* (for the husband); *Blount, Petre & Co.* (for the wife).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

LEE v. K. CARTER, LTD. AND ANOTHER.

[COURT OF APPEAL (Tucker, Bucknill and Somervell, L.J.J.), July 20, 21, 22, 1948.]

Lease—Assignment—Withholding of consent—Reasonableness—Prevention of creation of statutory tenancy.

Rent Restriction—Costs—Action in High Court—Claim arising out of Acts raised in defence—Increase of Rent and Mortgage Interests (Restrictions) Act, 1920 (c. 17), s. 17 (2).

By a lease, dated Mar. 1, 1940, the landlord let to a limited liability company for 7 years premises which, by reason of their rateable value, were within the Rent Restrictions Acts. The tenants covenanted not to assign the lease without the previous consent in writing of the landlord, such consent not to be unreasonably withheld. Towards the end of the tenancy the tenants applied to the landlord for his consent to an assignment of the unexpired portion of the lease to B., one of their directors, who, in accordance with the terms of the lease, had resided on the premises from the commencement of the lease. The landlord refused his consent on the ground that he wished to prevent a statutory tenancy arising as a result of accepting B. as the assignee. The tenants thereupon purported to assign the remainder of the lease to B. The landlord issued a writ against the tenants for possession and B. was added as a defendant. On

a summons before a master for judgment under R.S.C., Ord. 14, B. filed an affidavit that, as there had been a lawful assignment to her by reason of the landlord's unreasonable refusal to give consent, she was entitled to the protection of the Rent Restrictions Acts. The landlord was aware before the issue of the writ that B. intended to raise this issue. The master made an order remitting the action to the county court, where judgment was given for immediate possession with costs on the High Court scale down to the date when the action was remitted.

HELD : (i) the refusal to give consent was connected with the person or personality of the proposed assignee and with her user of the premises, and directly affected the subject-matter of the contract, and consent was not unreasonably withheld.

Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease, Houlder Brothers & Co., Ltd. v. Gibbs ([1925] Ch. 575), *applied*.

Re Swanson's Agreement, Hill v. Swanson ([1946] 2 All E.R. 628), *distinguished*.

(ii) by virtue of s. 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the landlord was not entitled to recover any costs in the High Court, and the county court judge's order should be varied by the substitution of an order that there be no costs prior to the date of remission.

[AS TO UNREASONABLE WITHHOLDING OF CONSENT TO ASSIGN, see HALSBURY, Hailsham Edn., Vol. 20, pp. 349-352, paras. 421, 422; and FOR CASES, see DIGEST, Vol. 31, pp. 382-385, Nos. 5279-5304.]

AS TO COSTS IN ACTIONS ARISING OUT OF THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 10, p. 335, para. 402; and FOR CASES, see DIGEST, Vol. 31, p. 585, Nos. 7344-7348.]

Cases referred to :

- (1) *Re Swanson's Agreement, Hill v. Swanson*, [1946] 2 All E.R. 628; 2nd Digest Supp.
- (2) *Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease, Houlder Brothers & Co., Ltd. v. Gibbs*, [1925] Ch. 575; 94 L.J.Ch. 312; 133 L.T. 322; C.A.; *affg.*, [1925] Ch. 198; 31 Digest 383, 5286.
- (3) *Tredegar v. Harwood*, [1929] A.C. 72; 97 L.J.Ch. 392; 139 L.T. 642; Digest Supp.
- (4) *Bates v. Donaldson*, [1896] 2 Q.B. 241; 65 L.J.Q.B. 578; 74 L.T. 751; 60 J.P. 596; 31 Digest 383, 5284.
- (5) *Bridewell Hospital (Governors) v. Fawcner & Rogers*, (1892), 8 T.L.R. 637; 31 Digest 382, 5274.
- (6) *Russoff v. Lipovitch*, [1925] 1 K.B. 328; 94 L.J.K.B. 355; 132 L.T. 789; 31 Digest 585, 7343.
- (7) *Jaslowitz v. Burstein*, [1948] 1 All E.R. 40; [1948] K.B. 408.
- (8) *Gunter v. Davis*, [1925] 1 K.B. 124; 94 L.J.K.B. 352; 132 L.T. 538; 31 Digest 585, 7347.

APPEAL by the tenants from an order of His Honour JUDGE DALE, made at Bloomsbury County Court, and dated Jan. 28, 1948, granting possession to the landlord of premises held under a lease, the unexpired portion of which the tenants had purported to assign despite the refusal of the landlord to give his consent to the assignment. The Court of Appeal now affirm the learned judge's finding that consent was not unreasonably withheld. The facts appear in the judgment of TUCKER, L.J.

Charles Lawson for the tenants.

Heathcote-Williams and Plume for the landlord.

TUCKER, L.J. : This is an appeal from a judgment of His Honour JUDGE DALE whereby he gave judgment for the landlord for possession forthwith of No. 3, Cavendish Court, London, in an action brought against the tenants, K. Carter, Ltd., and Mrs. Kate Bowman, to whom the tenants had purported to assign the unexpired portion of a lease of a flat dated Mar. 1, 1940, for a term of seven years from Mar. 28, 1940, at the inclusive yearly rent of £275 per annum. The sole question is whether or not the tenants were entitled to assign the benefit of this lease to Mrs. Bowman without the consent of the landlord. In other words, was the landlord's consent unreasonably withheld?

The facts of this case are unusual and it is necessary to refer in some detail to the provisions in the lease. It was made between the landlord, as lessor, the tenants, as lessees, and Mrs. Kate Bowman, as the guarantor. The lease contained the usual provisions, including lessees' covenants to this effect:

2 (6) Not at any time during the said term to use the said flat or any part thereof or permit the same or any part thereof to be used for the exercise or carrying on of any art profession trade business charity occupation or calling whatsoever except that of a model dress designer and manufacturer nor as a receptacle for lunatic or invalid persons or otherwise than as a private residence and for the business of a model dress designer and manufacturer . . . (7) Not without the lessor's previous consent in writing to assign underlet or part with the possession of the said flat or any part thereof (such consent to an assignment or underletting of the whole of the said flat not to be unreasonably withheld) provided always that the lessor may as a condition of such consent to an assignment require the proposed assignee to enter into direct covenants with the lessor to perform and observe all the covenants on the lessee's part herein contained and non-compliance with such condition shall be deemed to be a reasonable ground for refusing such consent notwithstanding the respectability and financial responsibility of the proposed assignee provided however that the use of the flat as a residence by Mrs. Kate Bowman and her family or any director of the lessee shall not be deemed a breach of this covenant.

Clause 2 (18) of the lease is a covenant at the expiration of the term to deliver up to the lessor the said flat in good and substantial repair and condition, and cl. 4 contains a provision for forfeiture in the event of any non-observance or breach of any condition contained in the lease.

Throughout all the times material to this action the tenants remained in possession and occupation of the premises and Mrs. Kate Bowman resided in the flat, as she was entitled to do by the express provisions of the lease. She was also the guarantor for the tenants for the due performance by them of their covenants under the lease. It is clear from the provisions of the lease that it was expressly designed to ensure for the landlord that, at the expiration of the lease, he should have as tenant, if he was so minded, a limited liability company which would not be able to claim the protection of the Rent Restrictions Acts in answer to any proceedings he might desire to take to obtain possession of the premises. It is conceded that by reason of their rateable value these premises are within the Rent Restrictions Acts. On Mar. 8, 1946, when the end of the lease was in sight, the tenants' solicitors wrote as follows to the landlord:

Our clients, K. Carter, Ltd., are proposing to assign their lease of the above flat to Mrs. Kate Bowman who is, as you know, the principal shareholder and a director of the company and is already a guarantor of the company's obligations under the lease. Your licence is, of course, necessary to the assignment, and we shall be glad to know that it will be forthcoming.

The landlord refused to give his consent and the subject was dropped until the next year, when, on Jan. 17, 1947, the tenants' solicitors again wrote a letter in which they gave the names of several people as references for Mrs. Bowman, said that the tenants desired to assign the lease to her, and added:

We understand that application for this assignment was made to you in March, 1946, and that you then refused to give your consent. As Mrs. Bowman's references are of the highest character, we must point out that under the terms of the lease your consent cannot be unreasonably withheld, and we shall be glad if, in view of our letter, you will reconsider the matter and give your licence for this assignment.

The reply, on Jan. 20, was:

We have already written to your clients, Messrs. K. Carter, Ltd., reminding them that their lease of the above premises expires at Lady Day next, and requesting them to make the necessary arrangements to give up possession of the premises as at that date. In view of this, our client is not prepared to give his consent to the assignment of the lease to Mrs. Kate Bowman, and as you are now acting for Messrs. K. Carter, Ltd., perhaps you will kindly let us know that your clients are making the necessary arrangements to vacate the premises on the expiration of the lease.

Consent was not forthcoming, and, accordingly, on Jan. 27, 1947, the tenants purported to assign the lease to Mrs. Bowman, sent the assignment to the landlord, together with a guinea registration fee, which the landlord returned.

Although in the correspondence the landlord had not clearly indicated the precise reason for his refusal other than that the lease was coming to an end in the near future and he had written indicating his desire to have possession of the premises at the end of the lease, it was agreed at the hearing before the county court judge by counsel on both sides that the reason for the landlord's refusal was that he wished to prevent a statutory tenancy arising as a result of accepting Mrs. Bowman as the assignee. The position would then have been that at the expiration of the lease in March, 1947, he would be faced with a tenant in actual occupation of the premises, which were partly used as a dwelling-house, and, provided she continued to comply with the conditions of the tenancy, he would not be able to evict her except for one or other of the special reasons contained in the Rent Restrictions Acts, whereas, if K. Carter, Ltd., had remained his tenants, nothing could have prevented him getting possession of his own property at the end of the lease.

The learned judge, having had all the relevant authorities cited to him, came to the conclusion that the landlord was not unreasonable in withholding his consent on that ground and that, accordingly, the purported assignment was unlawful and the landlord was entitled to possession. In the reasons for judgment he said :

I held that K. Carter, Ltd., had no right to assign to Mrs. Bowman and the landlord was within his legal rights in refusing to consent to such assignment. The premises let to K. Carter, Ltd., were not controlled by the Rent Acts in view of their being a limited company, whereas Mrs. Bowman was a person who, if she became tenant, would be protected by the Acts and the whole nature of the tenancy would be changed. I consider the facts of the case of *Swanson* (1) were not comparable with the facts of the present case in view of the difference in the legal entities of the assignor and assignee in the present case. I held that the objection by the landlord to the assignee in the present case was reasonable within the principles of *Houlder Brothers v. Gibbs* (2) and *Tredegar v. Harwood* (3).

It must be remembered at the outset, as was stated by WARRINGTON, L.J., in *Houlder Brothers & Co., Ltd. v. Gibbs* (2) ([1925] Ch. 575, 584) :

The question whether a particular act is reasonable or unreasonable is obviously one that cannot be determined on abstract considerations. An act must be regarded as reasonable or unreasonable in reference to the circumstances under which it is committed . . .

I quote that observation because I think it requires to be borne in mind, in approaching this case and in approaching all other cases where the question is whether or not the withholding of consent was in the particular circumstances reasonable or unreasonable, that it must always depend on the facts of the particular case, and the facts of this case that I desire to emphasise are these. At the time of the assignment, and at the time of the previous application for consent in March, 1946, Mrs. Bowman was residing in and occupying and having the full benefit of this flat. The tenants were the lessees under the lease. Those conditions would have continued in any event for three months more until March, 1947, so that, if an assignment took place in January, no practical benefit from that date until Mar. 25, 1947, would result to Mrs. Bowman. In any event, she would have been entitled to remain in the flat and the tenants would have been lessees of the premises, but the result of the assignment would have been to alter the legal relationship between Mrs. Bowman and the landlord, to put her in the position of a tenant, with the result that at the end of the lease in March, 1947, the landlord would have been unable to enforce the provisions of para. (18) of cl. (2) in the lease containing the tenant's covenant to give up possession at the termination of the lease. Furthermore, at the termination of the lease, he would have found himself faced with a statutory tenant who could only have been evicted on the special grounds contained in the Rent Restrictions Acts. It is obvious that that was the whole reason why the landlord refused to give his consent.

It is said that the learned county court judge's decision was erroneous because he had not applied the principles laid down by TOMLIN, J., in *Houlder Brothers & Co., Ltd. v. Gibbs* (2) the headnote of which is as follows ([1925] Ch. 198) :

In a lease for years the lessees covenanted not to assign the premises, or any part thereof, without the consent in writing of the lessor, such consent not to be withheld

unreasonably in the case of a respectable and responsible person or corporation. The lessees agreed to assign the premises, subject to the consent of the lessor, to R., Ltd., who were in possession of adjoining premises on a yearly tenancy from the same lessor. The lessor refused to give his consent to the assignment on the ground that he would lose good tenants of the adjoining premises, and would have great difficulty in re-letting them: *Held*, that the licence had been unreasonably withheld, and that the lessees were free to assign. Grounds of objection unconnected with the person of the assignee or the user or occupation of the premises are not reasonable. *Dicta* tending to the contrary not followed.

TOMLIN, J., reviewed all the relevant authorities down to that time and he summed them up as follows (*ibid.*, 209):

The question is what I am to make of all that. I come to the conclusion that the principle as stated—and I hope I am not disrespectful in putting it this way—by A. L. SMITH, L.J., in *Bates v. Donaldson* (4) is accurately stated, and when he said what he did say, he meant what he said, and that it is by reference to the personality of the lessee or the nature of the user or occupation of the premises, that the court has to judge of the reasonableness of the lessor's refusal. It is quite true that the injury threatened or apprehended to the lessor may be in respect of something which has nothing to do with the lease of the demised premises; it may be in relation to other property of which he is the owner, but the danger must come from the nature of the user or occupation or from the personality of the assignee. In the present case what is the real reason of the refusal? The real reason is not one which had anything to do with the personality of the lessee, or with the user or occupation of the premises; the real reason is that the lessor wants to prevent the assignee from giving up other premises of which he is also lessor; in other words, his real purpose in refusing an assignment is not in relation to the demised premises at all, but in relation to other property, and to bring pressure to bear on the assignee not to give up a tenancy of different premises belonging to him.

Once again it is necessary, I think, to emphasise that that language must be considered in the light of the facts of the particular case with which the learned judge was dealing. I do not think for one moment that TOMLIN, J., was purporting to lay down some principle of universal application which would cover every conceivable case, and it is clear that he had not in his mind any such situation as that which has arisen in this case, *viz.*, the results which might follow at the end of a lease from the acceptance of a particular assignee for the termination of that lease.

That case came before the Court of Appeal, who upheld the decision of TOMLIN, J., and approved his reasoning; but all the members of the court, the MASTER OF THE ROLLS and the two Lords Justices, put the matter in their own words in the course of their judgment and used expressions to which I think it is necessary to refer having regard to the emphasis that counsel for the tenants has paid in the presentation of his case on the exact words used by TOMLIN, J. After dealing with *Bates v. Donaldson* (4) POLLOCK, M.R., said this ([1925] Ch. 575, 583):

For my part, I agree with A. L. SMITH, L.J., and I think that one must look at these words in their relation to the premises, and to the contract made in reference to the premises between the lessor and lessee; in other words, one must have regard to the relation of the lessor and lessee *inter se*, or, perhaps one may add, to the due and proper management of the property, as in *Governors of Bridewell Hospital v. Fawcner* (5). The latter case is an illustration of a withholding of consent on broad grounds bearing upon the estate of the lessor, or it may be on grounds which are important between the lessor and other lessees of that property, or that estate, of which the lessee had cognizance. But I do not think the words of the covenant can be so interpreted as to entitle the lessor to exercise the right of refusal when his reason given is one which is independent of the relation between the lessor and lessee, and is on grounds which are entirely personal to the lessor, and wholly extraneous to the lessee.

WARRINGTON, L.J., after using the language to which I have already referred, went on in these words (*ibid.*, 585):

Now, what is to be inferred from what may be treated as having been in the contemplation of the parties when the contract was made? I think it must be, as I have said, that it was intended to protect the lessor as against a lessee, who, although respectable and responsible, might well be reasonably objectionable in other ways, and, secondly, from the point of view of the property, to prevent the lessor from having to accept a lessee whose user of the property might again be reasonably objectionable.

SARGANT, L.J., said this (*ibid.*, 587) :

In the present case Mr. *Stamp* has shown in his able argument that it is not necessary for the success of the respondent that the operation of the covenant should be limited even to the extent laid down by A. L. SMITH, L.J. ; because Mr. *Stamp* points out that not only is the reason given here something that is not in relation to the use or occupation of the premises, or to the personality of the tenant, but that the reason has nothing whatever to do with the subject-matter of the demise. I was very much impressed by his argument that in a case of this kind the reason must be something affecting the subject-matter of the contract which forms the relationship between the landlord and the tenant, and that it must not be something wholly extraneous and completely dissociated from the subject-matter of the contract.

In the concluding words of his judgment he said (*ibid.*, 588) :

In the present case the reason for refusing has nothing whatever to do with the relationship of landlord and tenant in regard to the subject-matter of the demise. The sole reason is that if the property is allowed to be assigned to the new tenants, the new tenants, in respect of a tenancy of a completely different property which they hold from the lessor, will probably desire to terminate their tenancy of that other property.

I have quoted those observations at some length to show that all four of the judges who had to deal with that case expressed their views in somewhat differing language. For myself, I think that the present case comes within the language used both by TOMLIN, J., and by POLLOCK, M.R., and WARRINGTON and SARGANT, L.JJ., that the refusal to give consent must be connected with the person or personality of the proposed assignee and must directly affect the subject-matter of the contract. It is true that the consequences would not show themselves until the expiration of three months from the date of the assignment, and counsel for the tenants is right when he says that the contractual relationship would be the same had the landlord consented to the assignment, but none the less it was a contractual relationship pregnant with future possibilities, or more than possibilities, which would not have resulted from the previous existing contractual relationship between the landlord and the tenants.

In *Tredegar v. Harwood* (3) some doubt was expressed by LORD DUNEDIN and LORD PHILLIMORE with regard to the precise language that had been used by TOMLIN, J. I need not refer to what was said on the subject because *Houlder Brothers v. Gibbs* (2) still remains a binding authority on this court, and I have already indicated that I think this case comes within the reasoning of the Court of Appeal as well as of TOMLIN, J.

There is one other case to which I must refer and that is the recent decision, much relied on by counsel for the tenants, of EVERSLED, J., in *Re Swanson's Agreement* (1). In that case questions were raised by an originating summons which were as follows :

Whether according to the true construction of the tenancy agreement and in the events which had happened the refusal of the landlord to grant a licence to the tenant to assign the premises was unreasonable ; (ii) whether, notwithstanding such refusal, the tenant was at liberty to assign the premises without any such licence.

In the course of the examination of the facts of that case EVERSLED, J., eventually came to the conclusion that at the time of the assignment in question the contractual tenancy was not subsisting and, therefore, the question whether consent to the assignment could or could not be reasonably withheld did not arise and everything EVERSLED, J., said in his judgment on that part of the case was really *obiter*. None the less he dealt with the question at some length and it is necessary to observe that in that case, assuming the contractual tenancy to have been subsisting, the proposed assignor was a person who, if he had remained the tenant, would have become a statutory tenant at the termination of the agreement ; and the proposed assignee was in a similar position. But the tenant, the assignor, was minded to go out and to assign to the tenant who would come in. The landlord desired to obtain possession of the premises when his tenant went out and preferred to have possession rather than a statutory tenant, which would result from the assignment. That was a case where the landlord's real objection to the assignment, if there had been a contractual tenancy subsisting, was that he would have been thereby deprived of his opportunity of getting possession of the premises before the expiration of

the lease, and therefore the case would have been almost identical with *Bates v. Donaldson* (4), where A. L. SMITH, L.J., held that that was not a good reason for a landlord to refuse consent to the assignment. For those reasons I do not think the observations of EVERSLED, J., on this point in *Re Swanson's Agreement* (1) are conclusive in any way of the matter which comes before us, because I think that on the facts of *Swanson's* case (1), assuming a subsisting agreement, the reasons for the landlord's refusal were unreasonable having regard to the decision of *Bates v. Donaldson* (4). If the observations of EVERSLED, J., go beyond that and are inconsistent with the view I take of the present case, then I must respectfully differ from him; but for the reasons I have indicated I think that *Swanson's* case (1) was an altogether different one from the present. For those reasons, I think that this appeal fails and that the decision of the county court judge on the particular facts of this case was correct.

BUCKNILL, L.J. : I agree that the appeal should be dismissed, for the reasons given by my Lord, and I have nothing to add to them.

SOMERVELL, L.J. : I agree. To succeed in this appeal counsel for the tenants must show that the learned judge misdirected himself in what was primarily clearly a question of fact. I think he sought to do that by submitting that the learned county court judge had decided that the landlord was reasonable in refusing his consent by taking into account matters which, as a matter of law, he was not entitled to take into account. He submitted, as I understood him, that the question as to what would happen when the tenancy came to an end was something which was wholly irrelevant and which, as a matter of law, could not be relied on by the landlord in submitting that he was reasonable in what he did. All I want to do is to make it quite clear that I am not suggesting that there is any principle under which, in all cases and in all circumstances, a lease which is originally a lease to a company may not be assigned by that company to an individual, or perhaps, to put it more accurately, that the landlord would always be held to be reasonable if he refused his consent to such an assignment. I would like to add to the citations which TUCKER, L.J., has made from *Houlder Brothers & Co., Ltd. v. Gibbs* (2) one sentence only from the end of the judgment of POLLOCK, M.R., in which he said ([1925] 1 Ch. 575, 594): "... I think it is impossible to give an exact definition which will fit all cases . . ." That, I think, is an observation which is particularly applicable to the sort of subject-matter with which courts may be concerned in deciding issues under covenants of this kind in a lease; and, like my brother, I think it is a most important circumstance and a relevant circumstance in this case that the assignment which the landlord was asked to assent to lacked the normal circumstance in which a request for an assent to an assignment is put forward. The normal circumstance in which a lessee asks for consent to an assignment is because he no longer desires the use of the premises and he has found someone who is anxious to enter and occupy them. As has been pointed out in the present case, the circumstances here were exceptional and wholly different, because the proposed assignee, as she stated in her affidavit, had from Mar. 25, 1940, in accordance with the provision in that behalf contained in the lease, occupied the flat and used it as a private residence for herself and her family. I agree with and I do not wish to add anything to what my brother has said with regard to the law, and, in my opinion, the circumstances which clearly actuated the landlord's mind were circumstances which the learned county court judge was entitled to consider in deciding whether or not the landlord acted reasonably. The matter being one of fact and the learned county court judge having, as it seems to me, applied correct principles of law, the appeal must fail.

[Counsel addressed the court on the question of costs and the following judgments were delivered on that question.]

TUCKER, L.J. : A further question has now arisen in this case with regard to the costs. The action was commenced by the landlord by a writ issued in the High Court against the tenants on Oct. 20, 1947, and Mrs. Bowman was added as defendant. The whole case for the landlord was that the assignment to Mrs. Bowinan was unlawful, and, if that was correct, then Mrs. Bowman

A and the tenants were, at the time of the issue of the writ, trespassers. If, on the other hand, the assignment was lawful, Mrs. Bowman would have been protected by the Rent Restrictions Acts. The case came before the master under a summons for judgment under R.S.C., Ord. 14, and Mrs. Bowman put in an affidavit setting up that she was entitled to obtain possession under the provisions of the Rent Restrictions Acts and claiming that there had been a lawful assignment to her by reason of the unreasonable refusal of the landlord to give his consent. On the hearing of that summons the master, without any opposition from either side, made an order remitting the action to the county court. The learned judge gave judgment for possession, and gave the landlord costs on the High Court scale down to the date when the action was remitted.

B It is argued by counsel for the tenants that the county court judge had no jurisdiction to make that order with regard to High Court costs. He relies on s. 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which is in these words :

C A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs.

The County Courts Act, 1934, s. 48, is as follows :

A county court shall have jurisdiction to hear and determine any action for the recovery of land where neither the value of the land in question nor the rent payable in respect thereof exceeds the sum of one hundred pounds by the year.

D The rent in the present case was £275 per annum, and, accordingly, the county court would have had no jurisdiction under s. 48 of the County Courts Act, 1934. Counsel for the landlord, on being asked where the county court derived the jurisdiction to give the judgment which he has successfully upheld, answered that the jurisdiction was to be found in s. 17 (2) of the Rent Restrictions Act, 1920. I think he must fail with regard to the costs in the High Court because that same sub-section which gives the county court a jurisdiction to entertain proceedings which it would not otherwise have had deprives a party who takes such proceedings in the High Court of his right to recover any costs, the assumption being that they could have been commenced in the county court.

E Counsel argues that the county court got its jurisdiction under the first two lines of that sub-section, but that the last three lines do not apply to this case. He says : " When my client started his proceedings the county court had no jurisdiction by reason of the amount of rent of these premises, but as soon as I got before the master and Mrs. Bowman put in this affidavit, it became a claim arising under the Rent Restrictions Acts, the claim being a claim by Mrs. Bowman to be entitled to the protection of the Acts. Accordingly, the master thereupon had jurisdiction to remit the action and the county court had jurisdiction to entertain it." With regard to the concluding words he says : " Although the county court derived jurisdiction as soon as Mrs. Bowman had produced an affidavit, it was not an action which could have been commenced in the county court originally."

G I am unable to accept that argument. I do not think jurisdiction can depend on the precise stage at which a defendant raises his defence. It was known at all times before the issue of the writ what the issue was going to be and what the issue was which was being raised by Mrs. Bowman in these proceedings. That appears from the statement of claim on the writ and by previous correspondence between the parties, so it was no surprise to the landlord when he found before the master that this issue had been raised by Mrs. Bowman. Accordingly, I think if counsel for the landlord is right in saying that the county court did get jurisdiction under s. 17 (2) of the Act of 1920, he cannot now be heard to say that the consequential provisions of that section with regard to costs do not apply.

H For those reasons I think the submission with regard to costs made by counsel for the tenants is correct. I do not think it is necessary to give a final decision whether or not the county court would originally have had jurisdiction under

s. 17 (2). My decision rests on the fact that the landlord, having chosen to uphold a judgment on the ground that it can only be held by virtue of the jurisdiction conferred by s. 17 (2), cannot now be heard to say that that subsection does not apply with regard to the costs of the proceedings incurred in the High Court. I do not think it necessary to express any opinion with regard to the difficult questions which have been discussed or to refer to authorities such as *Russoff v. Lipovitch* (6), *Jaslowitz v. Burstein* (7) and *Gunter v. Davis* (8), which raise a question as to proceedings for the recovery of premises brought against persons who are trespassers, cases in which the landlord does not seek to rely on any of the provisions of the Rent Restrictions Acts in order to enable him to get possession. It is not necessary to decide the extent to which those authorities apply to the facts of this particular case, or whether they are applicable. I think this case depends on the particular course which was taken prior to the order to remit.

BUCKNILL, L.J. : I agree, and will only add one word on the doubt which was raised by **ATKIN, L.J.**, in *Russoff v. Lipovitch* (6), where he says ([1925] 1 K.B. 628, 640) :

I desire to add that I propose to reserve consideration of the question that arose in *Gunter v. Davis* (8), whether proceedings against a mere trespasser, who has never filled the position of tenant or sub-tenant, for the recovery of possession of a house to which the Act applies are proceedings arising out of the Act.

It seems to me in this case it cannot possibly be said that Mrs. Bowman was a trespasser. Not only did the landlord agree that the use of the flat as a residence by her and her family was not to be deemed a breach of the covenant not to assign without the lessor's previous consent in writing, but she did in fact get an assignment from the tenants which was valid in every respect except that the consent in writing had not been previously obtained. Therefore I do not think this case falls within the kind of case in respect of which **ATKIN, L.J.**, expressed that doubt.

SOMERVELL, L.J. : I agree.

TUCKER, L.J. : The order of the learned judge will be varied by striking out that part of his order in which he gave costs on the High Court scale down to the date of remission. There will be substituted for that an order that there be no costs prior to the date of remission. With regard to this appeal the successful landlord will have his costs less the sum of five guineas.

Appeal dismissed on these terms.

Solicitors : *H. B. Supperstone & Co.* (for the tenants) ; *Simon, Haynes, Barlas & Cassels* (for the landlord).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

AMERICAN FLANGE AND MANUFACTURING CO., INCORPORATED *v.* VAN LEER.

[KING'S BENCH DIVISION (Sellers, J.), June 23, 24, 25, 29, 30, July 1, 30, 1948.]

Patent—Use by Crown—Patent for whole article, not for component part—Application to unpatented article of Patents and Designs Act, 1907 (c. 29), s. 29 (1) (1A) (as amended to 1946) and Defence (Patents, Trade Marks, etc.) Regulations, 1941 (S.R. & O., 1941, No. 1780), reg. 3 (5).

By the Patents and Designs Act, 1907, s. 29 (1) (as amended by the Patents and Designs Act, 1919, s. 8) : "A patent shall have to all intents the like effect as against His Majesty the King as it has against a subject : Provided that any Government department may, by themselves or by such of their agents, contractors, or others as may be authorised in writing by them at any time after the application, make, use or exercise the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the Department and the patentee, or, in default of agreement, as may be

settled in the manner hereinafter provided. And the terms of any agreement or licence concluded between the inventor or patentee and any person other than a Government department, shall be inoperative so far as concerns the making, use or exercise of the invention for the service of the Crown." By s. 29 (1A) (as amended by the Patents and Designs Act, 1942, s. 2 (1)), the power of a Government department under s. 29 (1) was extended to include "power during any war period to make, use, exercise or vend an invention, upon such terms as are mentioned in the said sub-s. (1), for any purpose which appears to the department necessary or expedient for the efficient prosecution of any war in which His Majesty may be engaged or for the maintenance of supplies and services essential to the life of the community; and the terms of any such agreement or licence as is mentioned in the said sub-s. (1) shall be inoperative so far as concerns the making, use, exercise or vending of an invention under this sub-section as they are inoperative so far as concerns the making, use or exercise of an invention under that sub-section." By the Defence (Patents, Trade Marks, etc.) Regulations, 1941, reg. 3 (5): "In connection with the making, use, exercise or vending of any invention . . . on behalf of, or for the services of, the Crown (whether by virtue of the Patents and Designs Act, 1907, or otherwise) . . . the Minister of Supply . . . may authorise the use of any drawing, model, plan or other document or information in such manner as appears to him or them to be expedient in the interests of the defence of the realm or the efficient prosecution of the war, notwithstanding anything to the contrary contained in any licence or agreement; and any licence or agreement, if and so far as it confers on any person, otherwise than for the benefit of the Crown, a right to receive any payment in respect of the use of any document or information in pursuance of such an authorisation, shall be inoperative."

A manufacturer, who was licensed, on payment of royalties to the licensor, to manufacture, sell and use articles known as "sputs" and "plugs," supplied large numbers of each to the Minister of Supply under a contract which authorised him, under the provisions of s. 29 of the Act of 1907 (as amended) and reg. 3 (5) of the regulations of 1941, "for the purpose of performing the contract (but not otherwise) to make, use, exercise or vend such inventions and designs as may be required for that purpose and in connection with the making, use, exercise or vending of any inventions or application of any design as aforesaid to use any drawing, model, plan or other document or information as may be required for that purpose." The contract further provided: "The authority hereby conferred has the effect of relieving the contractor from liability, whether under licence agreements . . . or otherwise, to make any payments, whether by way of royalties and licence fees or otherwise in respect of the contractor's making use, exercise or vending of any invention or design . . . for the purpose of performing the contract." The "sputs" and "plugs" formed part of a closure device for the filling of a metallic container for which there was a British patent. In an action by the licensor for the recovery of royalties in respect of the sputs and plugs so supplied:—

HELD: (i) there was no patent covering either the sput or the plug separately as independent units, since the patent relied on by the defendant covered a whole assembly, of which the sput and plug were only component parts, and there had not been any "constructive" user of a patented invention, since a patent for a combination was not a patent covering the component parts of the combination.

Clark v. Adie (1877) (2 App. Cas. 315) and *Dunlop Pneumatic Tyre Co., Ltd. v. David Moseley & Sons, Ltd.* ([1904] 1 Ch. 612), applied.

(ii) the Patents and Designs Act, 1907, s. 29 (1) and (1A), as amended, applied only to a patented invention and an alleged invention which was the subject of an application for a patent.

(iii) the Defence (Patents, Trade Marks, etc.) Regulations, 1941, reg. 3 (5) applied to any invention whether patented or not, and, as the authority given in the contract by the Minister of Supply was an express authority under reg. 3 (5), the defendant was relieved thereby of his obligation to pay the royalties.

[AS TO THE USE OF INVENTIONS BY THE CROWN, see HALSBURY, Hailsham Edn., Vol. 24, pp. 532, 533, para. 1019; and FOR CASES, see DIGEST, Vol. 36, pp. 690, 691, Nos. 1668-1674.]

FOR THE DEFENCE (PATENTS, TRADE MARKS, ETC.) REGULATIONS, 1941, reg. 3 (5), see HALSBURY'S STATUTES, Vol. 34, p. 215.]

Cases referred to :

- (1) *No-Nail Cases Proprietary, Ltd. v. No-Nail Boxes, Ltd.*, [1944] 1 All E.R. 528; [1944] 1 K.B. 629; 113 L.J.K.B. 353; 170 L.T. 384; 61 R.P.C. 94; *affd.*, [1946] 1 All E.R. 523; [1946] A.C. 447; 2nd Digest Supp. A
- (2) *Foster Wheeler, Ltd. v. Green & Son, Ltd.*, [1946] 1 All E.R. 63; [1946] Ch. 101; 115 L.J.Ch. 43; 174 L.T. 118; 63 R.P.C. 10; 2nd Digest Supp.
- (3) *Dixon v. London Small Arms Co.*, (1876), 1 App. Cas. 632; 46 L.J.Q.B. 617; 35 L.T. 559; 36 Digest 690, 1670.
- (4) *Nobel's Explosives Co., Ltd. v. Anderson*, (1894), 11 R.P.C. 519; 36 Digest 552, 180.
- (5) *Electric & Musical Industries, Ltd. v. Lissen, Ltd.*, [1938] 4 All E.R. 221; 56 R.P.C. 23; Digest Supp. B
- (6) *Harrison v. Anderston Foundry Co.*, (1876), 1 App. Cas. 574; 36 Digest 563, 281.
- (7) *Clark v. Adie*, (1877), 2 App. Cas. 315; 46 L.J.Ch. 585; 36 L.T. 923; 36 Digest 628, 973.
- (8) *Townsend v. Haworth*, (1875), 12 Ch.D. 831, n.; 48 L.J.Ch. 770, n.; 36 Digest 746, 2333.
- (9) *Dunlop Pneumatic Tyre Co., Ltd. v. Moseley (David) & Sons, Ltd.*, [1904] 1 Ch. 612; 73 L.J.Ch. 417; 91 L.T. 40; 36 Digest 746, 2335. C
- (10) *United Telephone Co. v. Dale*, (1884), 25 Ch.D. 778; 53 L.J.Ch. 295; 50 L.T. 85; 36 Digest 818, 3045.

ACTION to recover royalties alleged to be due to the plaintiffs by the defendant in respect of articles made and sold to the Minister of Supply in 1944 and 1945. The defendant contended that he was relieved from his obligation to pay the royalties by the Patents and Designs Act, 1907, s. 29 (1) and (1A) (as amended by the Patents and Designs Act, 1919, s. 8, and the Patents and Designs Act, 1942, s. 2) and the Defence (Patents, Trade Marks, etc.) Regulations, 1941, reg. 3 (5). *SELLERS, J.*, held that the Act of 1907 (as amended) applied only to patented inventions, that the inventions in question were not covered by any British patent, and the Act, therefore, did not apply, but that the regulations of 1941 applied to any inventions, whether patented or not, and, therefore, the defendant was relieved of his obligation to pay the royalties. The facts appear in the judgment. D

Sir Valentine Holmes, K.C., and *J. P. Graham* for the plaintiffs.

Lloyd-Jacob, K.C., and *J. P. Ashworth* for the defendant.

P. J. Stuart Bevan (as *amicus curiae*) for the Minister of Supply. E

July 30. **SELLERS, J.**, read the following judgment. The plaintiffs *Cur. adv. vult.* are an American company carrying on business in Chicago. The defendant is a Dutchman who carries on business in Holland, England and elsewhere. The action is brought to recover a sum of £59,340 3s. (being the agreed sterling equivalent of 239,436 dollars and a few cents) which is claimed as being due under two written agreements between the plaintiffs and the defendant, relating respectively to articles called sputs and plugs, sometimes referred to alternatively as flanges and bungs. By the agreements the plaintiffs granted to the defendant licences to manufacture, sell and use in Great Britain and elsewhere closure devices of which a sput and a plug formed part and in respect of such sput and each plug manufactured, used and/or sold it was provided that the defendant should pay to the plaintiffs one half cent of United States of America currency during the period of the agreements. The "sput" agreement is to be found in an agreement dated May 1, 1928, together with a letter of the same date and a further notification thereof dated Jan. 1, 1932. The "plug" agreement is dated Jan. 1, 1932. The defendant has paid the royalties due under the agreement in respect of the sputs and plugs which he sold except those which he made and sold to the Ministry of Supply in 1944 and 1945; *i.e.*, the defendant has paid royalties in respect of the sales to private customers, but in respect of sales to the Ministry of Supply he has not paid and asserts that he is relieved from the obligation to pay the amount claimed by reason of s. 29 of the Patents and Designs Act, 1907 as amended by the Patents and Designs Act, 1919, F

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s. 8, and the Patents and Designs Act, 1942, s. 2, and/or by the Defence (Patents, Trade Marks, etc.) Regulations, 1941 (S.R. & O., 1941, No. 1780). The ultimate question for decision, therefore, is whether or not the statutory provisions do in the circumstances of this case relieve the defendant of what would otherwise be his clear and admitted obligation under the agreement.

A The "sput" agreement recites that the plaintiffs have been engaged for some years past and are still engaged in the manufacture of sputs (meaning plug receiving pushings for containers) and have highly developed such sputs, practically and commercially, and have patent protection thereon in Great Britain and elsewhere. It further recites that the defendant is desirous of exploiting the manufacture, use and sale of the said sputs (which he may purchase from the plaintiffs) in European countries and elsewhere, as specified, and the plaintiffs are willing for him to do so and to grant to him a licence under such patents and applications and all other patents and applications owned or controlled by the plaintiffs for sputs, granted or filed, or to be granted or filed, in any and all European countries and Great Britain during the life of the agreement. It was agreed in arts. I and II :

C I (a) The term "sputs" as herein used, shall mean and embrace not only sputs disclosed in American's patents but also any and all other sputs, now or hereafter during the life of this agreement, designed, exploited, manufactured, sold or controlled by either party hereto, whether the same are patented anywhere or not. (b) The term "said patents," as used herein, shall mean and include (inclusively of the patents and application above enumerated) any and all European and British patents and application covering "sputs," whether original, divisional, renewal, reissue or of extension, and whether heretofore or hereafter applied for or granted. II. American hereby grants unto Van Leer a licence to manufacture "sputs" and to sell and use "sputs" so manufactured by him, upon and subject to the following terms, conditions and limitations.

D Then there follow provisions for an exclusive licence to the defendant to manufacture, use and sell sputs in Great Britain and specified countries (Van Leer territory) for two years, with provision for extension in certain circumstances, which, if operative, may become non-exclusive if a minimum royalty is not maintained, and for a non-exclusive licence in other parts of the world except certain defined territory. Article IV is :

E Van Leer shall have the right and power to manufacture "sputs" and use and sell the "sputs" manufactured by him in said "Van Leer territory" and said "competitive territory," under such trading names as he may desire, but Van Leer shall pay royalties as hereinafter provided on any and all "sputs" manufactured, used and/or sold by him, whether trading under his own name and/or under or through other names in said "Van Leer territory" and "competitive territory," it being understood and agreed that Van Leer shall be personally responsible for any and all royalties accruing under this agreement.

F Article V makes provision for the payment of a royalty of one half cent United States currency for each sput manufactured, used and/or sold during the life of the contract. Article VIII is :

G Each party hereto grants to the other party hereto and the representatives of the other party, the right to inspect the manufacturing methods of the first party and to furnish the other party with blue prints and all drawings of dies and machinery employed in the usual course of manufacture of "sputs"; it also being understood that each party hereto shall have the right to embody in its "sputs" any and all improvements now or hereafter, during the life of this agreement, made or acquired by the other party hereto.

Article XII provides that the contract shall run for the life of the said patents and each of them unless otherwise sooner terminated.

H The "plug" agreement adapts the "sput" agreement and incorporates and embodies its terms and conditions, substituting "plugs" for "sputs" with certain exceptions, including the following :

I (b). For the first "Whereas" clause of said "sput licence" the following is substituted : "Whereas, American has designed and/or invented various plugs for containers, has highly developed the same, and has successfully placed certain of the same on the market, and has or is about to file patent applications in several European and other countries covering said plugs, either alone and/or in combination with flanges and/or in combination with flanges and cap seals; and . . ." (c). For art. I (a) of said "sput licence," as amended, the following is substituted : "(a) The term 'plugs'

as herein used, shall mean and embrace plugs like or similar to those heretofore or hereafter designed and/or invented by American and shall be inclusive of, but without limitation to, plugs known as 'Tri-Sure' and plugs similar thereto, whether the same are now or hereafter patented anywhere or not; it being also understood that the term 'plugs' includes plugs which are or may be covered (either alone and/or in combination with flanges and/or seals) by applications and/or patents now or hereafter owned or controlled by American."

Under these agreements the defendant had for many years been manufacturing and selling sputs and plugs in association with various companies controlled by him. A brief description of these articles is, I think, necessary. Both the parties are interested in the manufacture and sale of metal containers or drums for holding liquid. It is necessary or desirable to have an opening in the containers through which the contents can be emptied. That opening has to be closed so as to be liquid-tight until it is desired to open the container. In non-technical language, and in what I intend to be merely descriptive language, the sputs or plugs form part of the following device for a liquid-tight closure of the opening. The opening is made in some part of the container—the metal has been referred to as the drum stock—by cutting out a piece of the metal and passing the metal round the opening with a flange and making an octagonal indent to receive a sput. The sput has an octagonal outside surface and threaded interior and a projecting flange. The flange is designed to be curled over the flange of the container itself, thereby strengthening the flange of the opening. The sput has a gasket or washer on it but not attached to it. The plug is a threaded member with a small projecting flange at the top, with projections inside for enabling it to be screwed up or unscrewed and with a groove just under the top in which there is a gasket. The plug is so threaded that it fits into the sput. These parts were all exhibited and formed the component parts of the device as far as this case is concerned, but there is, in addition, a cap seal with a cork gasket. This seal is intended to be placed over the plug when screwed into the sput. The first process involved in this device is the cutting of the hole and the making of the flange and indentions on the drum stock. The sput is separately made of sheet metal and zinc plated and pressed by a machine into position in the recess, and its flanged edge turned over making a bead over the flange of the drum stock. It is then ready to receive the plug which is screwed in.

Between July, 1943, and March, 1945, 20 contracts were concluded between the defendant and the Ministry of Supply and under those contracts over 15,000,000 sputs and 19,000,000 plugs were made and sold to the Ministry of Supply, and the claim in this action is for the royalties on those sputs and plugs. The contracts were all made in a similar way and I shall refer to the first in date by way of illustration, and as typical. On July 27, 1943, the Ministry gave the defendant an instruction to proceed (commonly called an "I.T.P."). Part I of it is as follows:

Gentlemen, I am directed by the Minister of Supply to instruct you to proceed with the manufacture and supply of the stores detailed in the schedule below, on the terms and conditions of part II hereof and tender form attached. One copy of the inclosed form of tender must be returned duly completed and signed. Your quotation should be returned within 14 days from the date of this letter. The present instruction to proceed should not be regarded as an acceptance of any estimate or suggested price which may have been given orally or in writing in discussions or correspondence preceding this letter.

There is then set out the schedule specifying the commodity and the quantity, and a detailed specification, and provision is made for inspection and so forth. Then under the heading of "Price and Delivery" it says:

Delivery is required to commence at the earliest possible date, and I am to request you to state on your tender the date upon which deliveries can commence, the rate per week at which you can guarantee to maintain supplies thereafter, the information required in connection with the variation of prices (materials) clause and your lowest net quotation (exclusive of packages) for delivery of the stores "ex-works" (to include loading into road vehicles or loading into rail vehicles at a siding in your works) . . . Formal contract. Subject to agreement as to prices, a formal acceptance which will bear the reference number—(which should be quoted in full in all correspondence in connection with this order) will be forwarded to you as early as possible.

Part II is headed "Contract Conditions" and states :

The contract will be governed by the terms and conditions embodied in the Department's Contracts Form "A" and Standard Contract Conditions (January, 1942, ed.), Numbers . . .

Then there are set out various numbers described as "SC." standing for "Standard Conditions," and the one which is relevant here is "SC. 43. Patent Rights, etc."

A The next document which plays its part in building up this contract is a tender dated Aug. 31, 1943, addressed to the Ministry and making a quotation, as is requested in the instructions to proceed. In the body of that tender there is to be found this :

B The price quoted shall be exclusive of purchase tax in respect of any sale resulting from this order. If any claim is made for purchase tax in respect of any sale, the Department will indemnify the contractor against such tax. The undersigned hereby offers to provide and deliver the articles specified above at the prices and upon the terms set forth in parts I and II and Contracts Form "A" and in any specification mentioned in the schedule. It is further agreed that any printed conditions of contract or general reservations which may be printed on any correspondence or documents received from the contractor in connection with this contract shall not be applicable to this contract.

C The next document in this particular contract is dated Jan. 12, 1944. An extract from the letter is set out in the correspondence :

We inclose herewith our tenders in respect of Tri-Sure components and dies against the above contracts . . . Royalty—Our prices as quoted are exclusive of royalty which would normally be due on supplies of this patented closure, but for which we are not liable on the authority of the letter received by Messrs. Freshfields, Leese & Munns, from your Ministry dated 15/6/43.

D Following that there is, on Feb. 1, 1944, an acceptance by the Ministry :

With reference to the Department's Instructions to Proceed under the above reference, dated July 27, 1943, I am directed by the Minister of Supply to inform you that he hereby accepts the quotation contained in your tender dated Jan. 12, 1944, in conjunction with your letter of the same date, for the supply of the following . . .

E Then the goods and quantities are set out and the price. It then says : "Delivery has already been effected." Then, under the heading "Premises" it says :

The work performed under this contract was carried out at various sub-contractors' works and the various items assembled at Merseyside Works, Ellesmere Port, Cheshire, prior to despatch.

I think the word "assembled" there means "collected."

F A table of the contracts was put in as scheduled so as to make it unnecessary for me to refer in detail to any of the other contracts. That document (P.4) sets out the details of the contracts, the goods ordered and the quantities. I think the only reference I need make to it is that in respect of some of the contracts—I think Nos. 15, 17 and 18—a reference is made to Standard Condition 32 instead of Standard Condition 43. The condition is substantially the same, as will be apparent later on. Standard Condition 43 is as follows :

G Patent Rights, etc. (A). (1) Under the provisions of the Patents and Designs Act, 1907, ss. 29 and 58A, as amended by the Patents and Designs Act, 1942, s. 2, and under the Defence (Patents, Trade Marks, etc.) Regulations, 1941, reg. 3 (5), the contractor is authorised for the purpose of performing the contract (but not otherwise) to make, use, exercise or vend such inventions and designs as may be required for that purpose, and in connection with the making, use, exercise or vending of any inventions or application of any design as aforesaid to use any drawing, model, plan or other document or information as may be required for that purpose. No royalty, licence fee or other expense in respect of the making, use, exercise or vending by the contractor of any invention or design for the purpose of performing the contract or in respect of the use by the contractor of any drawing, model, plan or document or information in connection with the making, use, exercise or vending of any invention or application of any design for that purpose will be allowed as a proper item of cost incurred by the contractor unless it shall have been specifically agreed by the Minister of Supply and no such royalty, licence fee or other expense not so agreed shall be included in the contractor's tender, quotation, offer, acceptance or contract price. (2) The authority hereby conferred has the effect of relieving the contractor from liability, whether under licence agreements and similar agreements or otherwise, to make any payments, whether by way of royalties and licence fees or otherwise in respect of the contractor's

making use, exercise or vending of any invention or design, or use in connection therewith or with the application of any design, of any drawing or model or plan or other document or information, for the purpose of performing the contract. If any claim for any such payment is made against the contractor, it shall be referred to the Minister of Supply. (3) The contractor shall inform the Minister of Supply as soon as possible (a) of any licence or other agreement under which he would or might but for this authority have been liable to make any payment in respect of the making, use, exercise or vending as aforesaid of any invention or design or the use as aforesaid of any drawing, model, plan or other document or information, and (b) of any patented invention or registered design the making, use, exercise or vending of which by the contractor is likely to be required for the purposes of the contract and which the contractor would not have been entitled to make, use, exercise or vend if this authority had not been given: Provided that if and in so far as the contractor has already given any of the information so required to the Minister of Supply in connection with a previous contract it shall be sufficient for him to identify such contract and the letter giving such information. (4) The contractor shall incorporate in any sub-contract or order, made or placed by him for the purposes of the contract, of the classes specified in the schedule or of any further classes which may be agreed upon between the Minister of Supply and the contractor, the provisions set out in sub-cl. (1), (2) and (3) of this condition with the substitution of a reference to the sub-contractor for each reference to the contractor.

In the negotiations with the Ministry of Supply efforts were made by the defendant to have the royalties payable by him to the plaintiffs included in the price of the goods, but after correspondence and interviews during 1943 the Ministry wrote on Dec. 17, 1943, that the Department's Standard Condition 43, "Patent Rights," would be incorporated in all the formal contracts for the closures and dies and that the price quotations were to be exclusive of royalties. It was at the time thought, it seems, that no claim for royalties in respect of the closures would be made by the plaintiffs as it was mistakenly believed that the matter would be dealt with under a patent interchange agreement with America. The position, therefore, is that the defendant has not been paid by the Ministry of Supply the royalties now claimed against him in this action.

It will be convenient now to refer to the Patents Act, 1907, s. 29, as amended, and to the Defence (Patents, Trade Marks, etc.) Regulations, 1941, on which provisions the defence in this action solely rests. It is alleged by the defendant that, on their true construction and application, they make the terms of the licence under which the plaintiffs sue inoperative in so far as the claims for royalties in this case are concerned. All the closure parts involved were sold, it is alleged, by the defendant to the Ministry of Supply in pursuance of contracts in writing whereby the defendant was authorised to make, use, exercise or vend such inventions as might be required for the purpose of performing the said contracts and in connection with the making, use, exercising or vending of any inventions to use any drawing, model, plan or other document or information as might be required for the said purpose. Paragraph 6 of the amended defence is as follows:

The performance of the said contracts and each of them concerned the making, use, vending or exercise of the plaintiffs' invention or inventions for the service of the Crown. Further or in the alternative, the making, use, vending or exercise of the plaintiffs' invention or inventions and the use of the plaintiffs' drawings, models, plans documents and information for the service of the Crown included the performing of the said contracts and each of them. In the premises the terms of the letters and agreements referred to in para. 3 of the statement of claim were and are inoperative so far as concerns the said closure parts.

The Patents and Designs Act, 1907, s. 29 (1), [as amended by the Act of 1919] is as follows:

A patent shall have to all intents the like effect as against His Majesty the King as it has against a subject: Provided that any government department may, by themselves or by such of their agents, contractors, or others as may be authorised in writing by them at any time after the application, make, use or exercise the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled in the manner hereinafter provided. And the terms of any agreement or licence concluded between the inventor or patentee and any person other than a government department, shall be inoperative

so far as concerns the making, use or exercise of the invention for the service of the Crown.

Sub-section (1A), which incorporates an amendment of the statute of 1942, provides :

The power of a government department under sub-s. (1) of this section to make, use or exercise an invention for the services of the Crown shall include power during any war period to make, use, exercise or vend an invention, upon such terms as are mentioned in the said sub-s. (1), for any purpose which appears to the department necessary or expedient for the efficient prosecution of any war in which His Majesty may be engaged or for the maintenance of supplies and services essential to the life of the community ; and the terms of any such agreement or licence as is mentioned in the said sub-s. (1) shall be inoperative so far as concerns the making, use, exercise or vending of an invention under this sub-section as they are inoperative so far as concerns the making, use or exercise of an invention under that sub-section.

The effect of sub-s. (1A), therefore (as far as is material to this case) is to add "or vend" to the words "make, use or exercise" on the two occasions on which they occur in s. 29 (1).

Section 29 (2) of the Act of 1907 [as amended by s. 2 (1) of the Act of 1942] provides :

In case of any dispute as to the making, use, exercise or vending of an invention under this section, or the terms thereof, or as to the existence or scope of any record or trial as aforesaid, the matter shall be referred to the court for decision, who shall have power to refer the whole matter or any question or issue of fact arising thereon to be tried before a special or official referee or an arbitrator upon such terms as it may direct. The court, referee, or arbitrator, as the case may be, may, with the consent of the parties, take into consideration the validity of the patent for the purposes only of the reference and for the determination of the issues between the applicant and such government department.

For the purposes of this case I need not read any more of that section. In the definition section, s. 93, it says :

"Invention" means any manner of new manufacture the subject of letters patent and grant of privilege within s. 6 of the Statute of Monopolies . . . [1623], and includes an alleged invention.

The other provision relied on by the defendant is in the Defence (Patents, Trade Marks, etc.) Regulations, 1941, reg. 3 (5) :

In connection with the making, use, exercise or vending of any invention, or application of any design, on behalf of, or for the services of, the Crown (whether by virtue of the Patents and Designs Act, 1907, or otherwise), a Secretary of State, the Admiralty, the Minister of Supply or the Minister of Aircraft Production may authorise the use of any drawing, model, plan or other document or information in such manner as appears to him or them to be expedient in the interests of the defence of the realm or the efficient prosecution of the war, notwithstanding anything to the contrary contained in any licence or agreement ; and any licence or agreement, if and so far as it confers on any person, otherwise than for the benefit of the Crown, a right to receive any payment in respect of the use of any document or information in pursuance of such an authorisation, shall be inoperative.

The plaintiffs' main contentions were as follows :

(1) That s. 29 relates only to patented inventions and that the defendant did not make, use, exercise or vend any patented invention nor was the defendant authorised in writing to make any patented invention. (2) That on the proper construction of reg. 3 of the Defence (Patents, Trade Marks, etc) Regulations, 1941, para. (5) relates only to a case in which the Minister authorises the use of any drawing, model, plan or other document or information in connection with the making, use, exercise or vending of a *patented* invention, and that therefore it has no application where, as in the present case, the defendant did not make, use, exercise or vend a *patented* invention. (3) That even if reg. 3 (5) is to be construed so as to apply to an *unpatented* invention and even if the goods which the defendant made and sold to the Ministry could be called an *unpatented* invention (both of which the plaintiffs dispute), the *authority* given to the defendant was limited to an authority to use drawings, models, plans or other documents or information in connection with the making, use, exercise or vending of a *patented* invention and was not an authority to use those things in connection with the making, use, exercise or vending of an *unpatented* invention (which alone the defendant made and sold). Therefore the regulation has in any event no bearing in the case. (4) (a) That the licence did not give the plaintiffs any right to receive any payment in respect of the use of any document or information because

the royalties were not payable by the defendant to the plaintiffs for the use of documents or information. (b) That, if on the proper construction of the licence the royalties were payable in part in respect of the use by the defendant of any document or information, and if the defendant used any document or information, the use of the documents or information by the defendant was not "*in pursuance of the authorisation*" as it was not in pursuance of any authorisation that the defendant used whatever documents or information he did use. He needed no such authorisation as there was nothing in the licence "to the contrary," *i.e.*, to preclude him from using the documents or information in making sputs and bungs for the Ministry. (5) That as regards a large part of the sputs and bungs which the defendant made and sold to the Ministry, there was no *authority* given by the Minister under s. 29 to make, use, exercise or vend them. The purported authority was given after those particular goods had been sold and delivered and the authority in s. 29 cannot be given retrospectively.

The defendant's summarised submissions were as follows :

(1) The use, under s. 29, of a patented invention is use by the Crown. The defendant in supplying material either (i) made use of the inventions "constructively," or (ii) took part as an authorised agent of the Crown in the use of the inventions. (2) Regulation 3 (5) is expressed to apply not only to s. 29 use but also "otherwise." It cannot therefore be limited to patented inventions and relates equally to the use of information, etc., in connection with "alleged" or unpatented inventions. (3) The authority given to the defendant related to the proposed or intended user by the Crown, for which purpose the supply of component parts of the closures was an essential ingredient. Such supply involved the use of information, etc., received from plaintiffs in connection with the manufacture and assembly of what they alleged to be invented closure parts of their devising. (4) (a) The royalties were expressed to be payable in respect of the manufacture and use of sputs and plugs. If such manufacture incorporated, as it did, the use of information, etc., payment of royalty covered payment for such use. (b) The defendant manufactured and supplied sputs and plugs pursuant to the authority given in each "I.T.P." such authority covering all inventions, information, etc., if any, which fell to be used in such manufacture. Such authority was necessary, not because the licence precluded the defendant from using it at all but because the licence precluded him from using it except upon the terms of the licence. (5) The authority given by the Ministry was contained in the "I.T.P." which is in fact the order and which was expressed to be on terms and conditions which included the authority set out in Standard Condition 43 (or 32). The subsequent conclusion of a formal contract when costings, etc., had been determined did not post-date either the order or the authority given thereby. It confirmed formally the authority already given. In any event s. 29 enables retrospective authority to be granted, and contains nothing to the contrary effect.

Section 29 has recently been considered in the Court of Appeal in *No-Nail Cases Proprietary, Ltd. v. No-Nail Boxes, Ltd.* (1) and *Foster Wheeler, Ltd. v. Green & Son, Ltd.* (2). The plaintiffs rely on both those decisions in support of the construction that the plaintiffs advance. The actual decision in the *No-Nail* case (1) was, on the issue which is material, that a licensee or the owner of a patented invention may be included in the word "others" in that part of the proviso :

Provided that any government department may, by themselves or by such of their agents, contractors, or others as may be authorised in writing . . .

The plaintiffs expressly asked to keep this point open should the case go in due course beyond the Court of Appeal. I do not think it necessary to refer to the facts of the case. Both courts held that s. 29 relieved the licensees from liability to pay the royalty under the agreement.

In the *Foster Wheeler* case (2), it was decided that patentees are not included in the word "others," and that the defendants, who were patentees of a patent for making economisers for use in marine boilers, and who had contracted to sell the patented economisers exclusively to the plaintiffs, were not relieved of their obligation to the plaintiffs by an authorisation by the Crown to manufacture and supply the economisers to the Crown. The patentees were, therefore, restrained from selling to the Crown. The judgment of the court was delivered by DU PARCQ, L.J., who had also read the judgment of the court in the *No-Nail* case (1). DU PARCQ, L.J., said ([1946] 1 All E.R. 63, 65, 66) :

Shortly stated, the question for our decision is this : When s. 29 empowers a government department to act "by themselves or by such of their agents, contractors, or others as may be authorised in writing by them" is the word "others" to be read as including the patentee ? If it cannot properly be so read, it must follow that the judge wrongly construed this difficult section, and that the appeal must be allowed.

Section 29 was recently considered by this court, and it was then held that a government department might lawfully authorise persons who were making patented articles under a licence from the patentee to make them on its behalf for the services of the Crown on terms to be agreed between the department and the patentee or settled as provided in the section : see *No-Nail Cases Proprietary, Ltd. v. No-Nail Boxes, Ltd.* (1). The question now before us is a different one, and is bare of authority. It must be answered, like all questions of construction, by reading the words of the section as a whole, with due regard to the apparent purpose of the section and to the context in which the words appear. The section begins by enacting that "a patent shall have to all intents the like effect as against His Majesty the King as it has against a subject." This enacting part of the section, in our opinion, provides the key to the interpretation of the section as a whole. The legislature is concerned with the effect which letters patent granted by the Crown are to have as against the Crown. Is the monopoly granted to the patentee to avail him as against the Crown, or only as against his fellow-subjects ? Having answered that question in favour of the patentee, Parliament has proceeded, by a proviso, seriously to qualify the right which it has conferred. Any government department may do what, done by a subject, would *prima facie* be an infringement of the patent, namely, make, use, exercise and vend the invention. But this right is qualified in its turn. First, the department must be dealing with the invention in the permitted manner "for the services of the Crown." Secondly, the department must come to an agreement with the patentee (subject to the approval of the Treasury) as to the terms on which the invention is to be dealt with, or, failing agreement, must abide by such terms as may be settled in the manner prescribed by sub-s. (2). Finally, not only may the government department make, use, exercise or vend the invention "by themselves," but (to put the matter as briefly as possible) they may authorise "others" to do the like on their behalf. So far the section has dealt solely with the rights of the patentee as against the Crown. Then, having disposed of that question, it goes on to provide that the terms of any agreement or licence concluded between the inventor or patentee and any person other than a government department shall be inoperative so far as concerns the making, use, exercise or vending, of the invention for the services of the Crown.

Later in his judgment DU PARCQ, L.J., said (*ibid.*, 66, 67) :

The court will always lean strongly against an interpretation of a statute which deprives the subject of rights without compensation, and if there be any ambiguity in the words of the section, this consideration must lend great weight to the contention advanced on behalf of Foster Wheeler.

Although neither of the two cases deals directly with the point in issue before me, I have read substantially from this judgment because it deals generally with the interpretation of the section, and I think both cases together justify the propositions which the plaintiffs asked me to draw from them, namely : (i) a licensee from the patentee may be included in the word "others" in the proviso to s. 29 ; (ii) a patentee is not included ; (iii) in considering the section the court will lean against a construction which deprives the subject of rights without compensation ; and (iv) the key to the interpretation of the section as a whole is to be found in the first two lines of the section, and the proviso enables a government department to do that which would, *prima facie*, be an infringement of a patent. I think that all these propositions taken together indicate, and, perhaps, involve, as was submitted, that the section is dealing with patented and not unpatented inventions.

Looking at the position historically, it was decided in the House of Lords in *Dixon v. London Small Arms Co., Ltd.* (3) :

The Crown has the right to the use of a patented process or invention without compensation to the patentee. *Per* LORD SELBORNE : This right of the Crown is not because the Crown is impliedly excepted from the effect of the letters patent, but because the privilege thereby granted is granted against the subject only and not against the Crown.

Following that decision, the Patents, Designs and Trade Marks Act, 1883, was passed, s. 27 of which provided :

(1) A patent shall have to all intents the like effect as against Her Majesty the Queen, her heirs and successors, as it has against a subject. (2) But the officers or authorities administering any department of the service of the Crown may, by themselves, their agents, contractors, or others, at any time after the application, use the invention for the services of the Crown on terms to be before or after the use thereof agreed on, with the approval of the Treasury, between those officers or authorities and the patentee, or, in default of such agreement, on such terms as may be settled by the Treasury after hearing all parties interested.

That section is the forerunner of the present s. 29 and would clearly seem to refer to a patented invention. Section 29 re-models and amplifies s. 27 of the Act of 1883. It replaces "but" with "provided that." It requires authorisation in writing and makes different provisions for settling the compensation in default of agreement. The last sentence in s. 29 is entirely new, but, if s. 27 of the Act of 1883 applied only to a patented invention, nothing in the substituted s. 29 would appear to alter that aspect of the section.

On behalf of the defendant it was submitted that the definition of "invention" in s. 93 did not, properly construed, mean a patented invention and that, e.g., in s. 1 (1) which provides:

An application for a patent may be made by any person who claims to be the true and first inventor of an invention . . .

the word "invention" could not mean a patented invention because a claim of an invention must exist before the application for a patent. The definition of the word "invention" is, I think, wider than a patented invention, but s. 29 provides that the government department may give the necessary authority in writing "after application." The section, in my opinion, applies to a patented invention and to an alleged invention which is the subject of an application for a patent. Unless the sputs or the plugs are patented inventions or are the subject of an application for a patent, the defence under s. 29, in my view, fails. No question arises in this case of an application for a patent and I will postpone consideration of the question whether there is any patent until after I have dealt with the regulations relied on. The defendant contends that reg. 3 (5) of the regulations of 1941 relates to the use of both patented and unpatented inventions and that the Crown is entitled to authorise the use of drawings, information, etc., in connection with the sputs and plugs, even if they are unpatented inventions. It is said that the defendant was so authorised to use, and did use, the plaintiffs' information in the manufacture for the Crown and that the agreements between the parties provide for payment in respect of the use of such information and, therefore, are inoperative under the regulation. The plaintiffs, on the other hand, contend that reg. 3 (5) is ancillary or complementary to s. 29 of the Act and enables a person who is authorised to use a patented invention to use any information which by any agreement he is precluded himself from using.

The Defence (Patents, Trade Marks, etc.) Regulations, 1941, are made under the Emergency Powers Defence Acts. They deal with patents, trade marks and registered designs, and reg. 3 controls various matters relating to them. Regulation 3 (1) makes provision for prohibiting publication of information with respect to the subject-matter of an application for a patent. Regulation 3 (2) restricts application for a patent in a foreign country. In reg. 3 (3) and (4), which go together, the word "invention" cannot be restricted to a patented invention because reg. 3 (4) gives the right to a person to apply for and obtain a patent in respect of an invention notwithstanding that there has been previous publication or use by reason of the compulsory powers given by reg. 3 (3). Then comes reg. 3 (5). If I am right in the construction of the previous two sub-sections, I think "invention" in sub-section (5) must also refer to a patented or unpatented invention, and this interpretation is strengthened by the words in brackets:

. . . (whether by virtue of the Patents and Designs Act, 1907, or otherwise) . . .

The making, using, etc., of an invention on behalf of or for the services of the Crown may be by virtue of the Patents Act, 1907, s. 29, but it may be otherwise. It may be the use of an invention revealed to the authorities mentioned by directions given under reg. 3 (3) and not the subject of any patent or application for a patent. In either case, the production of the drawings, information, etc., may be authorised:

. . . notwithstanding anything to the contrary contained in any licence or agreement; and any licence or agreement, if and so far as it confers on any person, otherwise than for the benefit of the Crown, a right to receive any payment in respect of the use of any document or information in pursuance of such an authorisation, shall be inoperative.

This construction of the regulation may deprive an inventor of a secret, but not patented, invention or process of compensation for such use as the Crown

makes of his invention, but the provision is in Emergency Regulations to meet national necessity and there are general provisions for *ex gratia* payments in suitable cases.

I now turn to consideration of the patents. In the particulars given under para. 6 of the defence, the defendant relied on the inventions or designs covered by letters patent numbers 219,610, 294,740, 322,205, 348,285, 363,180, 391,050 and 391,051. The first four patents expired before any date material to this action, but they were all examined in some detail before me. I accept the evidence of Mr. H. A. Gill, an experienced chartered patent agent and consulting engineer, with regard to the various patents. It was not challenged by the evidence of any other patent agent. The effect of it and of my interpretation of the patents is that neither the sput nor the plug as a separate unit or integer is covered by any of the patents. On behalf of the defendant this was conceded in respect of the sput, but it was alleged that the plug was covered as an integer of British Patent 391,051, the application date of which in the United Kingdom is Oct. 31, 1932. The heading is "Improved closure device for the filling and/or discharge opening of a metallic container." It is said that that indicates a distinction between the closure device and the filling and discharge opening of a metallic container, and it is submitted that it follows that the expression "closure device" cannot include the flange because the flange is the member and the sput is the member which is so attached to the container that there can be no filling or discharge opening of the container which is not also a filling or discharge opening in the sput.

Emphasis is placed on p. 1, line 27 :

Another object of the invention is to provide an improved closure plug which is light in weight, cheap to manufacture, serves to reduce shipping and storage costs, and which may be easily and quickly applied to or removed from the container opening without the use of special tools.

Consequently, it is contended that "container opening" means the whole assembly without the plug and the distinction is between the plug as such and the rest of the container.

I have been referred to *Nobel's Explosives Co., Ltd. v. Anderson* (4), and I have been guided by the observations therein on the principles of construction. I have also been referred to the more recent *Electric and Musical Industries, Ltd. v. Lissen, Ltd.* (5) and, in particular, the passage in the speech of LORD RUSSELL OF KILLOWEN ([1938] 4 All E.R. 221, 224).

I am of opinion that this patent does not cover plugs alone but only in combination with sputs and the flange of the drum stock. Claim 1 is as follows :

A closure device for the filling and/or discharge opening of a metallic container, characterised by said opening being defined by a bushing part comprising an outwardly extending flange integral with a wall part of the container, a threaded member within the flange, and an interlocking bead at the outer or exterior ends of the flange and member, the threaded member having an inclined gasket seat adjacent its outer end, a threaded closure plug being adapted to be secured into said threaded member, the plug having a head and a groove between said head and the outermost thread of said plug and at least as deep as the threads, and a gasket formed of compressible material, mounted in said plug groove and substantially wholly confined and compressed between said seat, groove and head when the plug is screwed into position in the threaded member.

I construe this claim as saying that it is for a closure device characterised by the various features set out, including "a threaded closure plug being adapted to be secured into said threaded member" and then the plug is described. The opinion I have formed is, I think, supported by many parts of the specification and by comparison with the plaintiffs' Indian patent which claims "a closure plug or a closure device" having certain characteristics. The patent covers the whole device or assembly, including the drum stock with the flange with octagonal seating. I, therefore, find in favour of the plaintiffs' contention that there is no patent covering either the sput or the plug separately as independent units.

The defendant's contention (1) next calls for consideration. It was submitted strongly on behalf of the defendant that the defendant was supplying the sputs and plugs as component parts of the closure device with the necessary dies and tools for the assembly of the patented invention and that that established user

of the invention by the defendant under the authority of the Crown, and, but for that authority, there would have been an infringement of the patent. Secondly, it was submitted that the Crown assembled the parts by some agent other than the defendant and in so doing utilised the invention. The government contracts with the defendant were for sputs and plugs, but not for drums with the completed and assembled closure device. The government also bought a certain number of insertion dies and piercing and flanging dies. The evidence shows that of the sputs and plugs supplied by the defendant to the Ministry some were kept as spare parts and never assembled and many of these were returned to or collected in this country mixed with others of American manufacture. Some were probably assembled in this country, some abroad, and of the quantity sent or assembled abroad some probably returned to this country. I do not think anything more definite than that was established. Patent No. 391,051 is a patent for a combination and so, I think, are some of the others. It is established authority that a patent for a combination is not a patent which covers the integers or component parts of the combination. In *Harrison v. Anderston Foundry Co.* (6), there is a *dictum* of LORD CHELMSFORD (1876), 1 App. Cas. 574, 581):

If a patent is solely for a combination nothing is protected by it, and consequently nothing can be an infringement but the use of the entire combination.

I will make reference also to *Clark v. Adie* (7), the headnote of which reads as follows:

A patent may be granted not only in respect of a whole and complete thing described, but in respect, also, of a subordinate integer of that whole. But then the invention must be so described as to make it clear in respect of what (the whole, or the integer) the patent has been asked for and granted. Where a person has invented an improvement in the form of a particular apparatus or machine, but combines that individual improvement with other things which are not his inventions, his specification must claim that particular individual thing, and not leave it doubtful whether the claim is made for the whole combination, of which that thing really only forms a part.

There is a passage in the speech of LORD CAIRNS, L.C. (1877), 2 App. Cas. 315, 320, 321), which is very much in point, likewise *Townsend v. Haworth* (8) in which I refer to the whole of the speech of SIR GEORGE JESSEL, M.R. (1875), 12 Ch.D. 831, *n.*). Then there is the more recent *Dunlop Pneumatic Tyre Co., Ltd. v. David Moseley & Sons, Ltd.* (9), the headnote of which is:

The sale of a component part of a combination, the subject of a patent, the vendor knowing that the purchaser intends to use the article for the purpose of infringing the patent, is not an infringement by the vendor.

In the course of the judgment of VAUGHAN WILLIAMS, L.J., this passage occurs ([1904] 1 Ch. 612, 619):

I wish to say a word about *United Telephone Co. v. Dale* (10). In that case in the course of the argument PEARSON, J., said: "If there was a patent for a knife of a particular construction, and an injunction was granted restraining a defendant from selling knives made according to the patent, and he was to sell the component parts so that any school-boy could put them together and construct the knife, surely that sale would be a breach of the injunction." I have not now to determine whether that observation was right or not, but, so far as I am concerned, I can see no reason for saying that it is wrong, and there is nothing in my present judgment which is intended to be inconsistent with it. If you are in substance selling the whole of a patented machine, I do not think that you can save yourself from liability for infringement, because you sell it in parts which are so manufactured as to be adapted to be easily put together. But that is not the present case. What is complained of here is merely the sale of one or other of the parts of the tyres patented by the plaintiffs.

It is this passage, and particularly, I think, the quotation from what PEARSON, J., said in argument, which is the foundation—perhaps the sole foundation—of the defendant's argument of constructive infringement. I cannot find that there is any authority to support the contention; indeed, the authorities seem to me to be against it. I do not think that this case is a suitable one in which to consider the topic further. On the facts there is no satisfactory evidence on which to find conclusively what use was made of the sputs or plugs or when or where or by whom, and I think no evidence at all that the defendant supplied an essential component, the drum stock. There is also some evidence that

sputs or plugs could be used otherwise than with a metal container. There is no evidence of any person being authorised in writing to use the plaintiffs' invention except the defendant himself.

A In my judgment, therefore, the plaintiffs' contention (1) is established, but not their contention (2). I therefore turn to contention (3). Regulation 3 (5) requires an authority to use the drawing, information, etc., and it is alleged that no authority was given to use those things in connection with the use of an unpatented invention. It may well be that the defendant and the Ministry of Supply acted throughout on the basis that the sputs and plugs were the subject of patent protection. This might have been avoided if attention had been given to para. 3 (b) of the Standard Condition 43. Such differences as there are between Standard Condition 43 and Standard Condition 32 do not affect the construction on the point which arises here. I take Standard Condition 43 :

B Under the provisions of s. 29 . . . of the Patents and Designs Act, 1907 . . . and under the Defence (Patents, Trade Marks, etc.) Regulations, 1941, reg. 3 (5), the contractor is authorised for the purpose of performing the contract (but not otherwise) to make, use . . . such inventions . . . as may be required for that purpose and in connection with the making, use . . . of any inventions . . . as aforesaid to use any . . . information as may be required for that purpose.

C The plaintiffs submitted that this authority should be read distributively. Section 29 sanctions the giving of authority to make or use, etc., the invention and reg. 3 (5) sanctions the giving of authority to use information. If, it is contended, s. 29 relates only to patented inventions (as I have found), then the authority to use the information is only in connection with the use of any invention "as aforesaid," i.e., only in connection with a patented invention. The argument has force, but it seems to me not to do justice to the regulation and the conditions read together. If reg. 3 (5) has been rightly construed, it D permits authority to be given for the use of information in respect of unpatented inventions. Standard Condition 43 is an express authority under reg. 3 (5), which regulation does not require the authority to be in writing. It is drawing too fine a line to restrict the authority to an authorisation only in connection with a patented invention. There was here no patented invention. I think the defendant's contention on this point is to be preferred and I accept the defendant's contention (3).

E The plaintiffs' fourth contention and the defendant's corresponding answer calls for the consideration of the licences which I have set out earlier in this judgment. Paragraph 8 of the licences deals expressly with information. The plaintiffs submit that no royalty is payable for information and that there is nothing in the licences precluding the defendant from using any information which he obtains concerning the sputs and plugs or their manufacture. Here F again I accept the view set out in the defendant's answer which, in respect of their contention 4 (b), is supported by the decision in the *No-Nail* case (1).

G There remains only for consideration the subsidiary claim which is dealt with in the respective contentions numbered (5). In the first contract of the Ministry of Supply, to which I referred at the outset, the acceptance dated Feb. 8, 1944, of the defendant's tender states that the delivery of the goods has already been effected, and it was submitted that under s. 29 the authority in writing must be given before the act which would constitute the infringement if no such authority were given. In view of my findings, this does not now arise, but a similar contention could be raised in respect of the authority given under reg. 3 (5) in respect of the use of information, etc. I do not accept it and I think it is adequately dealt with in the defendant's corresponding answer.

H In the result, the defendant is relieved, in my judgment, of his obligation to pay the royalties claimed by reason of reg. 3 (5) of the Defence (Patents, Trade Marks, etc.) Regulations, 1941, and I give judgment for the defendant.

Judgment for the defendant with costs.

Solicitors: Warren, Murton & Co. (for the plaintiffs); Freshfields (for the defendant); Treasury Solicitor (for the Minister of Supply).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

FLOOD v. FLOOD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Ormerod, J.), July 21, 1948.]

Child—Custody—Maintenance—Order made under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (b)—Discharge of order—Order for custody under Guardianship of Infants Acts, 1886 and 1925.

On Feb. 4, 1943, a wife obtained an order under the Summary Jurisdiction (Separation and Maintenance) Acts giving her the custody of the two children of her marriage, with maintenance for herself in the maximum amount of £2 per week and for the children in the maximum sum of 10s. per week each. On Mar. 15, 1948, the wife applied to have the order varied by revoking such parts thereof as referred to the custody and maintenance of the children, it being intended, if the order was varied as asked, to apply for a summons under the Guardianship of Infants Act, 1925, returnable immediately, to obtain an order for custody and maintenance at a higher figure under that Act. There was evidence that the husband's means had increased and that one of the children was in poor health. It was contended that no cause was shown for discharging the provision of the first order with regard to custody as it was proposed to have custody restored immediately by another order, but the justices granted the application. On appeal by the husband:

HELD: in the matter of custody the paramount consideration was the welfare of the children, and in that connection the adequacy of the provision for maintenance was of great importance, and, the decision of the justices was right.

Re Kinseth ([1947] 1 All E.R. 201), approved and applied.

[AS TO JURISDICTION OF MAGISTRATES WITH REGARD TO CUSTODY AND GUARDIANSHIP OF INFANTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 840-848, paras. 1336-1354; and FOR CASES, see DIGEST, Vol. 27, pp. 558, 559, Nos. 6134-6151.]

Cases referred to:

- (1) *Underwood v. Underwood*, [1945] 2 All E.R. 561; [1946] P. 84; 115 L.J.P. 49; 173 L.T. 274; 109 J.P. 248; 2nd Digest Supp.
- (2) *Timmins v. Timmins*, [1919] P. 75; 88 L.J.P. 78; 120 L.T. 544; 27 Digest 567, 6255.
- (3) *Johnson v. Johnson*, [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 27 Digest 567, 6252.
- (4) *Re Kinseth*, [1947] 1 All E.R. 201; [1947] 1 Ch. 223; [1947] L.J.R. 642; 177 L.T. 3.
- (5) *Heworth v. Heworth*, [1948] 2 All E.R. 715; 112 J.P. 303.

APPEAL by a husband from an order of Bury, Lancashire, justices, made on May 3, 1948, whereby an order made on Feb. 4, 1943, was varied by revoking parts thereof referring to the custody and maintenance of the children of the marriage. The appeal was dismissed. The facts appear in the judgment of LORD MERRIMAN, P.

Clifford Mortimer and *John Mortimer* for the husband.

Quintin Hogg for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from a decision of the justices for the county borough of Bury in which he complains that, on May 3, 1948, the justices, on the wife's application, discharged an order for custody previously made in favour of the wife although her application was avowedly made, not to change the custody itself, but to get that custody under another Act of Parliament under which she could get larger maintenance for the children.

On Feb. 4, 1943, the wife obtained, on the ground of persistent cruelty, an order giving her the custody of the two children, with maintenance in the maximum amount of £2 a week for herself and in the maximum sum of 10s. for each child in respect of the two children whose custody was awarded to her. That order remained in force until the wife applied on Mar. 15, 1948, that the order might be varied by revoking such parts thereof as referred to the custody and maintenance of the two children. There is a side-note to the application in these words: "If the order is varied as asked, application will be made for a summons under the Guardianship of Infants Act, 1925, returnable immediately." There was, therefore, no doubt what the object of that summons was. It is

said that the justices had no jurisdiction to discharge this custody order merely in order to substitute another custody order in favour of the same parent, although thereby that parent was enabled to obtain larger maintenance. It is necessary to bear in mind the terms of the Summary Jurisdiction (Married Women) Act, 1895, s. 7, for it is on that section alone (at any rate, so far as concerns this case) that the very special right of a court of summary jurisdiction dealing with matrimonial causes to vary or even to discharge its own orders depends. The material words are :

A court of summary jurisdiction . . . may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of £2.

I need not repeat the analysis of that section which was given by this court in *Underwood v. Underwood* (1). Suffice it to say that, in so far as the mere question of *quantum* is concerned, it is clear that the words "upon fresh evidence" with all their implications are no longer applicable, but that they are still applicable to anything other than a mere question of amount, and counsel for the husband rightly called attention to the fact that this is not a mere question of amount.

This is the discharge of the original custody order itself, and I agree with him that it is necessary, therefore, before justices have jurisdiction to act, that cause must be shown on fresh evidence to the satisfaction of the court. Again, I need not repeat at length the definition of what is meant by "fresh evidence," beyond saying, as I said in *Underwood v. Underwood* (1), that I accept absolutely the summary of earlier judgments given by HILL, J., in *Timmins v. Timmins* (2), a summary which he concluded by saying ([1919] P. 80) (after quoting what was said in *Johnson v. Johnson* (3)) :

. . . that "fresh evidence" means evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing, and could not by reasonable means have come to his knowledge before that time . . . But they [the justices] can discharge or vary their order only upon cause shown. In my judgment that means cause shown for discharging that part of the order which is sought to be discharged, and the order cannot be discharged as a whole unless cause is shown for discharging every part of it.

From that it is argued that there cannot be any cause for discharging this custody order, because it is not said that the wife is no longer to have custody. On the contrary, she states in her summons that it is her intention, the moment this order is discharged, to ask for a fresh order to be made to the same effect under another statute. One must bear in mind that there are two concurrent jurisdictions in this respect. By the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (b), one of the orders that may be made on proof of the wife's complaint, is that "legal custody of any children of the marriage . . . while under the age of 16 years, be committed to the applicant," and then, 25 years later, by the Married Women (Maintenance) Act, 1920, s. 1 (1), where an order has been made "which contains a provision committing the legal custody of any children of the marriage to the applicant," the court

may, in addition to any other provision authorised by the Act, include a provision that the husband shall pay to the applicant, or to any officer of the court or third person on her behalf, a weekly sum not exceeding 10s. for the maintenance of each such child until such child attains the age of 16 years.

It is not compulsory to deal with the question of custody under that Act. It is permissible. At the same time, by the Guardianship of Infants Act, 1925—the Act which contains the well-known direction to the court to give paramount consideration to the welfare of the child as distinct from the supposed rights of either parent—the wife may apply for guardianship of a child, and, if she obtains it, the husband may be ordered to pay a sum not exceeding £1 as against the 10s. payable under the other Acts.

It is said that once the wife has elected to proceed under one of these Acts, she cannot recall her election and proceed under the other. It is necessary to examine this contention, but before doing so, I must refer (without reading them all) to the justices' reasons, and I would like to say that this case, in my opinion, has been most admirably tried. The justices find that the husband's income

had increased and that this fact, together with the difficulties in which the wife found herself with one of the children, which was in poor health, amounted to fresh evidence. They say that, if they were merely dealing with an order under the Summary Jurisdiction (Married Women) Act, 1895, for something less than the maximum amount for the wife or the children, these new facts would have amounted to fresh evidence which would have entitled them to increase the amount. I accept that only with this criticism, that, so far as the question of amount is concerned, "fresh evidence" is not necessary, but certainly those circumstances would have been good cause, if they were established to the satisfaction of the court, without the special considerations attaching to the need for "fresh evidence." I go further. If the words "upon fresh evidence" had still been material, those circumstances would, in relation to the amount, unquestionably have been within the accepted definition of the words "fresh evidence." The justices then face the difficulty which I have already stated, whether they could vary the order by revoking that part which related to the custody of the children when the wife was anxious to retain that custody. After referring to the passage in HILL, J.'s, judgment in *Timmins v. Timmins* (2) which I have mentioned, and the argument, based on that, that because the wife was anxious to retain custody of the children she had not shown cause why that part of the order which related to custody should be revoked, and to the judgment of VAISEY, J., in *Re Kinseth* (4), they conclude by saying that they do not think that there is any authority for saying that once a wife has chosen under which Act she seeks maintenance for her child she is at all times precluded from taking advantage of any other Act.

The judgment of VAISEY, J., in *Kinseth v. Kinseth* (4) deals, not with the revocation or discharge of an order already in existence, but with the double remedy. In that case the wife, on the ground of desertion, had obtained an order in favour of herself under the Summary Jurisdiction (Married Women) Act, 1895, but she deliberately refrained from asking for custody under that Act (no doubt, for the same reason as prevailed in this case) and sought to obtain guardianship under the Guardianship of Infants Act, 1925. The justices held that she could not take two bites at the cherry, and that this procedure was misconceived and they had no jurisdiction to make the order. On appeal, VAISEY, J., expressed the view, with which I am in complete agreement, that the wife had a right to take the course she did. He said in conclusion ([1947] 1 All E.R. 202) :

I am told that in the courts of summary jurisdiction in the metropolis it is a matter of routine or practice not to allow summonses under both Acts to proceed or be taken out . . . I myself can see no possible reason why women who have been deserted by their husbands should not be entitled to have the benefit of both these sets of statutes and the rule or practice that they may not proceed under more than one of the two appears, in my judgment, as at present advised, to be misconceived.

I do not understand VAISEY, J., as saying that the justices could make a custody order under both statutes simultaneously. All he was dealing with was the right to proceed under two alternative summonses. This matter was dealt with by this court on Apr. 27, 1948, in *Heworth v. Heworth* (5), when it was made clear that, although that was perfectly proper procedure, there must come a moment at which either the party or the court or both must decide under which Act the order is going to be made. In *Heworth v. Heworth* (5) two summonses were before the court, and the court had made a custody order under both summonses and had awarded maintenance of £1 a week under the Guardianship of Infants Act. We said that this was to be deprecated, for the reason, if for no other, that it embarrassed the question of appeal, and then I went on to say (p. 716 post; 112 J.P. 303) :

If two summonses are taken out regarding custody, the proper course is for the justices to choose one summons, instead of making an order for custody on both. I ended by saying that I trusted that course would be followed in all similar cases.

That, of course, does not deal directly with the point which is now before us, but I think it has an indirect bearing, which I can perhaps best illustrate by taking a hypothetical case. If the wife in the present case had asked, not only for an order for herself in the summons under the Summary Jurisdiction (Married Women) Act, 1895, but also for custody and maintenance under that Act, and at the same time had presented, as in *Heworth v. Heworth* (5), a summons under

the Guardianship of Infants Act, 1925, for custody and maintenance, there would have come a point at which either she or the court must choose under which summons the court should act. If the evidence was that at that time all the husband could afford was £3 a week—that is to say, £2 for herself and 10s. for each of two children—and she admitted that she could well manage to look after the children on that sum (in other words, if she satisfied the justices that the total sum of £3 a week was all that was required for the welfare and benefit of herself and of the children), she might well have elected to take, or the justices might well have decided to deal with, custody and maintenance under the same order as that made in her own favour under the Act of 1925. Then, let it be supposed, some years later the situation changes. The husband's means have increased, the value of money has decreased, and the children's needs have increased, and the wife says to the court: "I ask for this custody order to be set aside, not because it is in the interests of the children that my husband should have custody of them from this moment, but because it is in their interest that I should have more money with which to look after their welfare. Circumstances have changed for the worse so far as I am concerned and for the better so far as my husband is concerned. The children's needs have increased and so have my husband's means." That relates, not to a question of amount, but to an essential element of the question of custody, that essential element being: "What is for the welfare of the children?" My brother pointed this out very forcibly in the course of the argument, and I do not think that one can divorce the two integrated questions of custody and welfare of the children, on the one hand, and the means of supporting them, on the other. They seem to me to be completely bound up together, or, at any rate, to be so in this case. It is said that it cannot be right to allow some indirect motive, something unconnected with the actual custody, to come into this matter, but I think we have got to the stage in which it is impossible to lay down a hard and fast rule like that. The Court of Appeal have sanctioned the procedure of getting rid of a non-cohabitation clause in an order, not because the order was wrongly made or because it is any less right that it should continue for the protection of the wife, but for the express purpose of enabling her to found a charge of desertion against her husband. In my opinion, it is sufficient for us to be satisfied in this case, as I am satisfied, that the welfare of the children is involved in the change of the jurisdiction under which the new custody order has been made. I think that the justices came to a right decision, and that this appeal should be dismissed.

ORMEROD, J.: As I see this case, the real point is whether the evidence of the increased cost of maintaining the children and of the increased means of the husband was relevant to the question of the custody of the children apart from the amount which should be allowed for their maintenance, and, as the paramount interest is the interest of the children, and that is the matter to which the court must predominantly direct its consideration, it is clear that any question of amount which may involve the making of an order under one Act, on the one hand, or under another Act, on the other hand, is something which must be relevant to the issue of custody. In those circumstances I agree that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Butcher & Barlow*, Bury (for the husband); *Gregory, Rowcliffe & Co.*, agents for *A. S. Coupe*, Heywood (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

NOTE.

HEWORTH v. HEWORTH

[PROBATE, DIVORCE AND ADMIRALTY (Lord Merriman, P., and Willmer, J.), April 27, 1948.]

Husband and Wife—Custody—Maintenance—Summonses by wife under both Summary Jurisdiction and Guardianship of Infants Acts—Proper course for justices to follow.

A wife took out two summonses, the one under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, complaining of her husband's desertion and claiming maintenance for herself and the child of the marriage, and the other under the Guardianship of Infants Acts, 1886 and 1925, claiming custody of and maintenance for the child.

HELD: the proper course for the justices was to make an order for custody on one only of the summonses, choosing that under the Guardianship of Infants Acts if they wished to grant maintenance for the child at the higher rate permitted by those Acts, for it would be inconvenient, if the husband wished to challenge the justices' decision on the question of custody, for him to have to proceed in the Chancery Division in respect of the order under the Guardianship of Infants Acts and in the Probate, Divorce and Admiralty Division in respect of that under the Summary Jurisdiction Acts.

APPEAL from Grimsby justices.

The wife took out two summonses against the husband, the one under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, complaining of desertion and wilful neglect to maintain, and the other under the Guardianship of Infants Acts, 1886 and 1925, claiming the custody of and maintenance for the child of the marriage. The justices awarded the wife 30s. a week on the first summons and 20s. a week for the child on the second, making on each summons an order for custody of the child. The husband appealed.

Trapnell for the husband.

Edgelow for the wife.

LORD MERRIMAN, P.: I attach some importance to a subsidiary aspect of this case. Apparently the justices determined the question of custody under both summonses, but have awarded the amount of £1 a week under the summons brought under the Guardianship of Infants Acts. This practice is to be deprecated, for it would be extremely embarrassing if a husband wished to challenge the question of custody, as distinct from the question of amount, since he would have to appeal to this Division to set aside the custody order under the Summary Jurisdiction (Separation and Maintenance) Acts and to the Chancery Division to set aside the custody order under the Guardianship of Infants Acts. If two summonses are taken out regarding custody, the proper course is for the justices to choose one summons, instead of making an order for custody on both. If the justices here had wished to make an order for £1 a week in respect of this child, as against 10s., which is all they could order under the Summary Jurisdiction (Separation and Maintenance) Acts, then they should have ignored the question of custody under the summary jurisdiction order and dealt with the whole matter under the guardianship order. I trust that that course will be followed in all similar cases, for it is a real embarrassment that a husband, even if he is challenging only the amount, and certainly if he is appealing against the order for custody on the merits, should have to appeal to two different courts.

[His LORDSHIP then gave judgment allowing the appeal on the merits.]

WILLMER, J., concurred.

Solicitors: *Alan Edmunds & Co.* (for the husband); *Boxall & Boxall*, agents for *Drury & Taylor*, Goole.

R.H.W.

**LAWSON AND ANOTHER v. ODHAMS PRESS, LTD.
AND OTHERS.**

[COURT OF APPEAL (Lord Greene, M.R., and Tucker, L.J.), October 7, 1948.]

Interrogatory—Libel—Newspaper—Defence of fair comment—Interrogatory to writer of article as to identity of informant—Writer paid servant of newspaper. Practice—Interlocutory proceedings—Cross-examination on affidavit.

In an action for libel in respect of an article published in a newspaper, the plaintiffs sued the proprietors, printers and publishers of the newspaper, the editor, and H., who had written and signed the article. The defendants pleaded that the words complained of were fair comment on a matter of public interest, made in good faith and without malice. On an application by the plaintiffs to administer interrogatories to H., H. swore an affidavit stating that he was at all material times in the sole and exclusive employment of the newspaper proprietors, and at the adjourned hearing of the application he was cross-examined on his affidavit. The plaintiffs obtained from the master an order for an interrogatory addressed to H. asking him from whom he had obtained the information on which he relied when writing the article, but, on an appeal by H. from this order, the interrogatory was disallowed by the judge. The plaintiffs appealed to the Court of Appeal:—

HELD : it was open to the judge to recognise the existence of the special rule of practice not to allow an interrogatory of this kind to be administered to the proprietor or publisher of a newspaper, and to take the view that, as a matter of discretion, he should not allow an interrogatory also to a person in the position of H.

Plymouth Mutual Co-operative and Industrial Society, Ltd. v. Traders' Publishing Asscn., Ltd. ([1906] 1 K.B. 403; 94 L.T. 258) and *South Suburban Co-operative Society, Ltd. v. Orum* ([1937] 3 All E.R. 133; [1937] 2 K.B. 690; 157 L.T. 93), *considered*.

PER LORD GREENE, M.R. : The question whether or not cross-examination should be allowed on an affidavit sworn in interlocutory proceedings was a matter of discretion, and an order for cross-examination should not be made in interlocutory proceedings in the absence of special circumstances.

[AS TO INTERROGATORIES IN ACTIONS FOR LIBEL, see HALSBURY, Hailsham Edn., Vol. 10, pp. 417, 418, paras. 510, 511; and FOR CASES, see DIGEST, Vol. 18, pp. 204-206, Nos. 1526-1534.]

Cases referred to :

- (1) *Plymouth Mutual Co-operative and Industrial Society, Ltd. v. Traders' Publishing Asscn., Ltd.*, [1906] 1 K.B. 403; 75 L.J.K.B. 259; 94 L.T. 258; 18 Digest 205, 1532.
- (2) *Hennessy v. Wright* (No. 2), (1888), 24 Q.B.D. 445, *n.*; 18 Digest 204, 1528.
- (3) *Hope v. Brash*, [1897] 2 Q.B. 188; 66 L.J.Q.B. 653; 76 L.T. 823; 18 Digest 96, 479.
- (4) *South Suburban Co-operative Society, Ltd. v. Orum*, [1937] 3 All E.R. 133; [1937] 2 K.B. 690; 106 L.J.K.B. 555; 157 L.T. 93; Digest Supp.

INTERLOCUTORY APPEAL by the plaintiffs from an order of JONES, J., in chambers, dated July 29, 1948, disallowing an interrogatory which had been allowed by MASTER SIMNER.

The action was brought in respect of an alleged libel published in a newspaper, the defendants being the proprietors, printers and publishers of the newspaper, the editor, and the author of the article complained of. The author swore an affidavit stating that he was a paid servant of the newspaper. The defence was a plea of fair comment made in good faith and without malice. The plaintiffs applied (*inter alia*) to be allowed to administer an interrogatory directed to the author asking him from whom he had obtained the information on which the

article was based. On an appeal by the plaintiffs from the order of the judge disallowing the interrogatory, the Court of Appeal held that it was within the discretion of the judge to disallow the interrogatory, and dismissed the appeal. The facts appear in the judgment of TUCKER, L.J.

Neil Lawson and Dare for the plaintiffs.

Sir Valentine Holmes, K.C., and *J. Davidson* for the defendants.

LORD GREENE, M.R.: I will ask Tucker, L.J., to deliver the first judgment.

TUCKER, L.J.: This is an appeal from an order of JONES, J., in chambers disallowing an interrogatory addressed to one of the defendants which had been allowed by MASTER SIMNER. The action was brought by the plaintiffs, Frederick Thomas Lawson and George Francis Harrison, against the defendants, Odhams Press, Ltd., Alan John Fraser Hoby and Renton Stuart Campbell, in respect of an article published in THE PEOPLE newspaper on Aug. 17, 1947. It is not necessary to refer to the promotion and organisation of a boxing contest or exhibition which had taken place shortly before at Yeovil with which the plaintiffs were concerned. The defendants, Odhams Press, Ltd., were sued as the proprietors, printers and publishers of THE PEOPLE, Renton Stuart Campbell was sued as the editor, and the defendant, Hoby, was described as being a journalist who writes a sports column in the newspaper circulating in the United Kingdom. He was alleged to have been the author of the article in question which contained the alleged libel and to have signed the article. By their defence all three defendants admitted that they had printed or caused to be printed and published the words complained of. They denied that the words were capable of bearing the meanings alleged or any defamatory meaning and, in the alternative, by para. 6 they pleaded that the words were fair comment on a matter of public interest made in good faith and without malice towards the plaintiffs. A reply was delivered alleging that the defendants and each of them was actuated by malice in writing and publishing the words complained of.

On those pleadings the following, among other interrogatories, was directed to the second defendant, Hoby:

“From whom did you, the second defendant, obtain the information on which you relied in writing and/or causing to be printed and published the said expressions of opinion, or any, and which, of them?”

That interrogatory was allowed by the master and disallowed by JONES, J. Mr. Hoby had sworn an affidavit in which he stated that he had at all material times been and still was in the sole and exclusive employment of the defendant company, and that he had been so employed continuously save for war service since Sept. 14, 1937, and he said:

“I am now employed by the defendant company as a writer on sports and sporting events and I write weekly articles under my own name in THE PEOPLE, the newspaper on which I am employed. Everything written by me is based upon information which I obtain in the course of my employment by the said newspaper and under the control and instructions of my editor.”

The somewhat unusual course in cases of this nature was taken of requiring that the defendant should attend for cross-examination on that affidavit. It is not necessary for the purpose of this appeal to refer to that cross-examination, which I do not think in substance produced any evidence substantially differing from that to which Mr. Hoby had sworn in his affidavit.

It is said by counsel for the plaintiffs that the learned judge was wrong as a matter of law in disallowing this interrogatory. He says that we ought to infer from all the circumstances that the learned judge disallowed this interrogatory because he considered that as a matter of law he was precluded from allowing

such an interrogatory, the matter of law being that such an interrogatory cannot be directed in an action of this kind to a newspaper or to the proprietor and publisher of a newspaper, and that as a matter of law that protection also applied where such an interrogatory was directed to a servant of the company who had contributed an article to the newspaper which was also a defendant in the proceedings. It is conceded that the fact that the article was signed by Mr. Hoby adds nothing in support of the plaintiffs' appeal. Counsel for the plaintiffs says that once a plaintiff finds out who is in fact the author of a particular article and makes him a defendant, such defendant as a matter of law—I think he must put it as high as that—can always be required to answer an interrogatory as to the source of his information on which the article is based and the name of his informant.

Counsel for the plaintiffs has taken us through the authorities on this point and it is not necessary to refer in detail to them. It has now become a matter of practice, and, possibly, a matter of law, that an interrogatory of this kind will not be allowed to be administered to the proprietor or publisher of a newspaper. I do not think it is necessary to go further than *Plymouth Mutual Co-operative and Industrial Society, Ltd. v. Traders' Publishing Association, Ltd.* (1). In that case VAUGHAN WILLIAMS, L.J., after referring to *Hennessy v. Wright* (No. 2) (2) and *Hope v. Brash* (3), and quoting from them, said ([1906] 1 K.B. 415):

“It seems to me that under these circumstances the question which we have to ask ourselves is whether there are any special circumstances in this case which would justify a departure from the general rule of practice as to not compelling the disclosure of the names of the persons who supplied the information on which the alleged libel was based in cases of this kind, where the proprietors of a newspaper or other periodical publication set up a defence such as is here pleaded. I do not find any such special circumstances in this case.”

That is, as VAUGHAN WILLIAMS, L.J., said, the general rule of practice which had sprung up by 1906 and which has prevailed ever since.

At the other end of the line of cases on this subject comes, in 1937, *South Suburban Co-operative Society, Ltd. v. Orum* (4), where this court had to consider whether that rule of practice extended to the case of a letter appearing in a newspaper from an ordinary outside correspondent. It was held that the learned judge in chambers had rightly allowed in his discretion the administration of an interrogatory in such a case. The headnote in that case is as follows:

“Where, to an action for libel in respect of a letter published in a newspaper, there are pleas that the letter is fair comment made in good faith and without malice on a matter of public interest, an issue being thus raised as to the attitude of mind of the defendant at the time when the letter was published, the special rule of practice which in such a case exempts a defendant who is the proprietor or the publisher of the newspaper from disclosing the name of a person who supplied information contained in the letter notwithstanding that such information is otherwise relevant to that issue, does not extend to protect a defendant who is the writer or contributor of the letter from disclosing the names of his informants.”

SCOTT, L.J., in delivering the judgment of the court, referred to the line of authorities with regard to the newspaper cases and came to the conclusion that this practice existed, but that there was nothing in the authorities to extend it to the case of a member of the public writing a letter to a newspaper. Accordingly, he was of opinion that LEWIS, J., had properly allowed the interrogatory. I do not think it is necessary to refer in detail to the learned judge's judgment. Counsel for the plaintiffs says that the defendant, Hoby, in the

present case is on exactly the same footing as the defendant, Orum, in *South Suburban Co-operative Society, Ltd. v. Orum* (4). He says that they are both persons who committed a tort jointly with the proprietors of the two newspapers, and that it is irrelevant that in the one case the defendant is the servant of the proprietor of the newspaper in question and that in the other case he was not in that relation to the newspaper.

I think that counsel for the plaintiffs is in a difficulty with regard to this appeal for the reason that we have no information as to the reasons for which the learned judge disallowed this interrogatory. The allowing or disallowing of an interrogatory in a particular case is a matter purely within the discretion of the judge in chambers. If the learned judge had intimated, or if we were driven to the conclusion, that he had disallowed this interrogatory purely on the ground that he considered that as a matter of law the defendant, Hoby, was entitled to the protection which has been accorded to the proprietors and publishers of newspapers, I think that the case would have required more detailed consideration and that it would have been necessary to hear counsel for the defendants on that matter. I express no opinion as to what the ultimate result might have been. As, however, this is a pure matter of discretion and as there is nothing, in my view, in the material before us to indicate that the learned judge dealt with this as a matter of law by which he was bound, and that he did not exercise his discretion, I think we ought to assume that the learned judge did deal with it as a matter within his discretion. If that is so, there is nothing to indicate that he did not exercise his discretion judicially or on proper material. I think it was open to him to take the view that, recognising the existence of this practice in the cases of the proprietors and publishers of newspapers, recognising that the rule of practice had grown up in what was considered to be the public interest, as a matter of discretion he should not allow an interrogatory to be administered to a person in the position of Mr. Hoby, which would have the effect to all intents and purposes of nullifying the usefulness of this rule of practice. I think if he disallowed the interrogatory in the exercise of his discretion on grounds of that kind, as he may well have done, no complaint could be made. Taking the view, as I do, that there is nothing in this case to show that the learned judge either failed to exercise his discretion judicially or that he erroneously considered himself bound by some unalterable rule of law, I think this appeal fails.

LORD GREENE, M.R. : I agree. I only wish to say one thing in regard to the procedure adopted. On the application to deliver interrogatories to Mr. Hoby, he swore an affidavit which showed on the face of it that he was a paid servant of the newspaper and that the information he had obtained had been obtained by him in that capacity. The plaintiffs thought fit to apply to cross-examine on that affidavit. The adjourned hearing of that application took place in the presence of Mr. Hoby and it was obvious to everybody, I think, that, if a discussion had been entered into whether or not it was proper in respect of an affidavit sworn in interlocutory proceedings to allow cross-examination, having regard to certain matters it might have involved a great deal of delay. The result of that was that Mr. Hoby was cross-examined then and there, and that was a very reasonable course to be taken and acquiesced in by all parties. It need not be thought, therefore, that I am making any comment on the practice that was followed on the facts of the particular case, but I am bound to say that I am happy to hear from counsel for the defendants that in his experience it is not the practice, in the absence of special circumstances, to allow cross-examination on an affidavit of this kind sworn in interlocutory proceedings. It appears to me that if such a practice existed, it might be said to be a deplorable one, because it would mean that actions of this kind are subject to the multiplication of expense by cross-examination in interlocutory proceedings. The question whether or not cross-examination ought to be allowed is a matter of

discretion. I only express the hope, if I may properly do so, that in interlocutory proceedings no such order will be made in the absence of special circumstances of some kind. I thought it desirable to say that, because I think it would be unfortunate if it was thought that orders for cross-examination on affidavits of this kind are to be given as a matter of course. I agree that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Kimbers, Williams, Sweetland & Stinson*, agents for *Canning & Kyrke*, Chard, Somerset (for the plaintiffs); *Simmons & Simmons* (for the defendants).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

NOTE.

GILLAN v. LANDLESS.

[COURT OF APPEAL (Lord Greene, M.R., Tucker and Somervell, L.JJ.), October 5, 1948.]

Court of Appeal—Fresh evidence—Power to hear—County court appeal.

A landlord applied unsuccessfully to the county court for possession of certain premises. Subsequently he applied to the Court of Appeal for leave to call fresh evidence on the hearing of an appeal against the decision of the county court.

HELD: the Court of Appeal had no power to hear fresh evidence in an appeal from a county court.

MOTION by the landlord for leave to call fresh evidence at hearing of appeal.

The appeal was from a judgment given by His Honour JUDGE PEEL at Blackpool County Court on Apr. 15, 1948, in a case under the Rent Restrictions Acts, in which possession was sought by the landlord of certain premises on the ground that they were furnished. The county court judge found that they were not furnished within the meaning of the Acts and refused possession.

O'Malley for the landlord.

Shackleton Bailey for the tenant.

O'Malley: This is an appeal from the county court judge on the ground that he applied a test which was wrong since there was not sufficient evidence to entitle him to apply it. In such a case the court has an inherent jurisdiction to hear fresh evidence to provide the material on which to found this submission.

SOMERVELL, L.J.: Has any court ever done it?

O'Malley: There is no case of which I know where it has been done.

SOMERVELL, L.J.: Do you suggest that on the fresh evidence the court must then consider the facts of the case?

O'Malley: No. My case would be that, having regard to all the matters brought before you in the Court of Appeal, this is a proper case to be sent back to the county court judge for re-trial.

LORD GREENE, M.R.: We cannot give you any relief.

Motion dismissed with costs.

Solicitors: *Gibson & Weldon*, agents for *J. K. Lawson & Wilkinson*, Blackpool (for the landlord); *Gregory, Rowcliffe & Co.*, agents for *W. J. Read & Son*, Blackpool (for the tenant).

F.G.

LANGFORD PROPERTY CO., LTD. v. ATHANASSOGLOU AND ANOTHER.

[COURT OF APPEAL (Lord Greene, M.R., Tucker and Somervell, L.JJ.), September 29, 1948.]

Rent Restriction—Possession—Personal occupation—Tenant living elsewhere and passing two nights a week in premises.

The tenant of a flat in London which came within the Rent Restrictions Acts had a home in the country, but slept at the flat whenever he required to do so for the purpose of his business, that being on an average twice a week. He rarely had any meal in the flat. The landlords of the flat claimed possession on the ground that the tenant was not in personal occupation.

HELD : there was no evidence that the tenant was not in personal occupation, and, accordingly, his right to possession was protected by the Rent Restrictions Acts.

Skinner v. Geary ([1931] 2 K.B. 546 ; 145 L.T. 675), *distinguished*.

Per curiam : In my view, there is nothing in the Rent Restrictions Acts to prevent a man having more than one home. His business may require him at different times in the week or different times in the month to be in different parts of the country, and there is nothing to prevent him having a home in those different places.

[AS TO POSITION OF STATUTORY TENANT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, para. 401, and Supplement ; and FOR CASES, see DIGEST, Vol. 31, p. 563, Nos. 7100-7103, and Supplement.]

Case referred to :

(1) *Skinner v. Geary*, [1931] 2 K.B. 546 ; 100 L.J.K.B. 718 ; 145 L.T. 675 ; 95 J.P. 194 ; Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE BENSLEY WELLS at Marylebone County Court, made in an action by the landlords for possession of a flat occupied by the tenant, on the ground that the tenant was not in personal occupation of the flat. The Court of Appeal now reversed that decision. The facts appear in the judgment of TUCKER, L.J.

Raymond Stock for the tenant.

Heathcote-Williams for the landlords.

LORD GREENE, M.R. : I will ask TUCKER, L.J., to deliver the first judgment.

TUCKER, L.J. : This is an appeal from a judgment of His Honour JUDGE BENSLEY WELLS given in the Marylebone County Court, whereby he made an order for possession against the two defendants in the present action, called Athanassoglou and Tureman, of certain premises situate at 12a, Lancaster Close. It was common ground that the premises were within the Rent Restrictions Acts. The plaintiffs claimed possession on two grounds. The first was that there had been a breach by the first defendant of a covenant in his lease against assigning or sub-letting the premises, it being alleged that he had sub-let them to the second defendant. On that issue the learned judge found in favour of the first defendant that there had been no sub-letting but that Tureman was present on the premises purely as a guest of the other defendant. The second ground on which possession was claimed was that Athanassoglou was not in personal occupation of the premises as his home so as to entitle him to claim the protection of the Rent Restrictions Acts. The plaintiffs relied on the decision of this court in *Skinner v. Geary* (1), to which I will refer, to the effect that a tenant can only claim the protection of the Acts if he is in personal occupation of the premises.

With regard to the facts, the learned county court judge in the course of his judgment said this :

"Both defendants and Mrs. Tureman, all of whom gave evidence, impressed me favourably as witnesses, and I was satisfied that their evidence was substantially true in all material respects."

Then he proceeded to set out what his findings of fact were. He found that :

"The flat was fully furnished and all the furniture was the property of the defendant, Athanassoglou. The defendant, Tureman, and his wife had been occupying the flat since about the beginning of 1945 as guests of the defendant, Athanassoglou. There was no assignment or sub-letting."

Then, dealing with what is material to the present appeal, he said :

"The defendant, Athanassoglou, has a cottage at Great Missenden, Bucks, where he and his wife and family have lived since about 1940. This cottage is and has been since about 1940 the defendant, Athanassoglou's, home. He took the flat in question because he found it convenient to stay the night in London. Occasionally he slept in the flat, on the average two nights a week, always occupying the same room. On the occasions when he slept at the flat he arrived late at night, at any time after 9 p.m., and left very early the following morning. He very rarely had any meal in the flat."

Then the learned judge went on to refer to *Skinner v. Geary* (1) and certain passages in the judgment of SCRUTTON, L.J., and proceeded as follows :

"Applying these observations of SCRUTTON, L.J., to the present case I was of opinion that it was impossible to find as a fact that the defendant, Athanassoglou, was at any material time residing in the flat or occupying it in the sense that it was his home, nor was there any evidence that he ever intended to return to the flat to occupy it as his home, or otherwise than as a place where he might occasionally sleep as a matter of convenience."

Turning to *Skinner v. Geary* (1), SCRUTTON, L.J., dealt with the matter in this way ([1931] 2 K.B. 560) :

"Parliament was dealing with a tenant who was in occupation and who was not to be turned out ; it was not dealing, and never intended to deal, with a tenant who was not in occupation but who wished to say : ' Although I am not in actual occupation I claim the right so long as I pay the rent to retain my tenancy.' If that had been put forward Parliament would have received the suggestion with contempt."

Then he goes on :

"Parliament, says Mr. *Safford*, has not dealt with that case. In my opinion it has not done so because it never contemplated the possibility of the tenant living somewhere else. A non-occupying tenant was in my opinion never within the precincts of the Acts, which were dealing only with an occupying tenant who had a right to stay and not be turned out. This case is to be decided on the principle that the Acts do not apply to a person who is not personally occupying the house and who has no intention of returning to it. I except, of course, such a case as that to which I have already referred—namely, of temporary absence, the best instance of which is that of a sea captain who may be away for months but who intends to return, and whose wife and family occupy the house during his absence."

In the concluding paragraph of his judgment he says :

"For the reasons I have given the Act does not in my opinion apply to protect a tenant who is not in occupation of a house in the sense that the house is his home and to which, although he may be absent for a time, he intends to return. If it were to be held otherwise odd consequences would follow. The appellant in this case has contented himself with living in one house and claiming another."

Counsel for the landlords submits that this is a pure question of fact, and that, although we might have come to a different conclusion on the facts, we are bound by the facts as found by the learned county court judge. In my view, there was no evidence on which the learned judge could come to the conclusion at which he arrived, namely, that the defendant, Athanassoglou, was not in personal occupation of this flat. The facts found by the county court judge were that he habitually used it as a place in which to sleep when on business in London. His *bona fides* and truthfulness are not attacked. The fact that he has a house at Great Missenden which is also his home does not in any way prevent other premises which he may have occasion to use from also being his home. In another part of the judgment of SCRUTTON, L.J., in *Skinner v. Geary* (1) he refers to residence in a week-end cottage as being the kind of occupation which would be within the protection of the Acts. In my view, there is nothing in the Rent Restrictions Acts to prevent a man having more than one home. His business may require him at different times in the week or different times in the month to be in different parts of the country, and there is nothing to prevent him having a home in those different places. I think the learned judge has misapplied the judgment of SCRUTTON, L.J., and that on the facts as found by him there was really no evidence on which he could come to the conclusion that the defendant, Athanassoglou, was not in personal occupation of this flat. It contained his furniture, and he slept there whenever he required to do so for the purpose of his business, which was on an average twice a week, and his friends were residing there with his permission. Although I appreciate that there may be borderline cases, I think it is quite clear that the present case falls on the side of the dividing line which makes it amount to personal occupation by Mr. Athanassoglou. I have come to the conclusion that there was no evidence on which the learned judge could arrive at the decision at which he did arrive, and that this appeal should succeed.

LORD GREENE, M.R. : I agree.

SOMERVELL, L.J. : I agree.

Appeal allowed with costs.

Solicitors : *Stikeman & Co.* (for the landlords) ; *Webb, Justice & Co.* (for the tenant).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

CHAMPANHAC & CO., LTD. v. WALLER & CO., LTD.

[KING'S BENCH DIVISION (Slade, J.), July 28, 29, 30, 1948.]

Sale of Goods—Breach of warranty—Sale by sample—"With all faults and imperfections"—Goods not up to sample—Liability of vendor.

On Apr. 14, 1947, the plaintiffs' representative, M., visited the defendants' premises and was offered for purchase a quantity of government surplus balloons. He was shown a sample of the material of which they were made, and, having examined and tested it and found it strong and merchantable, he orally agreed to purchase 200 balloons at 30s. each. The defendants' agent then drew up a letter which was handed to M., and it was found as a fact that the material terms of the concluded oral agreement were contained therein. It was stated in the letter that the goods sold were "as sample taken away" and "it is distinctly understood that these are government surplus goods and we sell them to you with all faults and imperfections." On delivery of the balloons it was discovered that the material was perished and unmerchantable. The sale having been found to be by sample :—

HELD : the inclusion in the contract of the words "with all faults and imperfections" meant that, providing the bulk corresponded in type and quality with the sample, it would be accepted with whatever faults and imperfections it had, but that the fabric of the balloons did not correspond with the sample, and, the goods not having been rejected, the plaintiffs were liable for breach of warranty.

Robert A. Munro & Co., Ltd. v. Meyer ([1930] 2 K.B. 312; 143 L.T. 565), *applied.*

[AS TO SALE BY SAMPLE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 63-69, paras. 72-76; and FOR CASES, see DIGEST, Vol. 39, pp. 451-457, Nos. 789-847.]

Case referred to :

(1) *Robert A. Munro & Co., Ltd. v. Meyer*, [1930] 2 K.B. 312; 99 L.J.K.B. 703; 143 L.T. 565; Digest Supp.

ACTION for damages for breach of a contract for the sale of goods. The facts are set out in the headnote. Judgment was given for the plaintiffs.

Morle, K.C., and *J. P. Perkins* for the plaintiffs (the buyers).

Caplan for the defendants (the sellers).

SLADE, J. [after stating the facts] : I am satisfied that Mr. Marks, as agent for the plaintiffs, consented to the admission of those words "with all faults and imperfections" because he had been warned by Mr. Abrahams, the defendants' agent, that some of the goods might be dirty. If Mr. Abrahams had said : "The sample you have seen and tested you have found to be reasonably strong and merchantable, but I warn you that, by adding these words 'with all faults and imperfections,' when you get the remaining balloons you may find that they are perished and absolutely worthless," I can well imagine what Mr. Marks would have replied, but I cannot allow my mind to be influenced by these considerations, because this is an action for breach of warranty and not an action for deceit. Once the words in the concluded oral agreement had been determined, as I hold they had been because they are in substance the same as the document itself, it becomes a matter of construction as to what are the terms of the contract. It does not matter what one party had intended, *i.e.*, what he had in his mind, or what the other party had in his mind. The test is : What are the obligations of the parties *inter se* in the light of the language they have used ? That is the first problem of construction. Secondly, I have to give effect, if I can, to every word and expression in the contract. Thirdly, if there were two phrases used which were repugnant to each other I might be forced to say that the contract was too vague and uncertain to be capable of interpretation. Fourthly, I am entitled to bear in mind, if all other canons of construction fail, that this document was, as I find it to be, the composition of the defendants—that is, of Mr. Abrahams on behalf of the defendants—and, if there was any ambiguity in it which was incapable of being resolved by any other form of construction, I should be entitled to resolve it in favour of the person to whom the composition of Mr. Abrahams was tendered, that is to say, the plaintiffs. I find it unnecessary to rely on this last canon of construction, because I think a meaning can be attached to each of the expressions "as sample taken away" and "with all faults and imperfections."

For many purposes there is all the difference in the world between a sale by description and a sale by sample. There are different legal consequences attaching to sales of these two kinds which are set out respectively in ss. 13 and 15 of the Sale of Goods Act, 1893, but they have this much in common, that one may describe the goods which one is selling by giving expression to their colour, class, quality, nature, or type, or one can say in effect : "I am not very good at expressing myself, and in any case I may leave something out. This is the type of goods that I am offering to sell you"—producing a sample.

Although that is a sale by sample, it is none the less, in my view, an offer to sell goods the bulk of which will conform to the description which is conveyed to the buyer's mind by his being tendered the sample.

I do not desire to cite a large number of authorities, but I have been referred to a decision of WRIGHT, J., in *Robert A. Munro & Co., Ltd. v. Meyer* (1), where goods were sold under the description of a certain specified quality, and it was a term of the contract that they should be "taken with all faults and defects; damaged or inferior, if any, at a valuation to be arranged mutually or by arbitration." That I understand to mean that if any damaged goods were tendered they were to be accepted by the buyers and any difference in value was to be adjusted by arbitration, *i.e.*, the buyers were not entitled to reject them. The goods were bone meal, and should have contained guaranteed quantities of albuminoids 40-45 per cent., oil and/or fat 10-12 per cent., and phosphates about 30 per cent., whereas what was delivered contained a percentage of 3.66 of cocoa husks. WRIGHT, J., held that the provision that the goods should be taken with all faults and defects did not have the effect of forcing the buyer to accept, albeit at a lower price assessed by valuation, goods which were not of a certain specified quality because they contained this added percentage of cocoa husks. In other words, effect could be given to the existence in that contract of a sale by description into which the law implies the condition that the goods shall correspond with the description. That requirement was reconciled with the provision that the goods should be taken "with all faults and defects"; *i.e.*, "all faults and defects" meant that, if and when goods of the appropriate description were tendered in performance of a contract, those goods should be taken with all faults and defects, but the buyer was not bound to accept goods which were defective in the sense that they failed to correspond with the description. That, as I have pointed out, was a sale by description. This is a sale by sample, but, in my judgment, on this point the two matters are *in pari materia*. Here Mr. Marks, on behalf of the plaintiffs, was induced to enter into this contract by being shown a sample which he tested and re-examined before he agreed a price. He saw, according to his evidence, that it was merchantable and "quite strong." Having found that sample strong and of merchantable quality, he agreed to buy 200 balloons with all faults and imperfections.

There are two ways of reconciling those two phrases. One is: "I will accept any goods the bulk of which corresponds to the sample, whatever faults and imperfections there turn out to be in the sample." Another way of reading them is: "I will accept goods which correspond with the sample, *i.e.*, which are of the same nature and type of goods as those which I have been shown and on the faith of which I decided to buy, and so long as I get goods of that type and quality I will take them with any other faults and imperfections they may transpire to have." I prefer the latter of those two constructions, and that is the one I propose to hold to be the true construction of this contract, though I think the contract is also capable of being understood to reconcile the two phrases in the way which I first mentioned. I bear in mind, for example, that to comply with a sale by sample the law requires the seller to do two things: first, to deliver bulk which corresponds with the sample, and then to deliver goods which shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. That seems to me to show that goods may very well correspond with sample and yet have defects of which the buyer is ignorant because they do not appear on any reasonable examination of the sample, and it may well be that those words, "with all faults and imperfections," would be apt to relieve the seller in a sale by sample of the requirement that he should be liable for any defects in the sample which were not apparent on a reasonable examination, but not to exonerate him from the additional liability of delivering goods which themselves correspond with the sample.

I find as a fact that the bulk of the goods which were delivered in purported performance of this contract did not correspond with the sample. I do not think it is contested (and, if it is, I accept Mr. Marks's evidence) that the sample was strong and merchantable, and I find as a fact that the bulk as delivered was perished and unmerchantable—for all practical purposes commercially useless. In the circumstances, therefore, I find that the buyers would have had a right to reject the goods. They did not reject them. They accepted them, and, therefore, the breach of condition under the Sale of Goods Act, 1893, s. 15, becomes a breach of warranty, and the measure of damages is, in the first place, the difference in value between the goods as they were and the value which they would have had had they complied with the warranty. Secondly, as it is not denied that it was known to the sellers that the goods were bought by the plaintiffs for the purpose of re-sale, the sellers are, in my judgment, also liable for a reasonable loss of profit which the buyers have sustained by reason of having lost the contract for the re-sale of the balloons. It is not disputed that there was a contract for re-sale on the same terms, but, even if there had been no such contract, it has been shown that there was a market price for these goods, if they had been of merchantable quality, of 45s. each. The plaintiffs have still got the balloons and I must attach some value to them. Although I think that I am probably attaching a higher value to them than they, in fact, possess, I propose to assess the value of them in the plaintiffs' hands at £50. I find, therefore, that the difference in value between the goods as delivered and the goods as warranted was £300 less the £50, which is £250. I find that the contract for re-sale is evidence which I accept of the market value of the goods for the purpose of re-sale, that is to say, a profit of 15s. each. I add, therefore, another £150, and give judgment for the plaintiffs for £400 with costs.

Judgment for the plaintiffs with costs.

Solicitors : *F. W. Perkins & Co.* (for the plaintiffs) ; *J. G. Bosman, Robinson & Co.* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re A. B. (an infant).

[CHANCERY DIVISION (Roxburgh, J.), July 28, 1948.]

Adoption—Guardian ad litem—Person other than Official Solicitor—“Special reasons”—Adoption of Children Act, 1926 (c. 29), s. 8 (3)—Practice Direction (see ANNUAL PRACTICE, 1941, pp. 2619, 2620).

A daughter of the applicants, aged 15 years, became pregnant and a child was born before she attained 16 years of age. At an early stage of pregnancy the family doctor was consulted and the applicants arranged for their daughter to leave home until after the birth of the child. The applicants also moved their home to another district, and after the birth of the child both the daughter and her child went to reside with them. The family doctor did not attend the daughter in the confinement, she being sent to another district. The applicants applied for an adoption order under the Adoption of Children Act, 1926, and exhibited with their affidavit in support the consent of their daughter in the usual form whereby the daughter would be deprived of all parental control over the infant. On the first hearing of the originating summons the applicants applied *ex parte* that the family doctor should be appointed as the guardian *ad litem* of the infant pursuant to s. 8 (3) of the Act of 1926, and alleged that there were special reasons why a guardian *ad litem* other than the Official Solicitor should be appointed.

HELD : that the matter was one of public policy and not one concerning only the family ; that the intention of the Act of 1926 was that applications should be the subject of special judicial investigation ; that the Official Solicitor was experienced in these matters ; and that he would be appointed guardian *ad litem*.

[AS TO ADOPTION ORDERS, see HALSBURY, Hailsham Edn., Vol. 17, p. 680, para. 1408 ; and AS TO THE APPOINTMENT OF THE OFFICIAL SOLICITOR AS GUARDIAN *ad litem*, see THE ANNUAL PRACTICE, 1941, pp. 2619, 2620.]

CHAMBERS SUMMONS.*

The applicants, who were the parents of a girl who had given birth to a child before she had attained the age of 16, sought an order (i) that a fit and proper person might be appointed to act as guardian *ad litem* of the child ; and (ii) that they might be authorised to adopt the child under the Adoption of Children Act, 1926. The parents applied *ex parte* that the family doctor should be appointed guardian *ad litem* of the infant pursuant to s. 8 (3) of the Act of 1926, and alleged that there were special reasons why a guardian *ad litem* other than the Official Solicitor should be appointed.

Salt, K.C., and *H. E. Francis* for the applicants.

ROXBURGH, J. : This application raises an important matter of principle. It has as its ultimate object the adoption of an infant. The object of the interlocutory application now made is to obtain the appointment of a fit and proper person to act as guardian *ad litem* of the infant. Section 8 (3) of the Act provides that :

“ For the purpose of any application under this Act and subject to any rules under this section, the court shall appoint some person or body to act as guardian *ad litem* of the infant upon the hearing of the application with the duty of safeguarding the interests of the infant before the court.”

When the Act first came into force it was the practice for applicants to nominate a guardian *ad litem* whom the court appointed, but this practice soon fell into disuse because in every case the court referred the matter to the Official Solicitor to investigate matters on behalf of the infant and to report to the court as to the fitness of the applicant, and generally as to the adoption being for the benefit of the infant. In those circumstances an independent guardian *ad litem* became unnecessary, and the Chancery judges gave a general direction that in all cases the Master was to appoint the Official Solicitor as guardian *ad litem* upon his consent, the applicant undertaking to pay his costs. The judges also directed that, if there should in any particular case appear to be special reasons for the appointment of a person other than the Official Solicitor as guardian *ad litem*, the matter should be adjourned to the judge. This application has been adjourned to me accordingly.

Counsel for the applicants submits that in this case there are special reasons for the appointment of a person other than the Official Solicitor. Counsel presented the case on broad principle which renders it necessary for me to say what I am about to say. The facts are that the infant is a grandchild of the applicants and the mother is an infant. Her child was conceived when she was just over 15 years of age and the father of the child is unaware of the birth of the child. The applicants are anxious to make the whole world believe that the child is no child of their daughter but of her parents. The mother is young and must be handled in a way to ascertain her views. Matters of principle are raised which are not easy of solution. It is a possible view that the mother concurrently with pregnancy developed maternal instincts. I do not know. It is possible that if she were interviewed outside the family circle she might prefer to keep the child as her own. It may be a case where it would be proper

* Reported by leave of the judge and with the assistance of the Chief Master.

only to make an interim adoption order under the provisions of s. 6 of the Act. I cannot say as to this at this stage, but I cannot accept the submission of counsel for the applicants. It is a matter of public policy. It is not, as suggested, a matter only concerning the family which should be limited to the family and their advisers, and I think the special circumstances alleged by counsel are really circumstances in favour of the appointment of the Official Solicitor. If Parliament had meant to leave these matters to the family they would not have given this important jurisdiction to judges and other official persons. It was the intention of the Act that these applications should be the subject of special judicial investigation. The Official Solicitor is experienced in these matters. The special reasons shown in this case are in favour of his appointment.

Order for the appointment of the Official Solicitor as guardian ad litem subject to his consent, and the usual undertaking as to his costs.

Solicitors: *Gibson & Weldon*, agents for *Bowcock & Pursaill*, Leek (for the applicants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

HART v. GRIFFITHS-JONES.

[BIRMINGHAM SUMMER ASSIZES (Streatfeild, J.), July 28, 1948.]

Damages—Measure of damages—Fatal accident—Loss of expectation of life—Depreciation in value of money—Funeral expenses—Embalming of body—Erection of monument—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1), (2) (c).

In assessing the amount of damages to be awarded in respect of the loss of expectation of life of a child, regard must be had to the depreciation in value of money since the decision in *Benham v. Gambling* ([1941] 1 All E.R. 7). The cost of embalming the body is properly included in a claim for funeral expenses, but not the price of a monument.

[AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016; and FOR CASES, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to:

- (1) *Benham v. Gambling*, [1941] A.C. 157; [1941] 1 All E.R. 7; 110 L.J.K.B. 49; 164 L.T. 290; 2nd Digest Supp.
- (2) *Goldstein v. Salvation Army Assurance Society*, [1917] 2 K.B. 291; 86 L.J.K.B. 793; 117 L.T. 63; 7 Digest 522, 19.

ACTION tried by STREATFEILD, J.

The plaintiff, as administrator of the estate of his child, aged four, claimed damages under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of an accident as a result of which the child was killed. The factors which, it was held, may be taken into consideration in assessing damages are referred to in the headnote.

G. Heron and *E. G. H. Beresford* for the plaintiff.

A. J. Flint for the defendant.

STREATFEILD, J.: On Nov. 17, 1946, an accident occurred as a result of which the plaintiff, Harold Charles Hart, lost his little girl of four.

The first question for solution is whether it is proved that the accident was due to the negligent driving of the defendant. [HIS LORDSHIP reviewed the evidence, said that he had come to the conclusion that the accident was caused by want of care on the part of the defendant, and continued:—] The next question is what are the proper damages recoverable by the plaintiff in this action which he brings in his capacity as administrator of the estate of the child.

The first head of damages is that which is usually termed loss of expectation of life. That raises a difficult problem which during the last two years has led to considerable inconsistencies in awards both by judges and by juries. The matter has, however, become stabilised by the decision of the House of Lords in *Benham v. Gambling* (1). The measure of damages there laid down is, in effect, the loss of prospects of a happy life. I must also bear in mind the age of the deceased child, and the fact that she had yet to pass through the ordinary dangers of childhood, and I do not think that as large an award of damages is applicable to a child of that age. I have also to take into account the chance of the child's happiness of life. A picture has been drawn of the circumstances of this child living in what I am told by the police officer is a slum area. No doubt, the plaintiff has difficulties, now that he has been deserted by his wife, of looking after a child who has to accompany him when he goes out as a hawker. It is the best that he can do in the present circumstances, but, to my mind, it does not indicate a very happy state of affairs which, however, might have improved as time went on.

I am urged by counsel for the plaintiff in whatever sum I award to bear in mind the difference between the value of the £ in 1946, and that in 1941 when *Benham v. Gambling* (1) was decided. I would not be justified in awarding as much as £200 which was the award of the House of Lords to a child living in rather special circumstances, but I think counsel for the plaintiff is right in saying that some addition must be made in respect of the alteration in the value of the £. I have come to the conclusion that although I should have awarded less than £200 had I been considering like values, the depreciation of the £ justifies me in making an award under this head of £200.

One other matter I have to consider—the funeral expenses which were claimed at the figure of £39 16s. 0d. Part of that account is for the embalming of the body, and it has been suggested that that is an extravagance which should not be included in funeral expenses. I do not take that view. I think that the parents of a child who has been killed are not acting unreasonably if they have the body embalmed, and so I award the full amount of £39 16s. 0d. as claimed under the head of funeral expenses.

By way of an amendment a sum of £225 was added to the plaintiff's claim in respect of the cost of a monument to be erected over the grave of this child. It is not for me to pass judgment on people's views in spending sums on monuments over graves, although I cannot help thinking that a greater duty is owed to the living than to the dead. But I am clear that this sum is irrecoverable as funeral expenses under the Law Reform Act. My attention is drawn to *Goldstein v. Salvation Army Assurance Society* (2), where, it appears, the plaintiff had taken out a policy of insurance for the express purpose of providing for funeral expenses including the erection of a tombstone, and it was held by ROWLATT and MCCARDIE, JJ., that funeral expenses within the meaning of the Assurance Companies Act, 1909, included the cost of an ordinary stone or tablet on the grave. MCCARDIE, J., stated that the funeral expenses must be reasonable and proper and said ([1917] 2 K.B. 297):

"He [the judge] must remember the station in life, the occupation, and the creed of the dead person, and the general circumstances of the case, and he ought not to allow as a funeral expense anything beyond these reasonable and proper limits."

ROWLATT, J., in his judgment, stated (*ibid.*, 295):

"It is a well-known and inveterate practice acquiesced in by everybody that a tombstone, like mourning, is not allowed as part of the funeral expenses which are deducted in estimating estate duty. But I do not think that such considerations help us much in a case like this. One must look at the object of this statute, which was to enable people to secure by insurance money wherewith to fulfil what is really a sentimental obligation."

I do not think that the construction placed on the words "funeral expenses" in the Assurance Companies Act, 1909, helps me with regard to their construction in the Law Reform Act. I have to be guided by what is reasonable. In my view, in the circumstances of this case it is wholly unreasonable when a child has been killed to expect the negligent party to pay £225 towards the erection of a monument, that having been added by way of an amendment as an afterthought to this claim. I, therefore, disallow that claim completely.

Judgment for plaintiff for £239 16s., with costs.

Solicitors: *Eric Bowes*, Birmingham (for plaintiff); *Blewitt & Co.*, Birmingham (for defendant).

[*Reported by GWYNEDD LEWIS, Barrister-at-Law.*]

DANCER v. DANCER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Ormerod, J.), June 29, 1948.]

Marriage—Banns—Due publication—Absence of fraud—True name of intended spouse—Name acquired by repute—Marriage Act, 1823 (c. 76), ss. 7, 22.

A wife, who was the legitimate daughter of Mr. and Mrs. K. was christened J.K. and registered in that name. When she was 3, her mother began to live with a man, R., and continued to do so for 14 years until he died. The wife was brought up as the child of "Mr. and Mrs. R.," was always known by the surname "R.," and was not told her real name until she was 16. Before her marriage she told her intended husband her real name and it was agreed, on the advice of the vicar, that the banns should be published in the name of R. since to use any other name would mislead the public. On a petition by the husband for the nullity of the marriage it was argued that the marriage was void since the true surname had not been given and the banns had, therefore, not been duly published as required by the Marriage Act, 1823, ss. 7 and 22.

HELD: (i) as the wife had consented to her name being stated as "R." in the banns, not with any fraudulent intention or to conceal any fact, but in order to avoid concealment, there had been due publication of banns within s. 22 of the Act of 1823;

(ii) the name of "R." had by usage become the true surname of the wife within s. 7 of the Act, and, therefore, again, there had been due publication of the banns;

(iii) consequently, the marriage was valid.

Chipchase v. Chipchase ([1939] 3 All E.R. 895; [1939] P. 391), *applied*.

Chipchase v. Chipchase ([1941] 2 All E.R. 560; [1942] P. 47; 165 L.T. 333), *distinguished*.

[AS TO PUBLICATION OF BANNS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 572, 573, para. 859; and FOR CASES, see DIGEST, Vol. 27, pp. 46-49, Nos. 246-298.]

Cases referred to:

- (1) *Chipchase v. Chipchase*, [1939] 3 All E.R. 895; [1939] P. 391; 108 L.J.P. 154; Digest Supp.
- (2) *R. v. Inhabitants of Tibshelf*, (1830), 1 B. & Ad. 190; 8 L.J.O.S. M.C. 120; 109 E.R. 758; 27 Digest 47, 261.
- (3) *R. v. Inhabitants of Wroxtton*, (1833), 4 B. & Ad. 640; 1 Nev. & M.K.B. 712; 1 Nev. & M.M.C. 479; 2 L.J.M.C. 64; 110 E.R. 597; 27 Digest 47, 254.
- (4) *Orme v. Holloway (falsely calling herself Orme)* (1847), 5 Notes of Cases, 267; 27 Digest 47, 259.
- (5) *Chipchase v. Chipchase*, [1941] 2 All E.R. 560; [1942] P. 37; 110 L.J.P. 65; 165 L.T. 333; 2nd Digest Supp.
- (6) *Small v. Small & Furber*, (1923), 67 Sol. Jo. 277; 27 Digest 48, 276.
- (7) *Tooth v. Barrow*, (1854), 1 Ecc. & Ad. 371; 164 E.R. 214; 27 Digest 48, 273.

- (8) *Wormald v. Neale and Wormald (falsely called Neale)* (1868), 19 L.T. 93 ; 27 Digest 48, 274.
- (9) *Sullivan v. Sullivan (falsely called Oldacre)* (1818), 2 Hag. Con. 238 ; 161 E.R. 728 ; 27 Digest 49, 279.
- (10) *Wakefield v. Mackay (falsely called Wakefield)* (1807), 1 Hag. Con. 394 ; 1 Phillim. 134, n ; 161 E.R. 593 ; 27 Digest 37, 135.

PETITION for divorce and cross petition for nullity.

A wife, Jessamine Dancer, petitioned for divorce against her husband, George Alexander Dancer, on the grounds of cruelty and adultery. The husband cross-petitioned for a decree of nullity of the marriage on the ground that there had not been a due publication of the banns. The facts appear in the judgment of ORMEROD, J., who held that there had been a valid marriage.

Simpson Pedler for the wife.

Fairweather for the husband.

Kennedy Kisch for a party cited.

ORMEROD, J. : The wife, Jessamine Dancer, seeks a decree of dissolution of marriage against her husband, George Alexander Dancer, on the grounds of his cruelty and adultery. The husband asks for a decree of nullity and also asks for a decree of dissolution by way of alternative on the ground of his wife's adultery. It has been convenient for the prayer for a decree of nullity to be dealt with before the other matters are considered.

The wife was born in 1904, and was the legitimate daughter of a Mr. and Mrs. Knight. She was christened Jessamine Knight and registered in that name. When she was born her mother had ceased to live with her father and for some two or three years after she was born her mother was in domestic service. When the wife was three years old, the mother began to cohabit with a man named Roberts. She lived with Roberts as his wife until he died on Feb. 21, 1921, during which time she gave birth to five other children, and the wife, Jessamine, was brought up as the child of the mother, Mrs. Knight, and Roberts. She said in her evidence that she was always known by the name Roberts, and it was not until she was 16 that she was told by her mother that her father was Mr. Knight. She then knew for the first time that her native name was not Roberts but Knight, and that she was not the daughter of Mr. Roberts as she had believed. She was married on Dec. 25, 1924, to the husband.

Some little time before the marriage, when the question of publishing the banns arose, there was a conversation between the wife and the husband and the wife's mother as to the name under which the wife should have the banns called. There is some little discrepancy in the evidence about how long the husband had known the real name of his intended wife, but he did know, before the banns were published, that the wife was the daughter of Knight and not of Roberts. According to the husband the wife's mother was very anxious that the banns should be published in the name of Roberts. She said, according to him, that she was drawing a widow's pension as the widow of Roberts, and if the fact became known that she was really Mrs. Knight and not the widow of Roberts, it would mean that awkward inquiries would be made about her pension. In addition, she was anxious that it should not be known in the district that her children by Roberts were not born in wedlock. That is the husband's story. The wife, on the other hand, said that her mother was drawing, not a widow's pension, but a dependant's allowance by reason of the fact that she had lived with Roberts and had been dependent on him. She said that, although her mother was anxious that the name of Roberts should be used for the sake of her children, there was no question of conditions being made or any undue pressure being put upon her. The mother was called, and she said frankly that she asked her daughter to use the name of Roberts, but that the question of the pension certainly did not arise. Then, according to the wife, she went with

the husband to the vicar, and she put before the vicar the whole of the facts. She told the vicar that she was the daughter of Mr. and Mrs. Knight, and also that her mother had lived with Roberts since she, the wife, was three years of age, up to the time of the death of Roberts. She said that she had always been known as Roberts, and never knew any other name until the age of 16. She said that the vicar told her that she should use the name of Roberts, that to use any other name would be to mislead the public, and that people would not know who was being married if her banns were called in the name of Knight. The husband says that he has no recollection of going down to see the vicar and he does not think he did go, and that, so far as any arrangements about the banns were concerned, they were made by the wife alone. Having heard the evidence of both parties, I am satisfied that I should accept the wife's version of the facts. I accept that there was some discussion with regard to the name the wife should use—not because the wife's mother was afraid of awkward inquiries being made about any pension she was drawing, but merely for the sake of her other children.

The question then arises whether there has been any breach of the provisions of s. 22 of the Marriage Act, 1823, on the ground that the banns have not been duly called. Section 22 is clear in its terms in that it provides that a marriage shall be “null and void to all intents and purposes whatsoever” if the parties shall “knowingly and wilfully intermarry without due publication of banns.” By s. 7 of the Act it is provided that before the banns shall be published the parties shall cause to be delivered to the parson their true Christian names and surnames, and certain other particulars. The contention of counsel for the husband is this. The “true Christian name and surname” can only mean in this case the Christian name and surname which the wife acquired at birth by reason of her parentage and by subsequent baptism and registration, that she knew of her true Christian name and surname as also did her prospective husband, and, if they allowed the banns to be published in any other way, there was no due publication of the banns. Counsel for the husband says that, if that did happen and they allowed the banns to be published in any other way, they did it knowingly and wilfully and that whether or not there was any intention of concealment on the part of the wife and husband at the time they published the banns is immaterial. There has, in fact, been a breach of the statute and the marriage must be void. Counsel for the husband cited a substantial number of authorities, which, he says, purport to bear out that view. I must adopt the argument of SIR BOYD MERRIMAN, P., in *Chipchase v. Chipchase* (1). That was an appeal to the Divisional Court from a decision of justices. The question arose whether the marriage was null and void because to the knowledge of both parties the wife had given a wrong name when she published the banns. In that case she gave her maiden name, although, in fact, she had been married and she also stated that she was a widow. When that case came on for hearing by the Divisional Court, the learned President sent it back for further inquiry. In his judgment he quotes the words of s. 22 of the Marriage Act, 1823, and says ([1939] P. 397):

“ ‘Provided always, that if any persons . . . shall knowingly and wilfully intermarry without due publication of banns or licence . . . the marriages of such persons shall be null and void to all intents and purposes whatsoever.’ It is required by s. 7 that the true Christian names and surname shall be given to the parson for the purpose of publication of banns. As a matter of history the cases to which our attention has been called, *Rex v. Inhabitants of Tibshelf* (2), and *Rex v. Inhabitants of Wroxton* (3), show quite plainly that the words ‘knowingly and wilfully’ were deliberately introduced into s. 22 of the Act of 1823 in order to mitigate the hardship which had arisen under the earlier Act and was exemplified by *Rex v. Inhabitants of Tibshelf* (2), namely, that it was quite immaterial whether the falsity in the declaration had arisen

by accident or design and whether such design were fraudulent or not . . . The same appears even more clearly in the judgment of Sir JENNER FUST in *Orme v. Holloway* (4), where he says the construction of this Act is that, in order to set aside a marriage on the ground of undue publication of banns, it is necessary for both parties to be cognisant of the fraud ; it is necessary first to prove that there has been a fraud and, secondly, that both parties were cognisant of the fraud and knowingly and wilfully entering into the marriage without due publication of banns."

HENN COLLINS, J., was also a member of the court, and he agreed with the argument put forward by the learned President. *Chipchase v. Chipchase* (5) came before HENN COLLINS, J., in 1941, when he granted a decree of nullity. The reason for his doing so was that he found as a fact that the wife gave her maiden name, not because she was known by that name and that to give any other name would have been misleading, but because it served to conceal the fact that she was already married. In other words, HENN COLLINS, J., when dealing with the case when it came before him in the form of a petition for nullity, granted the decree of nullity because he found that the reason why the wife gave her maiden name was that she wished to conceal the true facts—that is, she did not give her maiden name for the purpose of avoiding concealment—and that in those circumstances there was an infraction of the statute. In the present case, I am satisfied that the wife, when she went to the vicar and gave the name by which she had been known since the age of three, did it deliberately, not in any sense to conceal her origin or her identity, but to avoid concealment. She adopted the advice of the vicar, which was : "If you give the name of Knight, no one will know anything at all about you. If you give the name of Roberts, which is the name by which you have always been known in this parish and everywhere else, then everyone will know who it is who is being married." On that advice and with the intention of avoiding any form of concealment, she allowed her name to go forward in the banns as Roberts. In those circumstances, if I adopt the argument of the learned President in *Chipchase v. Chipchase* (1), I am satisfied that this is a case where there has been no undue publication of banns.

Counsel for the husband has cited a number of cases where a marriage has been declared null and void because some name other than the original name of one of the parties has been given, but in each one of them there has been, in a greater or less degree, an element of fraud or concealment in some form or other. In *Small v. Small* (6), which is probably most in favour of counsel's contention, the only concealment at which one of the parties was aiming was the fact that he was a deserter from the Royal Field Artillery and had enlisted in another name in another regiment. In those circumstances it may well be that he was anxious to be married in his adopted name to avoid arrest. In *Tooth v. Barrow* (7), which was also cited, it is clear that the prospective wife adopted a name other than the name by which she had always been known for the specific purpose of preventing people in the district knowing that she was the person who was going to be married. Again, in *Wormald v. Wormald* (8), a false name was deliberately given because the girl who was going to be married wanted to prevent that fact being known. In the present case I am satisfied that there was no intention to deceive or intention to conceal, and that, having regard to the judgment of the learned President in *Chipchase v. Chipchase* (1), must be an end of the matter.

There is one further question with which I should deal. Section 7 of the Marriage Act, 1823, provides that the true Christian names and surnames should be delivered to the vicar at the time the banns are published. Therefore, the question arises—even supposing that the question of concealment or lack of concealment were not a matter to be considered in the interpretation of s. 22—whether or not the wife did give her true Christian name and surname to the vicar at the time when the banns were published. As to the Christian name,

of course, there could be no doubt, because she was baptised and registered in that name, the banns were called and she was married in the name of Jessamine. The real question then, is whether the name of Knight or the name of Roberts is her true surname, and what is the meaning of the word "true." It is clear in this case that she was born in wedlock and that her parents' name was Knight, but it is equally true that from the time she remembers anything at all she was known as Roberts, and up to the age of 16 she did not know that she had any other name. It is abundantly clear that she had never any intention of being known—apart from marriage—by any other name than Roberts, that Roberts was the name by which she was generally known, even at school, the name she would sign on any documents on which her name had to be inscribed. In those circumstances, the question arises whether her true name is the name which came to her at birth or the name which became hers by a usage which was so common and complete that it would not be reasonable to say now that her true name was other than Roberts. My attention was drawn by counsel for the husband to *Sullivan v. Sullivan* (9) which was decided long before 1823 when the Marriage Act was passed. My attention was particularly drawn to that part of the judgment of SIR WILLIAM SCOTT dealing with the difficulty of knowing what is a true name and whether a name can be acquired by repute. The judgment, first, deals with illegitimate children and whether they have the surname of the mother or acquire other names by repute as time goes on, and then he said ((1818), 2 Hag. Con. 253) :

"However, if they are much tossed about in the world, in a great variety of obscure fortunes, as such persons frequently are, it may be difficult to say for certain what name they have permanently acquired, as was the case in *Wakefield v. Mackay* (10). In general it may be said, that where there is a name of baptism and a native surname, those are the true names, unless they have been overridden by the use of other names assumed and generally accredited."

There is no doubt in the present case that the name of baptism, and the native surname—which in the absence of other conditions would be the true names—are the names of Jessamine Knight, but I am completely satisfied—to adopt the words of this judgment—that the name of Knight has now been overridden by the use of another name, the name of Roberts, which has been assumed and has been generally accredited.

I am satisfied that, even if the question of concealment did not enter into the interpretation of s. 22, on the interpretation of s. 7 of the Act I should be bound to say that the true name of this wife, in the sense that it was a name which had been assumed for her and by her, and by which she had been generally known throughout the whole of her conscious life, was the name of Roberts, which was the name by which her banns were called prior to her marriage. In those circumstances, it would be impossible to say that there was not due publication of the banns in this case, and, therefore, the plea on the cross-petition must fail.

Solicitors : *J. A. & H. E. Farnfield* (for the wife) ; *Duthie, Hart & Duthie* (for the husband and party cited).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

THE TOWERFIELD. OWNERS OF THE S.S. TOWERFIELD v. WORKINGTON HARBOUR AND DOCK BOARD.

[COURT OF APPEAL (Scott, Bucknill and Asquith, L.JJ.), April 6, 7, 8, 9, 12, 13, 14, 15, 16, May 25, 27, July 9, 1948.]

Harbour—Pilot—Compulsory pilot—Negligence—Contributory negligence—Ship running aground—Negligence of harbour board—How far negligence of pilot a defence to harbour board—Harbours, Docks, and Piers Clauses Act, 1847 (c. 27), s. 74—Pilotage Act, 1913 (c. 31), s. 15.

In 1931, the W. Harbour Board notified the maritime public, by means of an inset in the appropriate Admiralty chart and by means of notices to mariners, of the facilities afforded to shipping by their harbour on payment of dues and charges. From 1933 onwards the chart bore under the heading "Dredged Depths," the words "In the approach channel and turning basin within the pecked lines a depth of 4½ ft. at chart datum is maintained by dredging (1933)," which meant, in effect, that the depth of the channel was maintained at the level of the dock sill. On Oct. 19, 1941, s.s. Towerfield, having a draft of 23 ft. forward and 24 ft. aft, arrived off W. Harbour, and took on the compulsory Trinity House pilot. High water was at 11.8 a.m. producing a predicted depth of 30 ft. lin. at the dock sill. The pilot, after boarding the vessel received a message from the harbour-master that the harbour tug was not available to assist in bringing the Towerfield into the dock, but the pilot decided nevertheless to bring her in. At 11.10 a.m. the Towerfield crossed the bar and steamed up the channel at 3 knots, and after going about 400 yards grounded on the north side of the channel. She subsequently broke her back. The shipowners claimed damages from the harbour board in respect of (1) breach of the board's duty imposed by statute and at common law to take reasonable precautions that the approaches to the port were safe or to give warning that no such care had been exercised, and (2) breach of contract or warranty that the condition of the harbour was in accordance with the Admiralty chart. The harbour board counterclaimed for damage to the harbour on the ground that it was due to the negligence of those in charge of the Towerfield, and also under the Harbours, Docks, and Piers Clauses Act, 1847. It was accepted by a majority of the Court of Appeal that the pilot had been told by the harbour-master to keep to the north of the centre line of the channel, and that he had complied with that instruction. The harbour board had given no information either to the shipowners or the pilot as to the state of the channel at the place where the Towerfield went aground (which was within the channel as marked by the line of the northern dredging marks), nor had dredging been carried on continuously in order to keep the port open.

The Pilotage Act, 1913, s. 15, provides: "(1) Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory."

HELD: (by SCOTT and ASQUITH, L.JJ.): (i) section 15 (1) of the Act of 1913 should be read as strictly limited to actions in tort and should be applied to such actions as the present whether the ship was defendant or plaintiff, but, even if the effect of s. 15 (1) was to make the shipowner responsible for the conduct of the pilot to exactly the same extent as if he were the servant of the shipowner and if the pilot had been negligent (which, on the facts, he had not), the defendants could not avail themselves of their own wrong, namely, the breach of their common law duty to inform users

of the channel of its condition, and, therefore, the defence of contributory negligence failed;

(ii) the same considerations disposed of any charge against the ship-owner of a breach by him of his implied promise to navigate in the channel with care and skill;

(iii) possibly the same facts might be expressed as an estoppel of the defendants by their implied representation to the shipowner and pilot alike that they knew of no obstruction to prevent the ship passing quite close to the north side of the channel.

(by BUCKNILL, L.J.): (i) in view of the terms of s. 15 (1) of the Pilotage Act, 1913, the plaintiffs' claim failed, so far as it was based in tort, since the stranding of the ship was partly caused by the contributory negligence of the pilot;

(ii) the defendants failed in their counter-claim since s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, did not apply where damage to the property of a harbour authority was wholly or partly due to the negligence of the authority.

Order of WILLMER, J., varied.

[As TO CONTRIBUTORY NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 679-689; and FOR CASES, see DIGEST, Vol. 36, pp. 109-117, Nos. 726-781.]

Cases referred to:

- (1) *Norman v. Great Western Ry. Co.*, [1915] 1 K.B. 584; 84 L.J.K.B. 598; 112 L.T. 266; 38 Digest 352, 580.
- (2) *The Eurymedon*, [1938] P. 41; 107 L.J.P. 81; 158 L.T. 445; *sub nom.*, *Corstar Owners v. Eurymedon Owners*, *The Eurymedon*, [1938] 1 All E.R. 122; Digest Supp.
- (3) *The Boy Andrew v. St. Rognvald*, [1948] A.C. 140; *sub nom.*, *Admiralty Commissioners v. North of Scotland and Orkney and Shetland Steam Navigation Co., Ltd.*, [1947] 2 All E.R. 350; [1948] L.J.R. 768.
- (4) *Beechgrove S.S. Co., Ltd. v. Akt. Fjord of Kristiania*, [1916] 1 A.C. 364; 85 L.J.P.C. 1; 113 L.T. 1124; 41 Digest 908, 8011.
- (5) *The Adam W. Spies*, (1901), 70 L.J.P. 25; 41 Digest 683, 5124.
- (6) *The Hector*, (1883), 8 P.D. 218; 52 L.J.P. 47; 48 L.T. 890; 5 Asp. M.L.C. 101; 41 Digest 785, 6461.
- (7) *The Maria*, (1839), 1 Wm. Rob. 95; 7 L.T. 648; 41 Digest 908, 8012.
- (8) *Carruthers v. Sydebotham*, (1815), 4 M. & S. 77; 29 Digest 242, 1955.
- (9) *Thom v. Owners of S.S. Smerdis*, 1925 Sc.L.T. 239.
- (10) *Great Western Ry. Co. v. Mostyn (Owners)*, *The Mostyn*, [1928] A.C. 57; 97 L.J.P. 8; 138 L.T. 403, H.L.; *reversy.*, [1927] P. 25, C.A.; [1926] P. 46; 41 Digest 974, 8645.
- (11) *Det Forenede Dampskibs Selskab v. Barry Ry. Co.*, [1919] Ll.L.R. 658.
- (12) *The Moorcock*, (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 12 Digest 611, 5048.
- (13) *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 12 Digest 55, 310.

APPEAL from an order of WILLMER, J., dated May 23, 1947.

The owners of the s.s. Towerfield claimed damages against the Workington Harbour Board in respect of (1) a breach of the defendants' duty imposed on them by statute and at common law to take reasonable precautions that the approaches to the port and harbour of Workington were safe, or to give warning that no such care had been exercised, and (2) a breach of contract or warranty by the defendants that the condition of their harbour was in accordance with a statement inserted at their request on the appropriate Admiralty chart from 1933 onwards, as a result of which on Oct. 19, 1941, the Towerfield ran aground on the northern

side of the channel to a dock in the defendants' harbour. The defendants counterclaimed in respect of damage to the harbour.

At the time of the occurrence the two leading marks or beacons did not mark the centre of the dredged channel as indicated on the Admiralty chart. They were so placed that at their actual site on land they were 78ft. to the southward of two dredging marks and 169ft. to the northward of two other dredging marks. The line of the north dredging marks when protracted was not in alignment with the line of the leading marks, but was slightly divergent from it, so that at the place of stranding there was 98ft. instead of 78ft. between the two extended lines. On the morning of Oct. 19, the weather was clear with a strong south-westerly breeze, and the tides were spring and making. High water was at 11.8 a.m. with a predicted rise of tide producing a depth of 30ft. in. on the dock sill at high water. The actual depth on the sill was 31ft. 6ins. The Towerfield was a steel screw ship of 4,241 tons gross register, 373ft. long and 52.4ft. beam, and at the time of her stranding was laden. Her draft was 23ft. forward and 24ft. aft.

Pilotage was compulsory for the Towerfield and she was boarded by a Trinity House pilot, Craig. After Craig had reached the Towerfield, he received a message from the harbour-master that the defendants' harbour tug was not available to help to navigate the ship into the dock owing to boiler trouble. The captain of the Towerfield had never entered Workington Harbour before, and said that he relied on the pilot's local knowledge when accepting his decision to bring the ship in. He also pointed out in evidence that there was nothing on the inset of Workington Harbour printed on the Admiralty Chart No. 1346 to indicate that there would be any difficulty in navigating the ship up the channel. Neither Craig nor any agent of the defendants warned the captain of any silting up in the channel which substantially reduced its width. At 11.10 a.m., half an hour after another vessel, the s.s. Ashbury, which had a draft of 22ft. in. had safely negotiated the channel, the Towerfield crossed the bar at the seaward end of the south pier, and steamed up the channel at a speed of about 3 knots. After going about 400yds. she grounded on the north side of the channel about 500 yds. from the entrance to the Prince of Wales Dock. On the ebb tide she broke her back. After she had settled aground, the ship was angled 7 degrees to port of the line of the channel. Her starboard bilge amidships was 42ft. to the northward of the line of the leading marks. This put the ship's port side about 94ft. from the line of the leading marks and 4ft. on the channel side of the line of the north dredging marks at the place of stranding. The plaintiffs contended that the ship was in the fairway of the dredged channel, and that she was entitled to navigate anywhere within the dredged channel in the absence of any warning by the harbour board of any obstruction.

The court put the following questions to the assessors : (1) Was it good seamanship, apart from any knowledge of the pilot of any obstruction on the north bank, or knowledge of the probability of any such bank, for him to navigate the ship abeam of the Bush Perch 4ft. south of the north dredging marks and with her port side 94ft. to the north of the leading marks, giving due weight to the notice as to the dredging given in inset to chart, and, to the predicted rise of tide on a.m. tide of Oct. 19, to the fact that there was a freshet, and that the dredged channel south of the leading marks was limited to a width of about 80ft., and that he had no tug, and wind strong south-westerly breeze ? (Answer) : No. (2) Assuming that the pilot knew of the tendency of a bank both to form and to dissipate on the north edge of the dredged channel near the Bush Perch, under the influence of the freshet, and that he had no positive knowledge whether such bank was there or not on Oct. 19, was it good seamanship to bring the Towerfield up in the position set out in question 1 ? (Answer) : No. (3) Assuming the state of mind of the pilot as set out in question 2, in what position in the channel did good seamanship require him to bring the ship up with

reference to the leading marks when abeam of the Bush Perch, bearing in mind the factors set out in question 1? (Answer): To bring her up with the centre line of the ship very slightly north of the leading marks. (4) What additional precautions did good seamanship require from the pilot, having regard to the factors set out in question 1? (Answer): To watch the steering very carefully so as to counteract promptly the effects of the wind on the position of the ship in the channel and the effects of the freshet on her heading. (5) In your view could the Towerfield, on Oct. 19, have entered the port in safety and without difficulty if she had come up on the leading marks? (Answer): No. There would be an element of risk in coming in without a tug with a fresh or strong south-westerly wind particularly as there were no stakes or buoys to mark the edge of the navigable channel, which was very narrow for so large a ship. A ship cannot steer on a completely straight line. (6) In your view was the only safe method for the Towerfield to come up the channel on the morning of Oct. 19, to keep to the line of the leading marks having regard to the factors set out in question 1? (Answer): No method was quite safe, but the best would be to come up with the centre line of the ship very slightly north of the leading marks as stated in answer No. 3. (7) Would it have been good seamanship having regard to the factors set out in questions 1 and 2 for the pilot to bring the ship up the channel 50 to 60ft. south of the Bush Perch? (Answer): No. Except by keeping close to the leading marks there was no reliable method of judging the distance of the Bush Perch.

WILLMER, J., held that the pilot, Craig, was negligent and that his negligence was the sole cause of the stranding. The Court of Appeal, by a majority, held that the shipowners succeeded both on their claim in contract and on their claim in tort, and that the counterclaim failed.

Carpmael, K.C., Naisby, K.C., and Boyes for the owners of the s.s. Towerfield.

R. F. Hayward, K.C., Devlin, K.C., and Fletcher-Cooke for the Workington Harbour and Dock Board.

Cur. adv. vult.

July 9. The following judgments were read.

BUCKNILL, L.J. [having considered the facts, the evidence as to the state of the channel, and the answers of the assessors]: I accept the answers of our assessors and agree with the conclusion of WILLMER, J., that Craig was negligent in his pilotage of the Towerfield. In my opinion, the stranding and damage were partly caused by such negligence. The question then arises whether Craig's negligence bars the claim of the shipowners against the defendants in respect of their breach of duty, even if they are able to establish that the defendants partly caused the stranding by breach of duty and negligence on their part. I, therefore, now proceed to consider whether there was such breach of duty and negligence. [HIS LORDSHIP discussed the conclusions of WILLMER, J., and the contentions of counsel and continued:] In my opinion, it was the duty of the defendants to call the attention of those in charge of the Towerfield to certain matters which were within their special knowledge and which gravely increased the risk to the Towerfield when navigating their harbour. These matters are: (1) Their failure to take any soundings in the channel since Sept. 22; (2) the fact that the dredger had done no work on the north side of the channel since Oct. 9; (3) the fact that the channel navigable for the Towerfield on Oct. 19 was only 155ft. wide. The judge has found that the defendants' sounding plans were not exhibited for the pilots to see, although the harbour-master in his statement said that he always informed the pilots as to the results of his soundings and produced his sounding charts to them at his conferences with them, usually in the pilots' cabin. There is no evidence as to when or by whom Craig was told that the Towerfield would be coming to Workington or what her approximate draught would be, or that the Ashbury would be docking on the same tide. Craig lived at Maryport. There

is no evidence as to how often he was piloting ships at Workington in the last few weeks before Oct. 19, but we know he was there on Oct. 6, 7 and 17, and he had a look at the channel at low water on those days from the south side. In my opinion, the breach of duty of the defendants in failing to inform those in charge of the Towerfield (and I include Craig among them) of these matters concerning the navigation of the channel on Oct. 19 contributed to the stranding of the Towerfield.

The principles laid down by the Court of Appeal in *The Eurymedon* (2) which were referred to with approval by LORD SIMON in his speech in the House of Lords in *The Boy Andrew v. St. Rognvald* (3) ([1947] 2 All E.R. 354), seem to me to support this conclusion. If one applies the propositions stated by GREER, L.J., in that case, it seems to me that the breach of duty of the defendants in this case, of which the judge has rightly found them guilty, continued right up to the moment of stranding. Moreover, I think the breach of duty of the defendants in allowing a large bank to accumulate in the southern part of the dredged channel contributed to the negligent mistake of the pilot in navigating too far to the northward of the leading marks.

So far as the plaintiffs' claim in tort is concerned, the position, therefore, is that the damage to the ship was partly caused by the negligent navigation of the ship by her compulsory pilot, and partly caused by the negligence and breach of duty of the defendants. If Craig is to be considered as a voluntary pilot and as agent of the shipowner while in charge of the navigation of the ship when the shipowner is not only resisting but also when making a claim, then in 1941 the claim of the plaintiffs would fail at common law, on the ground of Craig's contributory negligence, but here a difficult question arises whether Craig was the agent of the shipowner by virtue of the Pilotage Act, 1913, s. 15, in connection with a claim by the shipowner as well as against him, or whether that Act merely imposes a liability on the shipowner for damage caused by the negligent navigation of the ship and leaves him in the same position as he was before the Act was passed so far as claims made by him for breach of duty or contract by a third party are concerned.

The Pilotage Act, 1913, s. 15, provides :

"Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory."

These words, by imposing on the shipowner a liability for the negligence of a pilot whom he is bound to employ, departed from the principle of the common law, and it may be urged with some force that its application should not be extended beyond the strict interpretation of its terms. The word "answerable" may be said to indicate that the section is dealing with a claim which has to be answered, and that the general tenor of the words indicates a claim by a third party for injury sustained by him through the faulty navigation of the vessel whilst in charge of a compulsory pilot. One of the objects of the section was to get rid of compulsory pilotage as a defence in order to bring the law of England into line with the laws of other nations. The Pilotage Act, 1913, s. 15 (2), enacts that the section shall not take effect until Jan. 1, 1918, or such earlier date as His Majesty may fix by Order in Council certifying that it is necessary to bring the section into operation in order to enable His Majesty to comply with an international convention. The convention therein referred to is the International Convention for the Unification of certain Rules of Law respecting Collisions signed at Brussels on Sept. 23, 1910 (Cmd. 5558). Article 5 of that Convention provided that :

"The liability imposed by the preceding articles attaches in cases where

the collision is caused by the fault of a pilot, even when the pilot is carried by compulsion of law."

See DIGBY AND COLE PILOTAGE LAW (1913), appendix II, p. 86. It will be noted that the word used in the Convention is "liable" not "answerable." The use of the word "answerable" in sub-s. (1) of s. 15 is probably explained by reference to sub-s. (3) of the section which is in the following terms: "As from the date of the coming into operation of this section, the Merchant Shipping Act, 1894, s. 633, shall cease to have effect." That section declared that an owner should not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of a compulsory pilot. In other words, the Pilotage Act, 1913, s. 15 (1), was intended to repeal the law as stated in the Merchant Shipping Act, 1894, s. 633.

So far as I know, it has never been argued either in the Admiralty Court or in the Commercial Court during the 30 years that have passed since 1918 that the object of s. 15 was not to get rid of compulsory pilotage altogether as a defence. In other words it has always been assumed that s. 15 (1) put on the shipowner the same responsibility for the acts of a compulsory pilot as he had always had for the acts of a voluntary pilot, namely "a contractual relation of service, to which the maxim of *respondet superior* directly applies," as LORD ATKINSON said in his speech in *The Beechgrove* (4) ([1916] 1 A.C. 383). This question before us turns on the meaning of the words of s. 15 (1), and having regard to the fact that those words are apparently taken from the Merchant Shipping Act, 1894, s. 633, it is, I think, permissible to see what interpretation has been put upon the words of s. 633. In *The Adam W. Spies* (5) the owners of a ship made a claim against the owner of the tug towing the ship for damage caused to the ship by the tug's negligence. SIR FRANCIS JEUNE, P., held that the damage was partly caused by the tug's negligence and partly by the negligence of the pilot in charge of the tow, who, the owners of the tow asserted, was a compulsory pilot, and expressed the view that, if the pilot was a compulsory pilot, the owners of the tow could recover all their damage from the tug owner on the ground that the owners of the ship would not be affected by the contributory negligence of the pilot. He said (70 L.J.P. 25):

"I have no doubt . . . that if it can be shown that the contributory negligence alleged was the negligence of the compulsory pilot, then that would be an answer on the part of the owners of the ship, and that they would not be affected by that contributory negligence, but would, notwithstanding it, be able to make good their claim for the negligence of the tug . . . It is true, as has been pointed out by counsel for the plaintiffs, that the wording of s. 633 [of the Merchant Shipping Act, 1894] points rather to a defence to an action brought against the ship for damages than to an answer to a defence of contributory negligence, but the words appear to me to be sufficiently broad to cover both cases. If the owner or master of a ship is not answerable to any person whatever for any loss or damage sustained by the fault of the compulsory pilot, then he cannot be answerable whether the question arises as one of contributory negligence or as a direct allegation of negligence against the ship."

Section 633 of the Act of 1894 replaced and re-enacted the Merchant Shipping Act, 1854, s. 388. That section is placed under a heading "Saving of owners and masters rights" and is as follows:

"No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

In *The Hector* (6) a collision occurred between the Hector and the Augustus through the joint negligence of both ships. The Hector was in charge of a compulsory pilot. BRETT, M.R., in the course of his judgment said (8 P.D. 225):

"If s. 388 of 17 & 18 Vic. c. 104, alone governed the law, I should hold that the Hector was entitled to succeed as to the whole. That is the logical consequence."

Here again these words seem to indicate that the words "answerable to any person whatever" included claims made by the owner of the ship which was in charge of a compulsory pilot.

The Act of 1854 replaced the Pilotage Act, 1825, s. 55 of which enacted that :

"... no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from or by reason or means of any neglect, default, incompetency or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this Act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof."

In *The Maria* (7), a collision between the British vessel Websters and the Prussian vessel Maria, the owners of the Websters sued the Maria, who in her defence alleged that she was under the charge of a duly licensed pilot, taken on board under the provisions of the Newcastle Pilot Act, 1801, s. 6, and that, by virtue of that Act and also of the Pilotage Act, 1825, s. 55, even if the damage had been occasioned by her the owners were not responsible. There was no counter-claim because the Maria also alleged that the collision was due to the negligence of a third ship. DR. LUSHINGTON, in the course of his judgment, said (1 Wm. Rob. 99) :

"Now the leading principle of the legislature in exonerating owners from any damage occasioned by their vessels having pilots on board, is this ; that the masters are compellable to take such pilots on board, and the owners are not responsible for the acts of persons to whom they are thus forced to commit the management of their property, and over whom they have no control. This, I apprehend, is a rule founded on a great principle of justice and equity."

Later on in the same judgment DR. LUSHINGTON said (*ibid.*, 106, 111) :

"... I am of opinion, that independently of the express provisions of these statutes [52 Geo. 3, c. 39, s. 30, and 6 Geo. 4, c. 125, s. 55] the compulsory taking of a pilot does upon general principles relieve the owner from all responsibility for his acts . . . upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment ; and why ? Because he selects them, and the selection is voluntary. But if a man is compelled to employ another, the principle upon which liability depends wholly fails . . . The opinion I have thus formed in this case is founded upon the general principles of reason and justice ; that no one should be chargeable with the acts of another who is not an agent of his own election and choice."

The judgment was approved by LORD BUCKMASTER in *The Beechgrove* (4) ([1916] 1 A.C. 379), where he accepted as accurate the principle that :

"... where the master is bound by Act of Parliament under a penalty to place his ship in the charge of a pilot, and he does so in compliance with the provisions of such Act, the ship is not to be considered as under the management of the owners or their servants."

The Act of 1825 replaced the Pilotage Act, 1812 (52 Geo. 3, c. 39), s. 30 of which enacted that :

"... no owner or master of any ship or vessel shall be answerable for any loss or damage, nor shall any owner or owners of any ship or vessel or consignee of goods, be prevented from recovering any loss or damage upon any contract of insurance of the same, or upon any other contract relating to any ship or vessel, or any cargo on board the same, for or by reason or means of any

neglect, default, incompetency or incapacity of any pilot taken on board of any such ship or vessel, under or in pursuance of any of the provisions of this Act."

This Act continued with alterations and amendments an Act of 48 Geo. 3, c. 104, passed in 1808 and to be in force for four years. The Act of 1808 contained no reference to exemption of liability in respect of the acts of a compulsory pilot. In *Carruthers v. Sydebotham* (8) the plaintiff was the owner of goods on board the *Alexander* and he insured them with the defendant against loss by stranding, unless caused by the misconduct of the master and mariners. Owing to the negligence of a pilot in charge of the ship the goods were damaged by stranding. The court held that the plaintiff could recover from the assured. It was contended for the defendant that the plaintiff could not recover because the pilot was the servant of the master. Judgment was given for the plaintiff and in the course of it LORD ELLENBOROUGH, C.J., said ((1815), 4 M. & S. 85):

"... if the master cannot navigate without a pilot except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person, whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is, that there is no privity between them. In general, if there be a damage arising from a marine peril, unless that damage be induced by the act of the master, or mariners, or owners of the ship, it is a damage within the scope of the policy. Here has been a stranding which has occasioned an average loss, for which the underwriter will be responsible unless it has been occasioned by the party's own act. And how can that be, unless the act of the pilot who is imposed upon the master by law, is to be considered as his act? It appears to me, therefore, that the underwriter is liable; because this does not fall within the description of a damage that has been caused by the act of the assured themselves, but by the act of the pilot, between whom and the assured there was no privity."

DR. LUSHINGTON in *The Maria* (7) commented on the similarity of the two sections in the Acts of 1812 and 1825 and did not refer to the fact that that part of the section in the Act of 1812 which dealt with claims for breach of contract had been omitted. This leads me to think that these words as to recovery of damage caused by a compulsory pilot were omitted in s. 55 of the Act of 1825, because they were regarded as unnecessary, in that the word "answerable" was intended to cover all claims both by and against persons in which the conduct of the compulsory pilot was a contributory cause of the damage.

The Maritime Conventions Act, 1911, s. 1 (i), enacts that, where by the fault of two or more vessels damage or loss is caused to one or more of those vessels, to their cargoes or freight or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault. Where damage is caused to ship A by the fault of ships A and B and the fault of A is that of her compulsory pilot (as happened in *The Hector* (6)), it seems that this section intends the liability to make good the damage to A to fall on the owners of A and the owners of B in proportion to the degree in which each vessel was at fault. To hold that the owner of A could recover the whole of his damage from the owner of B because A was in charge of a compulsory pilot seems to be inconsistent with the sub-section. It is true that para. (c) of the proviso to the section states that nothing in the section shall be construed as imposing any liability from which he is exempted by any provision of law. Such an exemption from liability, no doubt, would arise in the case of compulsory pilotage before the Pilotage Act, 1913, s. 15, came into force. After the Pilotage Act, 1913, was passed, it seems to me contrary to the object of the Maritime Conventions Act, 1911, if the proviso to s. 1 is construed

so as to entitle the shipowner to exemption from the burden of paying for part of the damage to his ship when his ship was partly to blame through the negligence of her compulsory pilot.

The interpretation of s. 15 of the Pilotage Act, 1913, was considered in *Thom v. Owners of S.S. Smerdis* (9), in which the First Division of the Inner House held that the compulsory pilot of the defendant's ship was the fellow servant of the chief engineer of that ship and that the defendant was, therefore, not liable for the death of the chief engineer through the negligence of the compulsory pilot. The case does not touch directly on the point now under consideration, namely, whether "answerable" includes a claim made by the shipowner against a third party for damage to which his compulsory pilot's negligence has contributed, but the Inner House did lay down the broad proposition that s. 15 made the compulsory pilot the servant of the shipowner. LORD PRESIDENT CLYDE summed up the effect of the section at the conclusion of his judgment in the following words (1925 Sc.L.T. 242):

"... the liability artificially made to rest on the owners must be taken with all the legal qualifications attaching to it, and the defence of collaborateur is one of them."

One of the "legal qualifications" is surely the responsibility for the contributory negligence of the pilot when it has partly caused the damage sued for.

In my opinion, therefore, the plaintiffs' claim fails, so far as it is based in tort against the defendants, on the ground that the stranding of the ship was partly caused by the negligence of the pilot, who must be regarded as a voluntary pilot for the purpose of the plaintiffs' claim. The fact that the defendants were also guilty of negligence contributing to the stranding will not avail the plaintiffs so far as this part of their claim is concerned, for under the rule of the common law in 1941 contributory negligence by the plaintiffs completely barred the claim.

[HIS LORDSHIP then considered the plaintiffs' claim for breach of contract or warranty, held that that claim failed, and continued:—] I must now consider the defendants' counterclaim. The defendants argued in support of their counterclaim that, even if they committed a breach of duty which contributed to the damage sustained by them, nevertheless they were entitled to recover it from the owners of the Towerfield by virtue of the Harbours, Docks, and Piers Clauses Act, 1847, s. 74 (which was incorporated in their Acts), if the owners of the Towerfield were also negligent, and their negligence contributed to the defendants' damage. The material words of s. 74 for the purposes of this case are:

"The owner of every vessel . . . shall be answerable to the undertakers for any damage done by such vessel . . . or by any person employed about the same, to the harbour, dock, or pier, . . . and the master or person having the charge of such vessel . . . through whose wilful act or negligence any such damage is done shall also be liable to make good the same . . . provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel, where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot whom such owner or master is bound by law to employ and put his vessel in charge of."

In *The Mostyn* (10) the defendants' ship damaged the plaintiffs' property and the plaintiffs then claimed under the Harbours, Docks, and Piers Clauses Act, 1847, s. 74, from the defendants in respect of this damage. The House of Lords, reversing the Court of Appeal, held that the damage was not caused by any negligence on the part of the defendants, but that the plaintiffs could recover their damage from them. The question whether the section applied to damage partly or wholly due to the negligence of the plaintiffs did not, therefore, arise, but two passages in the judgments bear on the position of the

defendants if they were negligent. In the House of Lords, LORD HALDANE, after pointing out that the general words of the section did not cover a case where the event causing damage occurred by the Act of God or the Sovereign's enemies, added ([1928] A.C. 64): "It would have been equally difficult to hold that there was liability if the damage had been caused by the action of the undertakers themselves." The other passage is in the judgment of SARGANT, L.J., in the Court of Appeal, and is as follows ([1927] P. 47):

"I may perhaps add that the case which was recently decided by ROCHE, J., as to contributory negligence and as to the owners or undertakers of a dock not being able to succeed where there was contributory negligence on their part, was in my opinion correctly decided. That case recognises that in another respect a limitation may have to be imposed upon the absolute liability apparently provided by the statute."

The case referred to is *Det Forenede Dampskibs Selskab v. Barry Ry. Co.* (11), in which while the plaintiffs' ship was being moved in the defendants' dock by the defendants' tug she collided with and did damage to the property of the defendants. The defendants claimed compensation from the plaintiffs in respect of that damage under the Harbours, Docks, and Piers Clauses Act, 1847, s. 74, which was incorporated in their statutory powers. ROCHE, J., found that the damage was caused, not by the neglect of anybody on board the ship or employed by the plaintiffs, but by the neglect of persons employed by the defendants. ROCHE, J., decided that in those circumstances the defendants' claim failed for the following reasons. He said ([1919] Ll.L.R. 659):

"I am satisfied that in these circumstances this section does not apply so as to enable the employers of the negligent person to recover from the shipowners, and I am satisfied that that is so, not merely by the reading of the section, but by the application of the section, and that nobody can take advantage or avail themselves of the wrong for which they are themselves responsible. If the company themselves gave rise to the cause of the damage done through the ship, they are assisting, as in the present case, and, in my judgment, they cannot . . . recover damages caused by neglect on their own side."

Counsel for the defendants argued that the process of reasoning applied by ROCHE, J., in the *Barry Ry.* case (11) did not apply where the shipowner is partly to blame, and the dock company is also partly to blame, because in such a case it is not necessary for the dock company to assert its own wrong in order to recover for the damage partly due to the negligence of the shipowner. He argued that the true principle underlying the decision in the *Barry Ry.* case (11) was that the Barry Railway's claim should be dismissed to avoid circuitry of action. Any sum recovered by them against the shipowner would be added to the shipowner's claim against the railway company in respect of their negligence. This, however, would not be so if the shipowner was also negligent because by the rule of the common law before 1945 his claim would be defeated by his own contributory negligence. I think the answer to this attractive argument is that s. 74 of the Act of 1847 does not apply to damage done to the harbour authority's property if it is wholly or partly caused by their negligence. It seems to me that the principle laid down by ROCHE, J., in a case where the damage is solely due to the negligence of the harbour authority, should also apply where the defendant's negligence has partly caused the damage. To allow the harbour authority to recover their damage in such circumstances would infringe the rule to which ROCHE, J., referred that nobody can take advantage of the wrong for which they are themselves solely or partly responsible. That was the rule of the common law before Parliament modified it by applying the Admiralty rule as to division of loss, and I think it should be the rule in a case where a claim is made under s. 74 of the Act of 1847.

For these reasons, in my opinion, the claim of the plaintiffs fails, the counterclaim of the defendants also fails, and the judgment of the trial judge should be varied accordingly.

SCOTT, L.J. : This is the judgment of ASQUITH, L.J., and myself. Knowing that BUCKNILL, L.J., was going to make a full statement of all the main facts of the case, we have not attempted to cover the same ground as he covered, and, for that reason, we asked him to deliver the first judgment. In so far as we differ materially in any respect—and we do on some—we endeavour hereafter to make clear how and why we do so. It is with diffidence, however, that we dissent either from him or from WILLMER, J.

This is an exceptionally difficult case. With our brother BUCKNILL's statement of the facts we are in general agreement, and do not attempt any detailed re-statement of the facts of our own. We note the answers of our assessors on the questions of seamanship which we put to them, but do not regard them as concluding the further question of negligence. No doubt, the difference between bad and good seamanship usually disposes of the issue of blame or no blame, but that consequence is not automatic. Decision on all questions of mere fact rests with the court, and in this appeal the issue of negligent navigation is exceptionally dependant on the particular facts as found by us. It is for the court to find negligence and not for its assessors, whose function is limited to giving expert evidence. In our questions to them we were careful not to invite, or, indeed, to leave, any opening for any expression of opinion by our assessors in the court's exclusive field, although we suspect that, had they been asked, they would have said that the pilot's choice of course up channel was an error of judgment and not negligence. In the result, after anxious consideration, we have come to the conclusion that the harbour board are precluded from alleging that the grounding of the ship was caused by what appeared to our assessors to be bad seamanship and to the learned judge to be negligence on the part of the pilot, by the board's own failure to convey to the pilot essential and crucial information which it was their duty to convey to him in relation to the maintenance by themselves of the navigable channel, for, by so failing, they misled him into taking the course up the channel which he did take. Indeed, the legal position may be stated in an even more direct and positive form. Negligence consists in taking action which the actor ought, in all the relevant circumstances of the case, to have foreseen was likely to cause harm. In the present case we are satisfied that had the board given the pilot certain information, of which it was fully aware, it would beyond all doubt have caused him to give the north bank just that slightly wider berth which would have prevented the stranding.

[HIS LORDSHIP dealt with the special circumstances considered in reviewing WILLMER, J.'s attribution of blame to the pilot, and continued :—] We are of the opinion, for reasons which follow, that his conduct cannot be relied on by the harbour board as contributory negligence, having regard to the form which their own negligence took, for we entirely agree with the learned judge's conclusion that the harbour board was gravely negligent in regard to their common law and statutory duty (a) to dredge continuously in order to keep the port open, (b) to inform themselves about its state, and (c) to warn shipowners, and, above all, their pilots, thereof. If, contrary to our view, the pilot was negligent, we also profoundly agree with BUCKNILL, L.J., that the learned judge's conclusion that the pilot's negligence was the sole cause of the stranding is wrong. The defendants' negligence was a continuing negligence, which was operating so as to cause the accident up to the very moment it happened.

Before further considering the views both of WILLMER, J., and of BUCKNILL, L.J., in the realm of tort, it will be convenient to consider an essentially different aspect of the legal problems raised by the litigation, which arises from the fact that the two parties were, in our opinion, in a contractual relationship,

by which they had committed themselves to various promises and conditions. The consequential bearing of the relationship on their mutual relations, not only in contract but also under the law of tort, must be considered, in order to ascertain their final liabilities to each other. We turn, therefore, at once to that question of contract. Where two litigants are asserting cross claims against each other for the tort of negligence, legal duties and liabilities are both likely to have been materially affected if there also existed at the relevant time a contractual relationship between them relating to the matters out of which the cross claims arose. That platitude has direct application to the present appeal. In 1931, the defendant harbour board caused the maritime public to be notified of the facilities afforded to shipping by their harbour, on payment of dues and charges. The inference is irresistible, that they did so by way of invitation to those interested to bring or send ships to their harbour, and so increase the board's revenue. The notification was achieved by the most effective means, namely, by getting it put on the appropriate Admiralty chart and into the "West Coast Pilot," the book containing the usual information to mariners, and kept up to date in the customary way by "Notices to Mariners," from time to time, of navigational changes. The dues and charges were not mentioned, no doubt because they were on the usual scale and would be taken for granted. The intermediary for the purpose, who in fact acted as the board's advertising agent, was the Hydrographic Department of the Admiralty in London, and the arrangement with it was made by correspondence, which was before this court and the court below. The opening request, in October, 1930, was for the issue of a separate large scale chart of the port, but effect to it was given by a large scale inset on the ordinary chart. We think it first appeared as an inset plan in the 1931 edition, on a natural scale of 1/10000, under the heading "Workington. From plan supplied by the Dock and Harbour, 1931, with additions from the Ordnance Survey." The channel was not then completely dredged, but it was soon after in fact dredged to 20ft. below ordnance datum, or 2.2ft. below the sill of the dock, and from 1933 onwards the inset on the West Coast chart carried on the left of the plan, under the heading "Dredged depths," the following words: "In the approach channel and turning basin within the pecked lines a depth of 4½ft. at chart datum is maintained by dredging. (1933)"—that is, to sill level. Chart datum then was, and continued at all material times to be, 4½ft. above the dock sill. That printed notice of the Port, in our opinion, was a standing invitation to use the dock, and, therefore, constituted an offer to all, whom it might concern, of the navigational facilities of the channel and turning basin, as described in the inset plan, and permanently maintained by dredging to the stated depth. It was an offer of a contract, to be accepted by any shipowner by conduct, namely, by his act of starting to send his ship through the dredged channel into the Workington Dock, whereupon the contract would be formed and all the reciprocal terms of the contract would become operative. Its fundamental feature was the continuing express warranty of a "maintained" depth of 4½ft. below datum. In our view, the fact that there was an express written or printed warranty eliminates any such ambiguity of language in the terms of the harbour authority's fundamental promise, as was the subject of controversy and decision in *The Moorcock* (12). There, just because there was nothing said by way of description about the safety of the berth, when the shipowner agreed to send his ship to the defendants' wharf, the court had to supply the deficiency by implying the unexpressed, but necessarily intended, term. In the offer made by the defendant board there is no room for any such basic implication, since the depth is expressly defined by its own offer as a minimum depth maintained over the whole area of the approaches to the dock: indeed, the words: "See note on dredged depths" are actually printed on that area as shown on the inset plan, the words running in a line parallel to the direction of the channel and into the turning basin. That express

undertaking in the printed offer, therefore, absolves the court from the necessity of implying a basic warranty, as was necessary in *The Moorcock* (12). But, although the basic warranty is express, there are, nevertheless, in our opinion, still certain unexpressed terms—simple and reciprocal—which must be implied, on *The Moorcock* (12) principle, in order to give to the mutual undertakings of the parties that business efficacy which must at the least have been intended by them. That principle imports a duty on the court, as a matter of law, to read into the express language of the contract just that minimum of additional provision which the intended business efficacy requires, but no more than that minimum. The dominant consideration is the obvious absurdity of the harbour board attempting to warrant in advance that nothing would ever happen in the future to prevent the board from carrying out its unqualified promise of a continuously maintained minimum depth throughout the described channel and turning basin. Some interpretation of the printed terms of the board's offer must be found which will make sense of it. In our opinion, there is no difficulty in discerning what the written offer must have implied and construing it accordingly. Three mutual undertakings are obviously implicit. We begin with their content only and postpone their legal relationship. The first is a proviso, in favour of the board, broadly to this effect: "If at the moment when the contractual relationship is established by the shipowner's acceptance by conduct of the board's offer (namely, either by sending his ship there or by his notifying to the board or its agent the intended entry of his ship into the port) there shall then be some obstruction in the channel or turning basin which either completely prevents reception of the notified ship or makes its entry to the port more difficult, by reason of some obstruction in the advertised area of maintained depth, the board shall be relieved from their absolute warranty on giving to the owner, or his master, timely notice, as the case may be, of the fact of such prevention or of the cause of such obstruction." The second implied promise is that such notification by the board shall in the case of a restriction include all reasonably requisite information so as to enable the ship nevertheless to enter safely. The third is a promise by the owner that the ship shall be navigated inwards with all reasonable care and skill. With that further content of reciprocal terms, implied on *The Moorcock* (12) principle, but subject to their legal relationship to each other which we shall consider next, the contract, in our view, gives full, but no more than full, efficacy to the business bargain, which must at least have been intended. The reasons for the implication are obvious. It was impossible for the board, at any moment of time when advertising on the chart their continuing offer, to have really intended to undertake absolutely that nothing would happen thereafter which would block the channel or turning basin, or put the dock gates out of action, or interfere with dredging operations, and so make their promise impossible of performance. Indeed, even at the time of the offeree's acceptance the difficulty in the way of performance might, unknown to the board, have already happened. The possibility of such happenings would, of course, always continue to be present, year in and year out. One legal solution of this difficulty might be to reject altogether the contractual interpretation of the board's advertisement; but that solution seems to us contrary to first principles of law upon the formation of contract: e.g., *Carlill v. Carbolic Smoke Ball Co.* (13), and we reject it. The right solution, we think, follows necessarily from *The Moorcock* (12) principle, that some provision to meet that difficulty must be inferred to have been present to the mind of the harbour board when issuing the notice of its continuing offer, and equally to the mind of any shipowner or shipmaster on behalf of his owner when silently accepting the offer by conduct. Some extent of implication is, therefore, inevitable; but we conceive *The Moorcock* (12) principle to call for the smallest departure from the written word compatible with its giving to the bargain that business efficacy which must at the least have been intended by both parties in order to achieve the object of the contract, i.e., as being truly necessary

for its business efficacy. Those premises lead us to a two-fold conclusion. The first part of our conclusion is that what is called for is not a modification in the board's contractual promise itself, but a partially resolute condition on the board's continuing to be bound to perform it, such as we have already stated. The performance by the board of their implied promise of due warning, effected by their supplying reasonably sufficient information to the owner and his master, is, in our view, just as much a contractual duty undertaken by them as was the provision of a safe berth under the promise of the wharfinger, defined by this court in *The Moorcock* (12). The second part of our conclusion is this. The express and absolute promise of minimum depth having been volunteered by the board for publication on the chart, it would, in our opinion, be contrary to good faith that they should be released from the absolute warranty which the advertisement imports, except conditionally on full performance of the lesser promise of due warning. The importance of that interpretation of the board's promise—(all the terms of which, in our opinion, are either expressly or impliedly contained in the board's written offer)—is that it put on the board the whole onus of proving complete compliance with the lesser obligation of the resolute term as a condition precedent to their exemption from the absolute obligation of the printed warranty. For the purpose of implementing that implied condition of due warning, the board impliedly promised (a) to take scrupulous care to keep their own knowledge of the state of the channel and turning basin up to date; (b) that, whenever there was an obstruction there, which by due diligence they could ascertain, they would inform the shipowner or his master of its locality, nature and size; (c) that, if at any time prevented by any cause from taking soundings or other necessary steps to ascertain those particulars, they would give plain warning of the failure and of their own resultant doubts; and, finally, (d) that they would keep the compulsory pilots, stationed by Trinity House at the ports on that coast, informed both of obstructions of which the board knew and of the relevant gaps in that knowledge and of any failure by them to keep that knowledge up to date. In our view, all these four duties (a), (b), (c) and (d), owed contractually to the shipowner, were owed by the board at common law equally to the pilots, as members of the maritime public using the approaches to the dock; but performance of the duty to keep the pilots informed could not in any way relieve the board of their separate duty, both in tort and by contract, to inform the shipowner—for the pilot was not the shipowner's agent for the purpose of receiving information from the board about obstructions, notice of which the board was thus, at any rate in contract, bound to bring personally to the mind of the shipowner, and probably also of his master. The board might properly send a message by the pilot, but if that pilot failed to deliver it they would not have discharged their secondary duty, namely, of keeping the shipowner informed. Nor were they entitled to rely on the pilot having acquired for himself the knowledge, which it was the board's own duty—contractual and at common law—to acquire and hand on to the owner by way of warning. Even if the Pilotage Act, 1913, s. 15, on its proper construction means (what it does not say) that the compulsory pilot is to be deemed for all purposes (including contract) the servant of the shipowner (which, in our opinion, it does not) he would not be such servant until after taking charge of the vessel for the pilotage run into port.

Before discussing further the proper interpretation of s. 15, it will be convenient to consider the plaintiffs' legal position in regard to the claims by them and the counter-claim against them in negligence. For that purpose we will assume provisionally that in regard to both cross claims in tort and mutual pleas of contributory negligence, as argued by counsel for the board, the section does, on its true interpretation, mean that the compulsory pilot is to be deemed to be the servant of the shipowner. On that footing we should, in the legal realm of tort, but for one vitally important aspect, to which we will recur in a moment, agree with the contention that in this litigation, begun in 1942, relating

to events in 1941, and governed by the common law rule of no recovery then obtaining in relation to contributory negligence, neither the plaintiffs nor the defendants could, if each were negligent and by that negligence contributed to the accident, recover against the other. The important aspect of the present case (to which we referred just now) is the neglect by the board to give to Pilot Craig the vital information in their possession, to which we have already made reference. That information was, in part, of a negative, and, in part, of a positive, character, relating to the state of the bank of silt on the north side of the channel near the Bush Perch, where the board for some months before October, 1941, had been conducting intermittent dredging operations. The board lay under a heavy and continuing duty to shipowners and to the pilots twice in the lunar month, namely, at every springs, when alone inspection of the bottom was practicable, to inspect and ascertain by proper examination and soundings the real condition of the channel and turning basin in relation to its advertised depth; but, in spite of this urgent duty, on the very last springs before the Towerfield came in, namely, on Oct. 6 and 7, the board's officers actually omitted to make any inspection on the north side. As for months past they had known about the encroaching bank there, and had been engaged regularly in trying to dredge it away, this omission was inexcusable. The gravamen of that omission was that they never informed either the plaintiffs or the pilot of their total ignorance at the crucial time before the Towerfield was due of the state of affairs on the north side of the channel caused by that omission. The impending advent of the Towerfield made their own complete want of up-to-date knowledge itself a most important piece of information of which to warn at least the pilot. That was the negative breach of duty. But there was a positive breach also. On Oct. 17 the harbour-master, Thompson, had, on that spot by looking down from above, actually seen the bank there lying only two feet under the water. We quote from his statement:

"Oct. 17, 1941. My last observation of the channel prior to the stranding of the Towerfield was on Friday, Oct. 17. Low water was about 4 p.m., when I went down on to the hard on the north side and in spite of the depth of water at that time I was able to see the bank on the north side. I should here observe that the soil on the north side is of a sandy nature and is therefore easily seen even if there is a depth of water on the bank. At that time there was a depth on the sill of 8ft. 6ins. or 9ft. 10ins. The bank on the north side was covered by what I estimate to be about 2ft. of water; there was certainly not less than 2ft. and there may have been a little more. The rise of tide on Oct. 17 brought the depth on the sill up to 28ft. 6ins. Therefore, there was a depth on the bank on the north side in way of the north dredging marks of at least 22ft. The bank, of course, reduced towards the channel. I could see that the bank on the north side had materially reduced in height as well as breadth, but I cannot now form an estimate as to what this was. I should estimate that by reason of the bank on the south side and the bank on the north side the channel width had been reduced by Oct. 17 to about 155ft. in way of the place where the Towerfield stranded."

That evidence is crucial, for it shows conclusively the knowledge of the harbour-master only two days before the Towerfield was due to enter. A depth of water of 22ft. on Oct. 17 meant (apart from wind effect, which could not be foreseen the day before) only 23ft. 7ins. on the mid-day high water of Oct. 19—and the Towerfield's draft was 24ft. aft.

We simply cannot imagine why the board did not make a point of telling Craig (1) that no soundings had been taken on Oct. 6/7, and (2) what the harbour-master himself had positively ascertained on the 17th. It is true that on the 17th Craig had had a look, but only across the whole channel from the south pier—and, from there, he obviously could not see what Thompson, when looking

downwards from his position on the north foreshore, saw "under water." In our view, Pilot Craig's mistake in thinking it proper to set a course as near as "50 or 60ft. from the Bush Perch" (and "safe at 40ft.") was thus directly induced by the defendants' own breach of their duty, owed in tort to him as a very special member of the navigating public (as well as to the plaintiffs) to keep him informed about the north bank, for we think he was entitled to infer, and we believe he did infer, from the board's silence, an assurance that they knew of nothing in that locality likely to interfere with the navigation of the Towerfield without a tug. This impression on his mind might well be strengthened when he got—if he did get it—from Pilot Stevenson the message from the harbour-master to bring the Towerfield up the channel on the north side of the leading marks. We cannot accept the learned judge's finding that that message was not sent him, but, even without it, the board's withholding of the two vital pieces of evidence, which we have mentioned, was a dereliction of duty by the board, both at common law and in contract, which deprives them of any defence to the plaintiffs' claim, whether in tort or contract. We will assume against the plaintiffs for this purpose that the effect of the Pilotage Act, 1913, s. 15, is to make the shipowner responsible for the conduct of the pilot to exactly the same degree and extent for all purposes as he is for the conduct of the officers of the ship employed and paid by him. In tort perhaps the simplest way of stating the position is that the only negligence alleged against the ship is that of the pilot. He is said to have steered a course negligently near to the north bank of the channel in the neighbourhood of the Bush Perch. But negligence is want of due care in the light of all the circumstances: and one most material circumstance was the harbour board's silence on the two vital points of relevant information which we have mentioned. Because of that silence he thought he could safely go as near as only 40ft. from the Bush Perch, and, with that in mind, decided to keep a distance from it of 50 or 60ft. Had he been given those two vital pieces of information it is obvious that he would have added a further margin of clearance—and very little was needed for the ship never to have touched at all—as is proved by her listing, in spite of her flat bottom, over to starboard as much as she did. We have no doubt that another 20ft., and probably only 10ft., of additional clearance would have sufficed to avoid her touching the bank, and at the worst to prevent her being held by it. It is for that reason not open to the board to charge the pilot with negligence for failing to avoid a hidden danger, of the presence of which they could, and should, have warned him. That, to our minds, disposes of the defence of contributory negligence.

Another legal way of formulating an answer to the defence of contributory negligence would be afforded by the maxim that the defendants cannot avail themselves of their own wrong, namely, their failure to perform their common law duty owed both to the shipowner and to the pilot, as users of the channel fairway, to inform them of the facts in question.

In contract the same considerations dispose of any charge of breach by the shipowner of his implied promise to navigate with care and skill. Possibly also the same facts may be expressed as an estoppel of the defendants by their implied representation to the shipowner and pilot alike that they knew of no obstruction to prevent the ship passing quite close to the north side of the channel. It is no excuse to the board to say that the pilot might have found out for himself. We see no ground for imposing on pilots the duty of watchdog to smell out the harbour board's own failure in its duties of maintenance. Their duty to inform the pilots was independent of any practice by the pilots to make investigations for themselves.

For the above-mentioned reasons, we are of opinion that the common law defence of contributory negligence based on the negligence of the pilot cannot, on the exceptional facts of the present case, operate as an answer to the plaintiffs' claim even in tort. But, even if in spite of the very exceptional facts of this

case, we are wrong in that legal conclusion about the position in tort, we are satisfied that those facts afford no answer to the plaintiffs' claim in contract. The nearest approach to such a defence as an answer to a claim for damages for breach of contract would be the contention that the damages did not flow from the breach, but solely from the plaintiffs' own act, and the reasons we have mentioned for rejecting the defendants' plea of contributory negligence seems to us equally a sufficient answer to that contention. In addition, that contention in the present case could, in any event, only be established by proof that the compulsory pilot was the shipowners' servant even for purposes of an action in contract. He is not that at common law—and that issue therefore resolves itself into a pure question of law, arising on the interpretation of the Pilotage Act, 1913, s. 15, as to whether, even in an action of contract, the compulsory pilot is to be treated as the servant of the shipowner. On that the first step is to examine its language closely, as it stood in 1913 :

"(1) Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory. (2) This section shall not take effect until Jan. 1, 1918, or such earlier date as His Majesty may fix by Order in Council, certifying that it is necessary to bring the section into operation in order to enable His Majesty to comply with an international convention. (3) As from the date of the coming into operation of this section, the Merchant Shipping Act, 1894, s. 633, shall cease to have effect."

Before considering what bearing the section has on an action in contract, we will discuss its bearing on an action in tort. The section requires very careful interpretation. If we give all the words of sub-s. (1) their natural meaning, the word "answerable" plainly pre-supposes an antecedent question or demand by some other person and calls for an answer. In its statutory context one can eliminate the idea of a mere "question" and concentrate on "demand." The demand contemplated by the statute *prima facie* will have been made by a claimant, actual or intended. In that context, therefore, the word must contemplate the answer of a person compellable by law to make answer to such a demand. The problem of construction for the court is to decide in what circumstances that person is to be compelled to make such answer. *Prima facie*, the person called on to answer will, therefore, be someone in the position of defendant to a legal claim. If it is contended that the word "answerable" is to be stretched beyond that natural meaning so as to give it a less natural meaning, *e.g.*, that the owner or master of the vessel shall be answerable for the pilot's navigation for all purposes, whether of asserting or resisting a claim, there must be sufficient reason for construing the statute so as to give it a meaning to some extent non-natural. We agree with BUCKNILL, L.J., that there is some degree of ambiguity in the sub-section, and that conclusion at once brings in the ordinary rule of construing ambiguous words in a statute, namely, to have regard to the scope and object of the statute and to the nature of the mischief to which it was directed. In the case of s. 15 of the Pilotage Act, 1913, no indication of that kind can be found in any other provision of that Act; but s. 15 (2) does give a plain clue; for it in effect records that the section was introduced for the special purpose of complying with an international convention. That convention was the Collisions Convention, brought into law by the Maritime Conventions Act, 1911, and it was primarily art. 5 of that convention which called for the alteration of the law as then defined by the Merchant Shipping Act, 1894, s. 633. The Convention was published by His Majesty's Government as a White Paper (Cmd. 5558 (1911)). It was made law in the United Kingdom by the Maritime Conventions Act, 1911. Article 5 provides :

"The liability imposed by the preceding articles attaches in cases where

the collision is caused by the fault of a pilot, even when the pilot is carried by compulsion of law."

The object of that Convention, signed at a diplomatic conference convened by the Belgian government at Brussels in order to consider a draft convention previously framed by the Comité Maritime International, was to unify certain rules of the municipal laws of all nations relating to collisions between ships, or to damage caused (without collision) by one ship to another ship and her cargo. It was concerned only with what English common law calls "torts" and English Admiralty law calls "fault," and what continental law, based on the Code Napoléon, calls by the French word "faute." That Convention had nothing whatsoever to do with contract. One of us happens to have personal knowledge of its object, as with the late LORD STERNDALE he had, as a member of the Comité Maritime International, taken part in its antecedent conferences, at which the Convention had been drafted, and he was subsequently one of the delegates of His Majesty's Government who at the diplomatic conference at Brussels, with His Majesty's Ambassador in Belgium, LORD STERNDALE and Mr. HUGH GODLEY, as delegates of His Majesty's Government, negotiated and signed the revised Convention. When, in the same year, the Maritime Conventions Bill to implement the Collisions Convention and the Salvage Convention was before Parliament, a general Pilotage Bill was also already projected, and the enactment of a provision to give effect to art. 5 of the Collisions Convention was, to the knowledge at the time of one of us, left over for inclusion in that bill. That is the explanation of s. 15 (2) of the Pilotage Act, 1913, as passed. But no such Order in Council was made and sub-ss. (2) and (3) were eventually repealed by the Statute Law Revision Act, 1927. We recognise that the language of s. 15 plainly goes beyond art. 5 of the Collisions Convention and that, to the extent that that extension is unambiguous, effect must be given to its greater scope; but on ordinary principles of interpretation any residual ambiguity in language should be construed with due regard to the object of the statute. We note particularly, for instance, that the scope of the section is not limited to collisions between ships, or even to damage caused by one ship to another without collision, the only other eventuality contemplated by the Convention. But two limitations on any extension of its meaning beyond the scope of art. 5 should, we think, be observed and applied. The first is that its scope should be regarded as limited, as was the Convention, to actions in tort, or, conversely, that the Convention contained no justification for extending the section to actions of contract. The second is another presumption from both the Convention and the Maritime Conventions Act, 1911. It is less strong than the first, because it disregards altogether the limiting force of the consideration, that the word "answerable" *prima facie* means answerable as defendant to a claim, but the purpose of giving effect to art. 5 of the Convention, in the sense undoubtedly intended by the Convention, outweighs that consideration. The main difference between English and Continental law was that in our Court of Admiralty where both ships were to blame the damages suffered by each were added together and then arbitrarily divided in half and liability apportioned accordingly. The continental principle was the proportional rule and the main object of the Convention was to make that rule universal. The Maritime Conventions Act, 1911, carried that object into law in the United Kingdom. As between litigant ships we think that characteristic of the Act of 1911 justifies an interpretation of the Pilotage Act, 1913, s. 15, which will extend the conception of the word "answerable" to the plaintiff ship as well as the defendant ship. But, even if that is so, we feel great difficulty in attributing to the plaintiff shipowner suing a harbour authority (which is not concerned in this action as owner of a ship) any greater freedom from the statutory attribution of the compulsory pilot's fault than he would enjoy if the defendant were the owner of a delinquent ship.

For these reasons we come to the conclusion, on the history of the section, that it would apply in the present litigation, in regard to the cross claims in tort, if the plea of contributory negligence were established. The historical investigation made by BUCKNILL, L.J., supports that conclusion, but we see no justification for extending s. 15 to the case of a shipowner suing, as in the present action, in contract. The section should be read as strictly limited to actions in tort where negligence of the compulsory pilot is alleged, whether the ship be defendant or plaintiff.

[HIS LORDSHIP discussed the evidence on the claim in contract, and concluded:] Even on the issue in tort we dissent from our brother BUCKNILL's conclusion that the plea of contributory negligence succeeds. In so far as the erroneous navigation by the pilot was caused by the harbour board's own failure of duty, whether at common law or by reason of their contract with the shipowner, to give him essential information, the board are precluded from relying on his error as constituting negligence either on his own part or on the part of the shipowner, even though s. 15 of the Pilotage Act, 1913, requires the court to regard the relationship between the two as that of master and servant.

The conclusions to which we come are that the plaintiffs succeed on their claim in contract and also on their claim in tort, and that the defendants fail on their counterclaim as well as on their plea of contributory negligence.

Judgment accordingly with costs here and below.

Solicitors: *Constant & Constant* (for the shipowners); *Thomas Cooper & Co.* (for the harbour board).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

Explained and distinguished. BOSTOCK v. BOSTOCK. [1950] 1 All E.R. 25

Applied. MOLE v. MOLE. [1950] 2 All E.R. 328.

McTAGGART v. McTAGGART.

[COURT OF APPEAL (Bucknill, Cohen and Denning, L.JJ.), October 14, 15, 1948.]

Divorce—Evidence—Privilege—Negotiations before probation officer—Admissibility of evidence of probation officer.

On the hearing of a petition by a husband for divorce on the ground of his wife's desertion, the parties gave evidence of what transpired at an interview which had taken place between them in the presence of the probation officer of a magistrates' court with a view to effecting a reconciliation. There being a conflict of evidence between the parties regarding this matter, the judge admitted the evidence of the probation officer who appeared on subpoena.

HELD: the evidence was rightly admitted.

Per COHEN and DENNING, L.JJ.: the privilege with regard to the negotiations between the parties, if any, was the privilege of the parties, and they, having given evidence on the point, could not assert the privilege. If objection had been taken by the wife to the husband giving evidence on this issue, the objection would have been valid.

Dictum of LUSH, J., in *La Roche v. Armstrong* ([1922] 1 K.B. 489; 126 L.T. 700), *approved*.

[AS TO PRIVILEGED WITNESSES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 724-733, paras. 798-806; and FOR CASES, see DIGEST, Vol. 22, pp. 392-421, Nos. 4011-4315.]

Case referred to:

(1) *La Roche v. Armstrong*, [1922] 1 K.B. 485; 91 L.J.K.B. 342; 126 L.T. 699; 22 Digest 86, 550.

APPEAL by a wife from an order of Mr. COMMISSIONER GRAZEBROOK, K.C., dated Mar. 1, 1948, granting a decree *nisi* to the husband on the ground of his wife's desertion. The Court of Appeal dismissed the appeal. The case is reported

only on the point relating to the admissibility of the evidence of the probation officer.

I. F. Reuben for the wife.

Gorst for the husband.

BUCKNILL, L.J., after stating the facts, accepted the husband's evidence, and upheld the commissioner's refusal to permit the husband to be cross-examined about his own behaviour, on the grounds that it was a vexatious question and not relevant. He was, therefore, of the opinion that the appeal should be dismissed.

COHEN, L.J. : I agree. The case turned largely on what transpired at an interview between the parties in March, 1943, arranged by the probation officer. The wife and the husband gave conflicting evidence on this point. The commissioner accepted the husband's evidence, mainly because he thought that it was corroborated by the probation officer. The latter was very properly a reluctant witness. He refused to give a statement to either party and would only appear on subpoena. The commissioner at first was reluctant to admit his evidence, but in the end decided that he must do so in view of the conflict of evidence between husband and wife.

In my opinion, the commissioner had no alternative. The privilege, if any, was the privilege of the parties, and they, having given evidence on the point, could not assert the privilege. The result is none the less unfortunate as the success of attempts at reconciliation might be prejudiced if it became known that the probation officer could be called to give evidence about them, and I desire to make it clear that, as at present advised, I think that, if objection had been taken by the wife to the husband's giving evidence on this issue, the objection would have been valid. Such a conclusion seems to me to be in accordance with the principle that discussions and correspondence in negotiations if "without prejudice" are privileged unless the parties waive the privilege.

I would refer in this connection to some observations of LUSH, J., in *La Roche v. Armstrong* (1), where the learned judge says ([1922] 1 K.B. 489) with regard to the question whether certain matters should be admitted in evidence :

"There is no authority upon the point, but my reason is that to rule otherwise would in many cases make negotiations for the settlement of litigation almost impossible. Unless parties to such negotiations can feel safe in making an offer and stating the facts upon which it is based the door to negotiations may be closed. It is for the benefit of litigants and others, that statements should be freely made in order to settle litigation."

In that case the court had to do with solicitors' correspondence and the litigation was actually pending, but it seems to me that the principle applies to negotiations to avoid threatened litigation, and *a fortiori* to negotiations between parties themselves. No one will be prejudiced by such a rule as I have suggested, for if reconciliation takes place there is an end of the matter, and if the attempts at reconciliation fail the aggrieved party can always ask the alleged deserting party to return.

DENNING, L.J. : I agree and desire particularly to associate myself with the observations which COHEN, L.J., has just made. It seems to me that negotiations which take place in the presence of the probation officer with a view to reconciliation are made on the understanding, by all concerned that they are to be without prejudice to the rights of the parties. The rule as to "without prejudice" communications applies with especial force to negotiations for reconciliation. It applies whenever the dispute has got to such dimensions that litigation is imminent. In all cases where the estrangement has reached the point where the parties consult a probation officer, litigation is imminent. It is clear that there is a dispute which may end either in the magistrates' court or the divorce court. The probation officer has no privilege of his own

from disclosure any more than a priest, or a medical man, or a banker, and on that account it has been sometimes supposed that the court will compel a probation officer to give evidence of what took place in the course of a negotiation. That is a mistake. The law favours reconciliation, and the court will not take on itself a course which would be so prejudicial to its success. If a probation officer should be compelled to give evidence as to what was said in the course of negotiations, it would mean that, when he attempted reconciliation, he would not be told the truth, or, at all events, not the whole truth. The parties would have at the back of their minds the thought that whatever they said might be given in evidence against them or for them, and would colour their statements accordingly. There is no chance of reconciliation unless the parties are able to talk with frankness to the probation officer and with complete confidence that what they say will not be disclosed. If they are genuinely seeking his assistance they must be taken to negotiate on that understanding even though nothing is expressly said. In this case, however, neither party claimed the privilege and must, therefore, be taken to have waived it. Speaking for myself, that is the only ground on which I thought it right to look at the evidence of the probation officer in this case.

Appeal dismissed. The husband did not ask for costs.

Solicitors: *A. B. Carpenter* (for the wife); *E. Vaughan Williams* (for the husband).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Re DUFFY (deceased). LAKEMAN *v.* ATTORNEY-GENERAL.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Evershed, L.JJ.), October 12, 13, 1948.]

Estate Duty—Company—Valuation of shares according to value of company's assets—Liability of company—Anticipated income tax claim on current profits—Finance Act, 1940 (c. 29), ss. 50 (1), 55 (2).

The Finance Act, 1940, s. 55, provides: "(1) Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of a company to which this section applies, then . . . the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of s. 7 (5) of the Finance Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding subsection. (2) For the purposes of such ascertainment as aforesaid:—(a) the net value of the assets of the company shall be taken to be the principal value thereof estimated in accordance with the said sub-s. (5), less the like allowance for liabilities of the company as is provided by s. 50 (1) of this Act in relation to the assets of a company passing on a death by virtue of s. 46 of this Act . . ." Section 50 (1) of the Act of 1940 provides: "In determining the value of the estate for the purpose of estate duty the provisions of s. 7 (1) of the Finance Act, 1894, as to making allowance for debts and incumbrances shall not have effect as respects any debt or incumbrance to which assets of the company passing on the death by virtue of s. 46 of this Act were liable, but the commissioners shall make an allowance from the principal value of those assets for all liabilities of the company (computed, as regards liabilities which have not matured at the date of the death, by reference to the value thereof at that date, and, as regards contingent liabilities, by reference to such estimation as appears to the commissioners to be reasonable) . . ."

On June 24, 1942, D. died possessed of shares in three companies to which s. 55 applied. His executors, in computing under that section the value of his shareholdings for the purposes of estate duty, sought to set off against

the companies' profits for the part of the current year which had elapsed at the date of D.'s death, the prospective income tax liability in respect of those profits which would be borne by the companies in the ensuing year.

HELD: the word "liabilities" in s. 50 (1) referred to liabilities existing in law at the relevant date, and did not include the anticipated income tax liability which did not exist until the following financial year. For this, therefore, an allowance under the sub-section could not be made.

[FOR THE FINANCE ACT, 1940 (c. 29), ss. 50 and 55, see HALSBURY'S STATUTES, Vol. 33, pp. 117, 122.]

APPEAL by executors from an order of ROXBURGH, J., dated Oct. 30, 1947, on an adjourned summons to determine whether, in computing, for the purposes of estate duty, the value of the deceased's shares in a company within the Finance Act, 1940, s. 55, the executors were entitled to set off as a liability against current profits the income tax liability in respect of those profits exigible under the Income Tax Act, 1918, sched. D, in the ensuing year. ROXBURGH, J., held them not to be so entitled, and the Court of Appeal now affirmed his decision. The facts appear in the judgment of LORD GREENE, M.R.

Millard Tucker, K.C., and *J. W. P. Clements* for the executors.

Pennyquick, K.C., and *J. H. Stamp* for the Attorney-General.

LORD GREENE, M.R.: The question raised relates to the proper method of valuing for the purpose of estate duty shares in three companies held by the deceased, being companies which fall within the special class of company for which the Finance Act, 1940, s. 55, makes provision. I need not go into an examination of what it is that brings these companies under that provision. There is no dispute as to that, but, in point of machinery, when a testator dies possessed of shares in such a company for the purpose of estate duty a special method of valuation is laid down by the section. Putting it shortly, the principal value of the shares is to be taken as being a proportion of the principal value of the entirety of the shares, and the principal value of the entirety of the shares is to be ascertained by reference to the value of the assets of the company. That is the sort of artificial scheme with which we are very familiar in Finance Acts. It is a scheme by which an existing state of law is, so to speak, pulled to pieces, and as a result something is deemed to be a person's property that, in law, it is not.

The deceased died on June 24, 1942. He died part of the way through the financial years, which were all different, of these three companies. From the date, it is obvious that he died in the course of the financial year for revenue purposes. The method of valuation of shares in such a case is to be found in the Finance Act, 1940, s. 55 (2). It is to be remembered, as I said a moment ago, that the valuation is to be made by reference to the value of the assets of the company. Sub-section (2) provides:

"(a) the net value of the assets of the company shall be taken to be the principal value thereof estimated in accordance with the said sub-s. (5) [*i.e.*, sub-s. (5) of s. 7 of the Finance Act, 1894] less the like allowance for liabilities of the company as is provided by s. 50 (1) of this Act in relation to the assets of a company passing on a death by virtue of s. 46 of this Act,"

The dispute here is as to what liabilities may, for the purposes of this valuation, be deducted from the gross value of the assets of the three companies.

It appears to be the practice, in applying these valuation provisions, to begin with a valuation of the assets less liabilities as shown by the last account of the company in respect of the financial year ending last before the deceased's death, but the relevant date being the deceased's death, which took place part of the way through the next financial year of the company, something must be done to bring the valuation up to date. The practice appears to be to take, first, a proper proportion of the profits of that year referable to the broken

period before the deceased's death and to treat that as an addition to the assets and deduct any liabilities that in the interval during that broken period have been incurred. In the present case each of these companies made profits in the year in which the deceased died. According to the system that I have mentioned, a proportionate part of these profits would fall to be added to the value of the companies' assets as shown by the previous balance sheets.

What is said is this. The profits earned in the year during which the deceased died will form the basis of the assessments for income tax in respect of the next year. Therefore, the profits which are earned during that year in which the deceased died carry, so to speak, *in gremio*, a liability for tax in respect of the financial year which will only begin after the death of the deceased. ROXBURGH, J., has held that that argument does not succeed. In my view, the point comes down to a very short point of construction. It is to be observed, generally, that, if a trader is liable to tax under sched. D of the Income Tax Act, 1918, in respect, let me say, of year 3, he will be assessed in respect of that year on the basis of the profits that he made in year 2. In year 2, while he was making those profits, no doubt, if he was a prudent person, he would say to himself: "It is morally certain that when year 3 comes along these profits that I have made will form the basis of my income tax assessment for year 3. I will, therefore, not spend all these profits. I am going to set aside a reserve against that liability if and when, as a business man naturally assumes it will, it arrives." The advantage of such prudent behaviour is clear because in the next year he may not make a penny of profit, and, if he has spent all his profits of the previous year, he will find himself liable to be assessed on those profits, and he will have no profits out of which he can pay tax. Therefore, from the business point of view, I entirely accept the proposition that a provision of that kind would be a prudent, and, indeed, a customary, thing for a trading company to make. Turning back to the valuation section, which is incorporated into s. 55, namely, s. 50 (1), I find this:

"In determining the value of the estate for the purpose of estate duty the provisions of s. 7 (1) of the Finance Act, 1894, as to making allowance for debts and incumbrances shall not have effect as respects any debt or incumbrance to which assets of the company passing on the death by virtue of s. 46 of this Act were liable . . ."

I need say no more about that part of the subsection save that s. 7 (1) of the Finance Act, 1894, was drafted with reference to the valuation, not of a particular piece of property, but of the estate of the deceased as a whole. Those valuation provisions and directions for deducting debts and incumbrances would not have worked in the case of the very artificial idea underlying these sections by which things which were not the deceased's assets are to be deemed to be his assets. Accordingly, in substitution for the provision for deducting debts and incumbrances in s. 7 (1) of the Act of 1894, this provision is inserted in s. 50 (1) of the Act of 1940:

" . . . but the commissioners shall make an allowance from the principal value of those assets for all liabilities of the company (computed, as regards liabilities which have not matured at the date of the death, by reference to the value thereof at that date, and, as regards contingent liabilities, by reference to such estimation as appears to the commissioners to be reasonable) other than—(a) liabilities in respect of shares in or debentures of the company; and (b) liabilities incurred otherwise than for the purposes of the business of the company wholly and exclusively."

That is dealing with a different class of company from that with which we are concerned, but the important thing is that that valuation provision is to be used in connection with the class of company with which we are concerned, subject to the variation, enacted by s. 55 (2) (a), that there may be deducted

liabilities mentioned in para. (b), that is to say: "liabilities incurred otherwise than for the purposes of the business of the company wholly and exclusively." If it had not been for that modification, an income tax liability, I apprehend, would not have been deductible, but the effect of altering s. 50 in that respect so as to allow for deduction of liabilities mentioned under head (b), is to permit a deduction in respect of income tax liability.

Coming back to the body of sub-s. (1) of s. 50, the commissioners are directed to make an allowance "from the principal value" of the assets (that would be the assets of the company) for all liabilities of the company. It is to be observed that, this process of arriving at the net value being a variant of what I may call the basic process provided for by s. 7 (1) of the Act of 1894, one would rather expect—I do not attribute any practical force to this argument, but it is right to point it out—that this new provision for arriving at the net value would not introduce a class of deduction going beyond the sort of thing which was deductible under s. 7 (1)—which were debts and incumbrances. It is true that the language used here is different. It does not say "debts and incumbrances"; it says "all liabilities of the company." We are all familiar with the fact that, in speaking of the liabilities of a company which keeps accounts, the word "liabilities" may be used in two senses. From one point of view, in reference to a particular company, anything that appears on the left hand side of its balance sheet is a liability. In the accountancy sense, it is a liability whether it be a provision for an actual legal liability or whether it be a provision which the directors, as business men, think is prudent to make for something that may or may not happen in the future. From the accountancy point of view, once these things are properly entered on the left hand side of the balance sheet, they are liabilities. Counsel for the executors repudiates the suggestion that he wished to construe the word "liabilities" in so extended a sense, but he rejects the suggestion that the word "liabilities" is to be construed in the limited and narrow sense of legal liabilities existing in point of law, whether under a contract, or under a statute, or in some other way. He says that in the present case you have a sort of half-way house. When the testator died the company had made, and was making, profits in respect of the Exchequer financial year then current which would form the basis of its assessment to income tax for the following financial year. He then says: "Notwithstanding the fact that the testator died long before the commencement of that Exchequer financial year, and, therefore, long before the beginning of the period in respect of which the assessment would take place on the basis of those profits, nevertheless those profits"—if I may return to the phrase I used earlier—"directly they were made carried within themselves, so to speak, *in gremio*, a liability to tax which in every business sense would materialise into a legal liability as soon as the Budget resolutions in the following year were passed." From the business point of view, I have no quarrel with that statement of the situation. It may well be that a business man who did not make proper provision for tax payable in the next year would be very unwise, but we have to construe the word "liabilities" in this context.

Before I state in a sentence my opinion on that point, I must just add a reference to the words in brackets, which I have quoted, as to computing the liabilities of the company. Those words deal with two sub-classes of liabilities. Neither of those sub-classes can go beyond the head class of liabilities. In other words, in order to fall within one or other of those two sub-classes, a thing must be a liability. Those two sub-classes are as follows: first, the liabilities "which have not matured at the date of the death." That has a very simple meaning. The other class is as regards "contingent liabilities," which are to be valued by reference to an estimate. In that context what I have to ask myself is this. What is the meaning of "liabilities," and, in particular, what is its meaning in the phrase "contingent liabilities"? It is to that simple point that this controversy comes down. It appears to me that, in the absence of some con-

text justifying a limitation of those words or some qualification being imposed on them, all we can do is to construe them in their natural and ordinary meaning. It is not for us to extract what we might like to think in certain cases would be a fairer method of valuation. We have to ascertain, from the construction of the words used by Parliament in stating its will, the method of valuation prescribed, in accordance with the natural and ordinary meaning of the words in their context, and to apply them, even though in this case, or in another case, we may think that some different method of valuation would have led to a fairer result. It may or may not be so. Anyone who is familiar with income tax or revenue law knows well that general provisions in an individual case may work rather harshly, but in another case they may work for the benefit of the income tax payer. All we have to do is to apply them.

Counsel for the executors says: "Income tax is a very special thing. It cannot be classed with the sort of apprehended future event which may or may not happen. It is as certain as anything can be." A glance at the Income Tax Acts makes it clear that income tax will be imposed. Therefore, he says, as soon as the profits are earned which are to form the basis of next year's assessment you can say with absolute certainty: "Those profits will form the basis of next year's assessment, and any prudent business man will not regard them as spendable save after making proper provisions for that liability which is going to arise in the future." That is an attractive argument, because to speak of income tax next year as if the question whether it was or was not going to be imposed were a thing at large would be stupid, but, taking the construction of these words, I find it impossible to give them a meaning extending beyond what is always ascertainable without any doubt whatsoever, namely, an existing legal liability—a liability actually existing in law at the relevant date. The words cannot be stretched so as to cover something which in a business sense is morally certain and for which every business man ought to make provision, but which in law does not become a liability until a subsequent date. That appears to me to be the short answer to this appeal, which, in my opinion, should be dismissed with costs.

SOMERVELL, L.J. : I agree.

EVERSHED, L.J. : I also agree.

Appeal dismissed with costs.

Solicitors: *George & William Webb* (for the executors); *Solicitor of Inland Revenue.*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

NOTE.

CLIFF v. CLIFF.

[COURT OF APPEAL (Lord Morton of Henryton, Bucknill and Asquith, L.JJ.), September 28, 1948].

Child—Custody—Declaration that divorced parent not fit to have custody—No jurisdiction to make in chambers—Guardianship of Infants Act, 1886 (c. 27), s. 7.

APPEAL from an order of HODSON, J., in chambers.

By s. 7 of the Guardianship of Infants Act, 1886: "In any case where a decree . . . nisi . . . for divorce, shall be pronounced, the court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children . . . of the marriage . . ."

The marriage of the parties took place in 1931. There were three children, the eldest being a son aged 16 and the youngest being aged 13. On Dec. 4,

1947, on the wife's petition, HODSON, J., granted a decree *nisi* dissolving the marriage. On Jan. 12, 1948, the wife's solicitor issued a summons before HODSON, J., in chambers asking that a declaration be made, pursuant to s. 7 of the Guardianship of Infants Act, 1886, that the husband was a person unfit to have the custody of the children of the marriage. HIS LORDSHIP made the order asked for. On appeal by the husband to the Court of Appeal the following two points were taken by counsel: (i) The judge had no jurisdiction to make the order in chambers, it being contended that an order under the Act could only be made by a court, and that a judge in chambers was not a court within the meaning of s. 7; and (ii) on the facts the order should not have been made.

Beyfus, K.C., and *Roland Adams* for the husband.

Arthian Davies, K.C., and *Victor Williams* for the wife.

(Counsel referred to *Baker v. Oakes* (1877) (2 Q.B.D. 171; 46 L.J.Q.B. 246; 35 L.T. 832) and *Re Davidson, Ex. p. Davidson* ([1899] 2 Q.B. 103; 68 L.J.Q.B. 836; 81 L.T. 182)).

THE COURT held that a judge sitting in chambers had no power to make a declaration under s. 7, the application for which must be made and determined in open court. In those circumstances the second point did not arise.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.* (for the husband); *Beaumont & Son* (for the wife).
C.St.J.N.

R. v. O'NEILL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Byrne, JJ.), October 18, 1948.]

Criminal Law—Sentence—Borstal detention—Second sentence to Borstal detention while undergoing or liable to undergo another such sentence—Date of commencement not to be fixed.

On July 25, 1946, the prisoner was sentenced to Borstal detention for a period not exceeding 3 years. On Sept. 4, 1947, he was released on a licence expiring in July, 1949. Shortly after his release the prisoner was brought before quarter sessions charged with housebreaking, to which he pleaded guilty, and was again sentenced to Borstal detention not exceeding 3 years, the sentence to begin at the expiration of that which he was then liable to serve.

HELD: it was not desirable, or, indeed, possible, to give any directions in the case of a sentence of Borstal detention as to when the sentence should begin if the prisoner were already undergoing, or liable to undergo, a sentence of Borstal detention, and, therefore, the sentence in the form adopted in the present case was not appropriate.

[AS TO SENTENCE OF DETENTION IN BORSTAL INSTITUTION, see HALSBURY, *Hailsham Edn.*, Vol. 9, pp. 243, 244, para. 344; and FOR CASES, see DIGEST, Vol. 14, p. 481, Nos. 5245, 5246, and Supplement.]

CASE REFERRED BY HOME SECRETARY under the Criminal Appeal Act, 1907, s. 19 (b).

The prisoner, while still on licence from a term of Borstal detention, was sentenced to a further term of detention by the Cheshire Quarter Sessions, who directed that the sentence was to run from the date of completion of the previous sentence. The court advised the Home Secretary that this form of sentence was inappropriate.

No counsel appeared.

LORD GODDARD, C.J.: This matter has been referred to the court by the Secretary of State under the Criminal Appeal Act, 1907, s. 19 (b), which provides that the Secretary of State may, if he thinks fit on considering any petition:

"if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly."

Under the Criminal Appeal Rules, 1908, the opinion of the court may be furnished to the Secretary of State either by giving judgment in open court and sending him a copy of the judgment or privately. As this case raises a point of importance to quarter sessions, we think that it would be desirable to give our opinion in public.

The prisoner pleaded Guilty at the Summer Cheshire Quarter Sessions to housebreaking, and he asked for 32 other cases to be taken into account. On July 25, 1946, he had been before a court of quarter sessions and had been sentenced to Borstal detention for a period not exceeding 3 years. On Sept. 4, 1947, he was released by the commissioners on a licence which expires in July, 1949. On his release he went into the army, but was discharged after one month for reasons which are immaterial for us to consider, and then he started on this career of crime. Cheshire Quarter Sessions ordered a sentence of Borstal detention not exceeding 3 years, and the chairman said: "Taking into account the high number of other offences involved . . . you will be sent to a Borstal institution for three further years. That means to say that the sentence will run from to-day and you will have to serve your sentence." The sentence was drawn up so that it was to commence at the expiration of the sentence imposed on him on July 25, 1946, so, presumably, the court meant that the prisoner was to serve the remaining term of his first sentence and then begin a further term of detention.

It has to be remembered that under the Prevention of Crime Act, 1908, which regulates Borstal detention and gives the power to impose a sentence of Borstal detention, it is left entirely to the Commissioners of Prisons to decide when the prisoner may be discharged. That is why the sentence is always framed as a sentence of detention not exceeding 3 years in a Borstal institution. As is well-known, it is seldom that prisoners are not released considerably before the expiration of 3 years from the date of the sentence when, in the judgment of the commissioners, their conduct shows that there is a reasonable chance of their going straight. If they commit another offence, they can then, as, no doubt, has happened in this case, be re-taken and will have to serve the unexpired portion of their sentence or such part of it as the commissioners in their discretion think fit. If, therefore, a court orders that a sentence of Borstal detention be passed on an offender who is already on licence, and orders that sentence to take effect at the expiration of the earlier sentence, no one can say for what period it will or it will not take effect because the expiration of the earlier sentence is entirely in the hands of the commissioners. They may release the present prisoner after serving a further three months. Then, if the new sentence is to take effect, they can release him again on that immediately.

We think that the right advice to give to the Home Secretary is that a sentence in this form is not appropriate, and that, therefore, the sentence should be regarded as though the words "at the expiration of the sentence imposed upon him on July 25, 1946," were eliminated. I hope it will be noticed by quarter sessions that it is not desirable, or, indeed, possible, to give any directions in the case of a sentence of Borstal detention as to when the sentence should begin if the prisoner is already undergoing or liable to undergo a sentence of Borstal detention.

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

R. v. CLAYTON-WRIGHT.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Jones and Byrne, JJ.),
October 15, 1948.]

Criminal Law—Indictment—Joinder of counts—Charges in respect of different transactions—Nexus of defrauding insurers present throughout—Indictments Act, 1915 (c. 90), sched. I, r. 3.

The appellant was convicted on an indictment containing four counts. The first charged him with arson in that he unlawfully set fire to a vessel. The second count charged him with arson of the vessel with intent to prejudice the insurers. The third count charged him with attempting to obtain money by false pretences from the insurers in respect of the policy of insurance on the vessel, and the fourth count charged him with obtaining money by false pretences by pretending that a mink coat had been stolen from his motor car and that he was entitled to payment under a policy of insurance in respect of the alleged loss.

HELD: the charges in the first three counts were in substance that the appellant had dealt with the vessel with the intention of defrauding underwriters and the fourth charge was a similar charge in respect of the fur coat, and, therefore, the nexus of insurance was present throughout counts 2, 3 and 4, which was sufficient to uphold the indictment since the charges formed "part of a series of offences of the same or a similar character" within r. 3 of the rules in sched. I to the Indictments Act, 1915.

[AS TO JOINDER OF OFFENCES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 137, 138, para. 179; and FOR CASES, see DIGEST, Vol. 14, pp. 226, 227, Nos. 2111-2119.]

Case referred to:

- (1) *R. v. Grondkowski and Malinowski*, [1946] 1 All E.R. 559; [1946] K.B. 369; 115 L.J.K.B. 289; 175 L.T. 32; 110 J.P. 193; 2nd Digest Supp.

APPEAL against conviction at Hampshire Assizes on an indictment containing four counts, two of them being for felony and one for misdemeanour in connection with one transaction and the fourth count being for misdemeanour arising out of a different transaction. The court held that the indictment was good. The facts appear in the judgment.

Scott Henderson, K.C., and *J. T. Molony* for the appellant.

Roberts, K.C., and *Cyril Williams* for the Crown.

The judgment of the court was delivered by

LORD GODDARD, C.J.: The appellant was convicted before HUMPHREYS, J., at Hampshire Assizes on an indictment containing four counts. The first count charged him with arson contrary to s. 42 of the Malicious Damage Act, 1861, in that on Mar. 2, 1948, at Southampton, he unlawfully and maliciously set fire to a vessel, namely, the *Barcarolle*. The second count charged him with arson with intent, contrary to s. 43, the particulars being that on the same day and at the same place he unlawfully and maliciously set fire to the vessel with intent thereby to prejudice the members of the Institute of London Underwriters who had underwritten a policy of insurance on the vessel. Both of those are felonies. In the third count he was charged with misdemeanour—attempting to obtain money by false pretences, the particulars being that on the same day and at the same place with intent to defraud he attempted to obtain from the members of the Institute of London Underwriters who had underwritten a policy of insurance on this vessel payment for the total loss of the vessel by falsely pretending it had become a total loss by reason of an accidental fire on board and that he was then entitled to payment under the policy. There was a fourth count, also for misdemeanour, charging him with obtaining money by false pretences in that on a day in June, 1947, with intent to defraud he obtained

the sum of £400 from the Royal Insurance Co., Ltd., by falsely pretending that a mink coat had been stolen from his motor car and that he was then entitled to payment of the sum under a policy of insurance.

Three points have been taken on his behalf. The first is that this indictment was so defective that no judgment could be based on it in that there was a misjoinder of the fourth count which, it is submitted, ought not to have been included in the indictment, and, therefore, the indictment was bad. The second point is that there ought to have been a separate trial at least with regard to the fourth count, and the third point is misdirection. The appellant was convicted on counts 1, 2 and 3. On the fourth count he was acquitted, but it is said that his trial was prejudiced by the inclusion of that count in the indictment. The first question we have to decide is whether the fourth count was rightly joined in the indictment. Before the Indictments Act, 1915, if a grand jury preferred an indictment containing a charge of felony and a charge of misdemeanour, that indictment was bad. The main object of the Indictments Act, 1915, was to simplify the whole system of criminal procedure so far as criminal pleadings were concerned and it is clear that the legislature intended that technical objections which did not go to the substance or merits of the case should as far as possible be swept away. Accordingly, by s. 4 of the Act it was provided :

“Subject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanour, and charges for both felonies and misdemeanours, may be joined in the same indictment, but where a felony is tried together with any misdemeanour, the jury shall be sworn and the person accused shall have the same right of challenging jurors as if all the offences charged in the indictment were felonies.”

By r. 3 of the rules which appear in sched. I to the Act :

“Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.”

By s. 5 of the Act it was provided :

“(1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit.”

By the Administration of Justice (Miscellaneous Provisions) Act, 1933, provision is made for quashing one count in the indictment and allowing the rest of the indictment to stand. I do not say that, if an indictment which is preferred is defective in that it does not comply with the provisions of the Indictments Act, 1915, s. 4, and the rules made thereunder and is left unamended until after verdict, that indictment can be supported. If the indictment is defective and remains defective until judgment, no verdict can be based on it. In the present case no application was made to amend and counsel for the Crown stood on the indictment and submitted it was a good indictment. Therefore, we have to consider whether this was an indictment in which count 4 was properly included. It makes no difference for this purpose that the appellant was acquitted on count 4. If it was a bad indictment, it was bad *ab initio*. It is clear that count 2 can be joined with count 1. They were both felonies and they both

A relate to the same set of circumstances. Count 3, which was for misdemeanour, can also be joined with count 2, and, it follows, with count 1 also, although those are felonies, because all three counts relate to exactly the same set of facts. Count 4 relates to a charge of obtaining by false pretences a sum of money from underwriters on another policy of insurance than that which is dealt with in the second and third counts. It is said that because that deals with a mink coat which was insured under a different policy from the policy on the ship, it was a bad joinder and that it cannot come within the words in r. 3 "if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character."

B One test which the learned judge applied was to consider whether or not the evidence with regard to the mink coat could be given in evidence on the other charges. He came to the conclusion that it could, and, in the opinion of the court, he came to a right conclusion. When evidence was given by the prosecution that there had been a discussion between the appellant and other persons with regard to the desirability or possibility of firing the ship to get money out of the underwriters, it was stated that the appellant referred to this incident of the fur coat as showing how easy it was to get money out of underwriters. That was one ground, but the main ground on which the court holds C that there was no misjoinder is the following. The charge contained in the first three counts, although the first count simply charges the arson and not the attempting to get money, in substance was that the appellant fired the yacht with the idea of swindling underwriters. The charge with regard to the mink coat was a similar charge of swindling underwriters, and, therefore, one gets D what I may call the nexus of insurance, the nexus of fraudulent acts to the prejudice of the underwriters going through counts 2, 3 and 4, and, in the opinion of the court, that is sufficient to uphold this indictment because it comes within the words of r. 3, that the charges "are a part of a series of offences of the same or a similar character." They were similar in the sense that both charges were charges of swindling underwriters.

E [HIS LORDSHIP, dealing with the submission that there ought to have been a separate trial on count 4, said that in *R. v. Grondkowski and Malinowski* (1) the court said ([1946] 1 All E.R. 562): "The real test, after all, which must be applied by a Court of Criminal Appeal on a matter which is essentially one of discretion is, has the exercise of the discretion resulted in a miscarriage of justice." It was clear that the joinder in the present case could not have re- F sulted in a miscarriage of justice. There was no misdirection, there had been a perfectly fair trial, a full and proper summing-up in which the defence was adequately placed before the jury, and the jury had come to a correct verdict.] The appeal would be dismissed.

Appeal dismissed.

G Solicitors: *Wrentmore & Son*, agents for *Evans & Insley*, Bournemouth (for appellant); *R. R. H. Meggeson*, Southampton (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

R. v. BEDFORD.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Byrne, JJ.),
October 13, 1948.]

Criminal Law—Appeal—Special treatment of appellant—Time counting as part of sentence—Application for leave to appeal—Refusal by judge in chambers—Appeal to full court—Dismissal of appeal—Criminal Justice Act, 1948 (c. 58), s. 38 (2).

The applicant applied for leave to appeal on July 17, 1948, and his application was dismissed by SLADE, J., in chambers on Aug. 17, 1948. On Oct. 13, 1948, his application came before the full Court of Criminal Appeal which refused it.

HELD : that the applicant was not entitled to have treated as part of his sentence any part of the time he was in custody between Aug. 17 and Oct. 13.

[AS TO COMPUTATION OF TERM OF SENTENCE IF APPEAL DISMISSED, see HALSBURY, Hailsham Edn., Vol. 9, p. 281, para. 411; and FOR CASES, see DIGEST, Vol. 14, pp. 507, 508, Nos. 5617-5629.]

APPLICATION for leave to appeal. The facts appear in the headnote and the judgment.

No counsel appeared.

LORD GODDARD, C.J. : Section 38 (2) of the Criminal Justice Act, 1948, provides that six weeks or less of the time during which an appellant to this court is specially treated shall be disregarded in computing the term of his sentence. This means that where a prisoner gives notice of appeal or makes application for leave to appeal the time spent in prison does not count as part of his sentence if the application or appeal is heard and dismissed within six weeks. If the hearing does not take place till after six weeks have expired from the date of the notice, and if the appeal or application is dismissed, any time that the prisoner has spent in prison over six weeks will be counted as part of his sentence. It may, however, be that his application for leave to appeal has come before a single judge of the court and been dismissed and the prisoner has desired that the case should be further considered by the full court. In such a case the time that must elapse between the date of the dismissal of the application by the single judge and the dismissal of the application by this court will not count as part of the sentence for the fact that the application has already been dealt with and refused by the judge will ordinarily be considered a good reason for the court exercising the discretion which s. 38 (2) (b) gives it. In this particular case the applicant applied for leave to appeal on July 17, 1948. He would then be specially treated in prison as an appellant. His application was considered by SLADE, J., on Aug. 17, 1948, less than six weeks from the date of the notice. He would, therefore, not be entitled to have any part of the time that he was waiting treated as part of his sentence. He was not content with the refusal of SLADE, J., and applied for leave to appeal to this court which has refused his application. Consequently, no part of the time from Aug. 17 to Oct. 13 can be allowed as he ought to have been content with the learned judge's refusal on Aug. 17.

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

ROBERTSON v. MINISTER OF PENSIONS.

Re 56, DENTON ROAD, ISON (Denning, J.), October 5, 11, 1948.]
ENHAM, MIDDLESEX. [1952]

3.R. 799. *lity—Injury suffered in December, 1939—Claim admitted
by War Office—Minister of Pensions not consulted—Assurance given by War
Office binding on Minister of Pensions.*

By the Pensions (Navy, Army, Air Force, Nursing and Auxiliary Services) Transfer of Powers Order, 1939 (made under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, s. 1), the entire administration of disablement claims in respect of military service after Sept. 2, 1939, was transferred to the Minister of Pensions. In December, 1939, the claimant was injured in an accident while on military service, and in July, 1940, he was examined by a medical board, found unfit for general service, and graded in Category B. In March, 1941, he wrote to the War Office, requesting that the question of attributability in regard to the disability should be settled. On Apr. 8, 1941, without consulting the Minister of Pensions, the War Office replied that the claimant's disability had been accepted as attributable to military service. On the faith of that assurance the claimant took no steps to obtain independent medical opinion or to secure possession of the X-ray plates relating to his accident, and these were now no longer available. The question was whether the assurance contained in the letter from the War Office was binding on the Minister of Pensions :—

HELD : (i) the letter from the War Office was on the face of it an authoritative decision intended to be binding and to be acted on, and the fact that the claimant had, as a result of that letter, forborne from getting a medical opinion was sufficient to have made the letter binding if it had been written by a private person.

Pease & Partners, Ltd. v. Birch ([1941] 1 All E.R. 343; *sub nom. Birch v. Pease & Partners, Ltd.*, [1941] 1 K.B. 615; 165 L.T. 146), *applied*.

(ii) since the letter from the War Office was clear and explicit, the doctrine of executive necessity could not be implied therein, so as to entitle the Crown to revoke the decision without cause.

Reilly v. R. ([1934] A.C. 176; 150 L.T. 384), *applied*.

Rederiaktiebolaget Amphitrite v. R. ([1921] 3 K.B. 500; 126 L.T. 63), *distinguished*.

(iii) as the War Office was an agent for the Crown, the Crown was bound by the letter and, therefore, other government departments, being also agents of the Crown, were also bound, and, accordingly, the letter was binding on the Minister of Pensions, whose function was to administer the Royal Warrant issued by the Crown so as to honour all assurances given by or on behalf of the Crown.

[AS TO WAR PENSIONS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 779, 780, paras. 1098, 1099, and Supplement; and FOR CASES, see DIGEST, 2nd Supp., Royal Forces, Nos. 266b-266mg.]

Cases referred to :

- (1) *Pease & Partners, Ltd. v. Birch*, [1941] 1 All E.R. 343; *sub nom. Birch v. Pease & Partners, Ltd.*, [1941] 1 K.B. 615; 110 L.J.K.B. 273; 165 L.T. 146; 2nd Digest Supp.
- (2) *Central London Property Trust, Ltd., v. High Trees House, Ltd.*, [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 2nd Digest Supp.
- (3) *Bob Guinness, Ltd. v. Salomonsen*, [1948] 2 K.B. 42.
- (4) *Rederiaktiebolaget Amphitrite v. R.*, [1921] 3 K.B. 500; 91 L.J.K.B. 75; 126 L.T. 63; 16 Digest 238, 341.
- (5) *Reilly v. R.*, [1934] A.C. 176; 103 L.J.P.C. 41; 150 L.T. 384; Digest Supp.

APPEAL by the claimant from a decision of a pensions appeal tribunal that his disability was not attributable to military service.

In April, 1941, the War Office, without consulting the Minister of Pensions, informed the claimant that his disability had been accepted as attributable to military service. DENNING, J., now held that the assurance given by the War Office was binding on the Minister of Pensions. The facts appear in the judgment.

Crispin for the claimant.

H. L. Parker for the Minister.

Cur. adv. vult.

Oct. 11. DENNING, J., read the following judgment. In April, 1941, the War Office wrote to Colonel Robertson telling him that his disability had been accepted as attributable to military service. The question raised by this Case Stated is whether that assurance is binding on the Minister of Pensions.

Colonel Robertson served throughout the 1914-18 war. He served in the Territorials for all the years between the wars, and he served for six years in the 1939-45 war. He now suffers from a disability which is the result of an injury, but the question is: Which injury? He had two injuries. The first was in a train accident in 1927, not connected with military service. It seemed to be only a slight injury. He had a stiff neck and some neuritis, but this cleared up by 1928. Thereafter he played Rugby football and led an energetic life with no further trouble. The second accident was in December, 1939, while on military service. He fell and injured himself, receiving a severe blow on the chin. This was very painful and left some stiffness which persisted, and in May, 1940, he was taken into Millbank Hospital and X-rayed. A medical board was held in July, 1940, and he was found unfit for general service and put in Category B permanently.

Those facts give rise to three possible interpretations: (i) The disability may have been due to the first injury which took a long time to manifest itself. It would then not be due to war service. (ii) The first injury may have cleared up, or, at any rate, left only a condition which might never have given any trouble but for the second accident. The disability would then be due to the second injury which was attributable to war service. (iii) The first accident may have given rise to an injurious process which would, sooner or later, have given rise to the disability in greater or less degree, but was accelerated or intensified by the second accident. The disability would then be due to the first injury, though aggravated by the second. In that case, so long as aggravation remained, the disability would be due to war service. It is plain that for the determination of those nice questions a sight of the X-rays would be most important.

On Mar. 11 and 14, 1941, Colonel Robertson wrote to the Director of Personal Services at the War Office giving a full statement regarding his case and making this request:

"On July 3, 1940, I was examined at Millbank by a medical board, which reported me permanently unfit for general service and placed me in Category B. I understand that no report was made on the question of attributability and I should be glad if this matter can now be reconsidered."

On Apr. 8, 1941, the Director of Personal Services replied:

"Dear Colonel, You wrote me on Mar. 11 regarding the injury you sustained in December, 1939, and I now write to let you know that your case has been duly considered and your disability has been accepted as attributable to military service. I am pleased the question has been settled in such a satisfactory manner."

Colonel Robertson says that, on the faith of that assurance, he did not take any steps (as he otherwise would have done) to get an independent medical

opinion in 1941 ; that at that time the X-ray plates were still available, whereas they have now been lost or destroyed ; and that his position is, accordingly, prejudiced. Colonel Robertson did not, of course, know what steps the War Office took when they considered his case, but at the hearing before me the War Office file was produced, and, by consent, I looked at it. It shows that the Director of Personal Services wrote to the divisional commander and obtained evidence as to the injury in December, 1939, and its consequences, and that he sent all the material, including the proceedings at the medical board, to the headquarters of the Army Medical Department. They reported :

“ From the evidence available we consider that the officer's condition was attributable to the accident in December, 1939.”

There was ample material for that decision. The doctors at the medical board had agreed that, although the discs were probably damaged in the first accident, the second was the precipitating cause of the symptoms from which he suffered. The papers were then sent to the Army Finance Department who replied : “ We agree—attributable.” Then they were returned to the Director of Personal Services who wrote to Colonel Robertson the letter of Apr. 8, 1941. It is clear, therefore, that the letter was written after careful consideration by all the departments concerned at the War Office and with their full authority, but the Minister of Pensions had not been consulted, nor anyone in his department. Nevertheless, if the letter was to have any effect at all, it would have to be binding on the Minister of Pensions, because the Pensions (Navy, Army Air Force, Nursing and Auxiliary Services) Transfer of Powers Order, 1939 (S.R. & O., 1939, No. 1194), made under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, s. 1, had transferred to him the entire administration of disablement claims in respect of service after Sept. 2, 1939, and the Royal Warrants carry this into effect. The War Office still retained jurisdiction over claims in respect of service before September, 1939, and that is a jurisdiction which they still retain under art. 653 of the Pay Warrant, 1940. This claim of Colonel Robertson was, however, clearly a claim in respect of his injury of December, 1939, and so came within the Royal Warrants in respect of war service.

The important thing to notice is that the letter of Apr. 8, 1941, is framed in the very words of the Royal Warrant of June, 1940 (Cmd. 6205), which was then in force. Article 5 of that warrant lays down the condition under which “ a disability ” shall or shall not be “ accepted as attributable to military service.” That warrant dealt with all claims in respect of war injuries, *i.e.*, pensions, retired disability pay, allowances and medical expenses. The assurance was given to Colonel Robertson in these explicit words :

“ . . . your disability has been accepted as attributable to military service.”

That was, on the face of it, an authoritative decision intended to be binding and intended to be acted on. Even if Colonel Robertson had studied the Royal Warrant in every detail, there would have been nothing to lead him to suppose that the decision was not authoritative. He might well presume that the Army Medical Board was recognised by the Minister of Pensions for the purpose of certifying under arts. 2 (4) and 5 of the Royal Warrant, and that their certificate of attributability was sufficient for the purpose of the warrant.

What then is the result in law ? If this was a question between subjects, a person who gave such an assurance as that contained in the War Office letter would be held bound by it unless he could show that it was made under the influence of a mistake or induced by a misrepresentation or the like, none of which appears here. There are many cases in the books which establish that an unequivocal acceptance of liability will be enforced, if it is intended to be binding, intended to be acted on, and is, in fact, acted on. I may instance the cases under the Workmen's Compensation Act, 1925, the latest of which is

Birch v. Pease & Partners, Ltd. (1). These cases are often not cases of estoppel in the strict sense, because estoppel strictly only applies to representations of facts, not of law. Here all the primary facts were known to both parties and the only question was : What was the proper conclusion to be drawn from them ? Furthermore, the cases are often not cases of simple contracts because, unlike a compromise, there is no consideration given at the time. Thus, we have here no promise, express or implied, by Colonel Robertson to forbear from getting a medical opinion. Yet, if his disability had not been accepted as attributable to military service, he would have got one. He did, therefore, on the faith of the War Office letter forbear to get such an opinion. That is sufficient to make the letter binding. The case falls within the principle that if a man gives a promise or assurance which he intends to be binding on him and to be acted on by the person to whom it was given, then, once it is acted on he is bound by it : see *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (2) and *Bob Guinness, Ltd. v. Salomonsen* (3).

The next question is whether the assurance is binding on the Crown. The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, *i.e.*, the doctrine that the Crown cannot bind itself so as to fetter its future executive action. That doctrine was propounded by ROWLATT, J., in *Rederiaktiebolaget Amphitrite v. R.* (4), but it was unnecessary for the decision, because the statement there was not a promise which was intended to be binding but only an expression of intention. ROWLATT, J., seems to be influenced by the cases on the right of the Crown to dismiss its servants at pleasure, but those cases must now all be read in the light of the judgment of LORD ATKIN ([1934] A.C. 179) in *Reilly v. R.* (5). That judgment shows that, in regard to contracts of service, the Crown is bound by its express promises as much as any subject. The cases where it has been held entitled to dismiss at pleasure are based on an implied term which cannot, of course, exist where there is an express term dealing with the matter. In my opinion, the defence of executive necessity is of limited scope. It only avails the Crown where there is an implied term to that effect, or that is the true meaning of the contract. It has certainly no application to this case. The War Office letter is clear and explicit and I see no room for implying a term that the Crown is to be at liberty to revoke the decision at its pleasure and without cause.

I come, therefore, to the most difficult question in the case. Is the Minister of Pensions bound by the War Office letter ? I think he is. Colonel Robertson thought, no doubt, that, as he was serving in the Army, his claim to attributability would be dealt with by or through the War Office. So he wrote to the War Office. The War Office did not refer him to the Minister of Pensions. They assumed authority over the matter and assured him that his disability had been accepted as attributable to military service. He was entitled to assume that they had consulted any other departments that might be concerned, such as the Minister of Pensions, before they gave him the assurance. He was entitled to assume that the board of medical officers who examined him were recognised by the Minister of Pensions for the purpose of giving certificates as to attributability. Can it be seriously suggested that, having got that assurance, he was not entitled to rely on it ? In my opinion, if a government department in its dealings with a subject takes it on itself to assume authority on a matter with which he is concerned, he is entitled to rely on it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it binds the Crown also, and as the Crown is bound, so are the other departments, for they also are but agents of the Crown. The War Office letter, therefore, binds the Crown, and through the Crown it binds the Minister of Pensions. The function of the Minister of Pensions is to administer the Royal Warrant issued by the Crown and he must so administer

it as to honour all assurances given by or on behalf of the Crown.]

In my opinion, therefore, the finding of the tribunal that the disability was not attributable to war service must be set aside. The War Office letter is binding on the Minister of Pensions and he is bound to accept the disability as "attributable to military service" for the purposes of the Royal Warrant of 1940, *i.e.*, as "due to war service" for the purposes of art. 3 of the Royal Warrant of 1946 (Cmd. 6799). The Minister is, therefore, bound to concede that, of the three interpretations I mentioned at the beginning, either (ii) or (iii) applies, and, if there is a reasonable doubt as to which of these, the benefit must be given to Colonel Robertson. Of these two, interpretation (ii) was the interpretation intended by the War Office and is plainly the right interpretation. This appeal is, therefore, allowed. An award must issue that Colonel Robertson's disability is due to the injury of December, 1939, which was attributable to war service.

Appeal allowed.

Solicitors: *Culross & Trelawny* (for the claimant); *Treasury Solicitor* (for the Minister of Pensions).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

Considered. BOWN v. BOWN AND WESTON. [1948] 2 All E.R. 778.

GUNNER v. GUNNER AND STIRLING.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), May 13, 14, 1948.]

Variation of Settlement—Insurance policy—Sum payable on death of husband—Policy expressed to be effected under Married Women's Property Act, 1882, for benefit of wife absolutely—Payment of periodical premiums—Married Women's Property Act, 1882 (c. 75), s. 11—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192.

The husband and wife were married in 1935, and in 1944 the husband took out a policy of insurance, whereby, subject to the payment of premiums, the sum of £5,000 was payable on his death. It was stated in the policy that the insurance was effected under the Married Women's Property Act, 1882, s. 11, "for the benefit and separate use of the assured's wife" W.A.G. "absolutely." In December, 1947, the husband obtained a decree absolute of divorce from the wife, and in March, 1948, he applied to vary the policy as being a post-nuptial settlement within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. It was contended by the wife that the policy did not effect a settlement, but that there was a complete gift to her of the rights thereunder:—

HELD: the wife acquired an immediate vested interest in the policy, but there was not a complete gift to her of the rights thereunder; the husband's object in taking out the policy was to make provision, by means of periodical payments, for the wife in the character of a wife; the transaction amounted to a post-nuptial settlement within the meaning of s. 192 of the Act of 1925; and, therefore, the court had jurisdiction to vary the policy.

Bosworthick v. Bosworthick ([1927] P. 64; 136 L.T. 211); *Cousins v. Sun Life Assurance Society* ([1933] Ch. 126; 148 L.T. 101); and *Melvill v. Melvill and Woodward* ([1930] P. 159; 143 L.T. 206), *applied*.

Chalmers v. Chalmers (1892) (68 L.T. 28); *Hubbard (otherwise Rogers) v. Hubbard* ([1901] P. 157; 84 L.T. 441); and *Brown v. Brown* ([1936] 2 All E.R. 1616; [1937] P. 7; 155 L.T. 418), *distinguished*.

[AS TO VARIATION OF SETTLEMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800, 801, paras. 175, 1276; and FOR CASES, see DIGEST, Vol. 27, pp. 520, 521, Nos. 5622-5631.]

Cases referred to :

- (1) *Cousins v. Sun Life Assurance Society*, [1933] Ch. 126 ; 102 L.J. Ch. 114 ; 148 L.T. 101 ; Digest Supp.
- (2) *Worsley v. Worsley and Wignall*, (1869), L.R. 1 P. & D. 648 ; 38 L.J.P. & M. 43 ; 20 L.T. 546 ; 27 Digest 246, 2174.
- (3) *Dormer (otherwise Ward) v. Ward*, [1901] P. 20 ; 69 L.J.P. 144 ; 83 L.T. 556, *revsg.*, [1900] P. 130 ; 27 Digest 521, 5629.
- (4) *Bosworthick v. Bosworthick*, [1927] P. 64 ; 95 L.J.P. 171 ; 136 L.T. 211 ; Digest Supp.
- (5) *Stedall v. Stedall*, (1902), 86 L.T. 124 ; 27 Digest 516, 5552.
- (6) *Prinsep v. Prinsep*, [1929] P. 225 ; 98 L.J.P. 105 ; 141 L.T. 220 ; Digest Supp.
- (7) *Melvill v. Melvill and Woodward*, [1930] P. 159 ; 99 L.J.P. 65 ; 143 L.T. 206 ; Digest Supp.
- (8) *Smith v. Smith*, [1945] 1 All E.R. 584 ; 114 L.J.P. 30 ; 173 L.T. 8 ; 2nd Digest Supp.
- (9) *Chalmers v. Chalmers*, (1892), 68 L.T. 28 ; 27 Digest 520, 5622.
- (10) *Hubbard (otherwise Rogers) v. Hubbard*, [1901] P. 157 ; 70 L.J.P. 34 ; 84 L.T. 441 ; 27 Digest 520, 5623.
- (11) *Brown v. Brown*, [1936] 2 All E.R. 1616 ; [1937] P. 7 ; 105 L.J.P. 103 ; 155 L.T. 418 ; Digest Supp.
- (12) *Blood v. Blood*, [1902] P. 78 ; *C.A.*, [1902] P. 190 ; 71 L.J.P. 97 ; 86 L.T. 641 ; 27 Digest 521, 5630.
- (13) *Churchward v. Churchward*, [1910] P. 195 ; 79 L.J.P. 59 ; 102 L.T. 862 ; 27 Digest 520, 5619.

APPLICATION on the registrar's report as to the variation of a settlement.

The husband petitioner, who had obtained a decree absolute of divorce, sought to vary a policy of insurance as being a post-nuptial settlement within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. The policy, which was taken out by the husband after the marriage, was expressed to be effected under the Married Women's Property Act, 1882, "for the benefit and separate use of the assured's wife" (the wife respondent) "absolutely." WALLINGTON, J., held that the transaction amounted to a settlement within the meaning of s. 192 of the Act of 1925, and, therefore, the court had jurisdiction to vary the policy. The facts appear in the judgment.

Maurice Berkeley and *J. L. S. Hale* for the husband.

J. A. Brightman for the wife.

WALLINGTON, J. : The parties were married on Sept. 20, 1935, and there are three children of the marriage living, Robert aged about 11, Christine aged about 8, and Clive aged about 3. The parties lived together for some time, and on Apr. 16, 1947, the husband signed a petition that was filed on Apr. 18, 1947, in which he asked for the dissolution of his marriage with his wife on the ground of her adultery with the co-respondent, Edgar Stirling, from Mar. 29, 1947, onwards. On Oct. 15, 1947, that suit was heard and a decree *nisi* was pronounced, that decree being made absolute on Dec. 1, 1947. On Feb. 9, 1944, some 3 years or more before the proceedings began, and, therefore, at a time when the husband would have had no suspicion that anything was likely to cause shipwreck to the marriage, he took out a policy of insurance with the Commercial Union Assurance Co., Ltd., taking advantage of the provisions in s. 11 of the Married Women's Property Act, 1882. By the policy, subject, of course, to the payment of premiums, the sum of £5,000 was payable to the payees under the policy. The schedule to the policy identified the payees as the person or persons under the Married Women's Property Act, 1882, to receive the policy moneys, and the event assured against was the death of the life assured. A space is reserved on this type of policy for special conditions to be

set out. In this case there is one special condition, the effect of which is as follows :

“ This insurance is effected under the provisions of the Married Women’s Property Act, 1882, for the benefit and separate use of the assured’s wife Winifred Agnes Gunner formerly Watkinson absolutely.”

A That policy was effected some eight and a half years after the marriage had been solemnised.

The decree having been made absolute, the husband, on Mar. 18, 1948, gave notice and set down for hearing before the registrar an application to vary the policy, described in the notice of application as “ a post-nuptial settlement made on Feb. 9, 1944, effected under the Married Women’s Property Act, 1882, by extinguishing all the interests of the respondent in the said policy absolutely.”

B That came before the learned registrar on May 5, 1948, and he signed a report in which he said that, with the approval of both parties, he was referring the matter to the judge for the determination of the question : Can the policy be regarded as a settlement at all ? That now comes before me for determination.

C First, I do not think it necessary to set out in any detail the various contentions and the bases on which those contentions rest on both sides. It is enough to say that counsel for the husband pressed for the variation of this policy as a settlement within the provisions of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, which, to all intents and purposes, for the purpose of this case at least, is in effect the same as the previous legislative provision dealing with this type of matter, *viz.*, s. 5 of the Matrimonial Causes Act, 1859, so that the authorities presented to me that came into existence before the existing

D provision are applicable to matters arising under the present section.

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, provides :

E “ The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this sub-section notwithstanding that there are no children of the marriage.”

F It is obvious that jurisdiction under the section depends on whether the transaction or document relied on as a settlement is, in fact and in law, a settlement within the meaning of that word in the section.

G Counsel for the husband has cited a number of authorities, and has submitted that the form of the transaction is immaterial, but, if the transaction, whatever be its form, is one made under the provisions of the Married Women’s Property Act, 1882,—as this plainly is—provision is made for the wife as the husband’s spouse, and is made for her in her character as his wife, and, if the legal effect of the transaction is subsisting at the material date—which is the date on which the decree was made absolute in this suit—there is a settlement within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. He concedes that in this case, as in all similar cases, by reason of the provisions of s. 11 of the Act of 1882 at the moment when the policy is effected there is created

H a trust in favour of the wife, a trust under which the husband is trustee and the wife *cestui que trust*, the husband as trustee being subject to all the duties and obligations of a trustee, and the wife, immediately on the policy being effected, becoming entitled to a vested interest in the policy. He further submits that the trust is one which continues, and in this case has continued, down to and beyond the crucial date, that none of the policy moneys has been received by anybody, the event on which they can be received by anybody not having arrived, and, therefore, the document and the accompanying facts constitute a

settlement which is within s. 192. Counsel for the wife, on the other hand, has contended that there can be no settlement if there is an out and out gift, that in this case the legal effect of the policy is to make over to the wife a complete gift of the rights under the policy, and that, with the payment of each premium by the husband, the husband automatically loses any right in the premium that is paid. He added that the wife becomes under the provisions of the policy the donee of the policy and of the advantages of each separate premium when it is paid. That is the fundamental basis on which counsel for the wife rests his case.

It is not necessary for me to discuss the various authorities in detail. It is agreed that the cases cited by counsel for the husband are the only cases that are of any real assistance on this point. The circumstances of each of these cases have been closely investigated and learned counsel on both sides have pointed out their distinguishing features. Counsel for the husband, on the one hand, has indicated with clarity and accuracy the features in the decided cases which, he submits, support the view that this is a case of a settlement within the section under which this jurisdiction arises. Counsel for the wife has also shown clearly that the cases in which variations have been made in different types of transaction which have been held to be variable settlements depend, for example, on the existence of a burden or obligation on the person making the settlement, in this case the husband. Counsel for the husband says that that is not conclusive, his submission being that one has to look at the real purpose of the transaction. If the real purpose of the present transaction is to be effected, the husband must go on paying the premiums because, unless he does so, neither he nor anyone else can ever get the benefit of the policy moneys which will cease to be payable.

In my view, this policy was taken out by the husband when he had no reason to suppose that there would be any likelihood of the marriage being broken up. He effected it in order that, by periodical payments, he might be able at the expiration of the period mentioned in the policy to make a provision to the extent of £5,000 for his wife because she was his wife and because for that reason he desired to provide for her. The event on the happening of which the sum is to be paid is the death of the assured, *i.e.*, the husband. That would obviously be a time at which, in his view, the wife, left as a widow, would be in need of the provision. It is not stretching one's imagination too far to say that it may well have been that in 1944, when this marriage was eight and a half years old and the husband was about 35 years of age, he would be unable, unless he made some arrangement of this kind, to make such a provision as he felt his wife would be in need of at his death. It cannot be supposed, in my view, that he would have dreamt of making such provision if she had not been his wife and if he had not felt himself under an obligation to do his best for her because she was his wife. It follows, therefore, that this provision was made for her in her character of a wife, and it is plain that, unless the husband went on paying the premiums, although under no contractual obligation to pay them, it would be impossible for him to achieve the purpose that he must have had in mind when he effected the policy. Again, it must be remembered that if, in the circumstances that have happened, he continues to pay the premiums, he will be continuing to make provision for a woman who is no longer his wife and has ceased to be his wife, because she has elected, or has not resisted the temptation, to indulge in a matrimonial offence which has brought the marriage to an end.

The authorities which have been relied on are, first, *Cousins v. Sun Life Assurance Society* (1) in the Court of Appeal, *Worsley v. Worsley and Wignall* (2), *Dormer (otherwise Ward) v. Ward* (3), *Bosworthick v. Bosworthick* (4), *Stedall v. Stedall* (5), *Prinsep v. Prinsep* (6), *Melwill v. Melwill and Woodward* (7) and *Smith v. Smith* (8). Those are the authorities on which counsel for the husband relied in support of his case that this transaction created a settlement within the meaning of s. 192. There are three other cases that he cited, in order to make

the list of authorities complete, on which he does not rely but on which counsel for the wife does. They are *Chalmers v. Chalmers* (9), *Hubbard v. Hubbard* (10) and *Brown v. Brown* (11). I need refer only to one or two of those cases to illustrate the kind of view that has been expressed when this question has come before the court.

A In *Cousins v. Sun Life Assurance Society* (1), LORD HANWORTH, M.R., said ([1933] Ch. 132) :

B “Our attention has been called to a great number of cases, but the point seems really to be plain enough, and there is certainly one previous decision which supports the view come to by this court. It will be observed that the policy is declared to be for the benefit of a named wife. Two sections in successive Married Women’s Property Acts have dealt with the case of an insurance policy taken out by a husband or a wife for the benefit of the other.”

After dealing at some length with s. 10 of the Act of 1870, LORD HANWORTH, M.R., said (*ibid.*, 134) with regard to the provisions of the Married Women’s Property Act, 1882 :

C “. . . I have looked in vain for any statement introducing a contingency to negative the creation of a vested interest in favour of this named wife. It is suggested that the section provides in certain events for the policy moneys reverting to and becoming part of the estate of the insured person. But when is this to happen ? ”

D HIS LORDSHIP then dealt with that in full, and ultimately he came to the conclusion that is set out in the headnote :

“ . . . the wife took an immediate vested interest in the policy which passed on her death in the husband’s lifetime to her personal representatives as part of her estate.”

E In that case the husband, who had issued the policy, had claimed against the assurance company and the executors of his wife, who had died on Oct. 3, 1931, that he was the sole beneficiary. That case establishes plainly in a case such as the present that the wife does acquire an immediate vested interest. About that there is no question, but the further question is whether that fact prevents the transaction—I use that neutral expression—being a “settlement” within s. 192 of the Act of 1925.

F In *Bosworthick v. Bosworthick* (4) the question was whether a bond executed by a wife securing to a husband an immediate annuity of £300 for his life was a settlement within the meaning of this section. The headnote indicates that the court came to the conclusion that :

G “. . . a liberal interpretation according to their obvious purpose must be given to s. 5 of the Matrimonial Causes Act, 1859, and s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and that although the bond did not involve the settlement of property, or a charge on property, for successive interests, it nevertheless amounted to a post-nuptial settlement within the meaning of those sections, and that the court had power, consequent upon the dissolution of the marriage, to deal with the bond and discharge it.”

H That case is enlightening on two matters, one that a transaction may be a “settlement” within the meaning of s. 192 of the Act of 1925 although it falls far short of the requirements which Chancery judges and practitioners in the Chancery Courts would demand before agreeing that it constituted a settlement. It follows, therefore, that I need not find anything like a strict settlement in order to invoke the jurisdiction of this section. A second thing that emerges from *Bosworthick v. Bosworthick* (4) is that, having dealt fully with a number of cases, including *Dormer v. Ward* (3) in the Court of Appeal, LORD HANWORTH, M.R.,

stated ([1927] P. 70) that GORELL BARNES, J., who dealt with *Dormer v. Ward* (3) in the court below :

"... appears to have taken the view that the covenant merely created a debt, and that he ought not to make an order dealing with it. But on appeal, in spite of the argument urged in support of the decision in the court below, the Court of Appeal held that it had jurisdiction to deal with the covenant apart from the settlement, and if we were to hold that there was no jurisdiction in the present case, I think that we should be running counter to the decision of this court in *Dormer v. Ward* (3), which we cannot do. On consideration of the authorities, the ground of my decision is that the section is to be construed liberally and widely, and I do not intend to narrow the meaning of the word 'settlement.'"

ROMER, J., who was then sitting in the Court of Appeal, delivered a short judgment in the course of which he said (*ibid.*, 72) :

"We have had numerous authorities cited to us going as far back as 1861, and amongst them an authority which is binding on this court, and in my judgment those authorities establish that where a husband has made provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the legislature."

In *Prinsep v. Prinsep* (6) HILL, J., said ([1929] P. 232) :

"The main point in issue is whether the settlement of Aug. 25, 1920, is a 'post-nuptial settlement on the parties' within the meaning of s. 192 of the Judicature Act, 1925."

The document he was there referring to was a deed whereby the mother of the husband brought into a settlement trust funds amounting to a large sum of money, and by a deed of separation entered into by the husband and the wife on Feb. 23, 1926, the wife was to receive an allowance from the husband of £2,000 a year for life, of which any moneys received by her under the settlement of 1920 should be treated as part payment and satisfaction. The court treated the matter of the allowances by the husband under the separation deed as a settlement within the meaning of this section. The learned judge went on to say :

"Is it upon the husband in the character of husband or in the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state. Is the settlement of Aug. 25, 1920, of that character? It was made at a time when there was a husband, Mr. Prinsep, and there was a wife, Mrs. Prinsep, and there was also a child of the marriage. In terms, it has in contemplation Mr. Prinsep, whom it designates 'principal beneficiary,' but it also has in contemplation his then wife, Mrs. Prinsep, and any future wife and his child and any future children. The trustees are, however, given a very wide discretion. Clause 3 deals with income. During the lifetime of Mr. Prinsep it is to be applied for the benefit of all or any one of the following, Mr. Prinsep, his issue by any marriage and any wife of his, as the trustees in their absolute discretion think fit; and if no wife or issue is living then they have the like discretion as between Mr. Prinsep and the persons who would be entitled if he were dead."

HILL, J., then dealt with the precise question in detail, but those are the passages to which I desire to refer as indicating the basis on which he considered the question whether the deeds and documents with which he was dealing constituted a settlement or not.

Melville v. Melville (7) is important on the same question, as LORD HANWORTH, M.R., said ([1930] P. 171) :

“The interpretation which is to be given to the section has been laid down in a number of cases as a wide interpretation. In *Worsley v. Worsley* (2) LORD PENZANCE says : ‘The court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is, that the legislature by this section has armed the court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife.’ The same interpretation of the section was adopted by GORELL BARNES, J., as he then was, in *Blood v. Blood* (12), where he says : ‘Those words are extremely wide, and I am anxious that they should not, by any construction the court may put upon them, be narrowed in any way.’ In *Churchward v. Churchward* (13), SIR SAMUEL EVANS, P., says : ‘I adopt in the fullest sense, both in the letter and the spirit, the words of GORELL BARNES, J., in *Blood v. Blood* (12).’ He then quotes the passage to which I have just referred, and adds : ‘To narrow them would be undesirable for this reason : the various circumstances which come before the court, and for which this section is brought into operation, are so diverse that it is to my mind extremely important that, so far as possible, the court should have power to deal with all the cases that come before it, and, in dealing with them, to meet the justice of the case.’”

Later in his judgment LORD HANWORTH, M.R., said ([1930] P. 173) :

“I think the court ought always to bear in mind the words which have been used by GORELL BARNES, J., and approved by SIR SAMUEL EVANS, P., that the section is intended to be a wide one and embraces a large number of settlements which might not appear to be settlements in the strict terms of a conveyancer, because the section is intended to operate in a number of cases not easy to catalogue under any definition. But we have it stated in *Bosworthick v. Bosworthick* (4) that there may be a settlement, although it does not involve the settlement of property, or a charge of property for successive interests. In that case there was an annuity secured by a bond, and it was held to be a settlement within the terms of the section.”

In *Smith v. Smith* (8) there was a house owned jointly by a husband and a wife as joint tenants and the details of the case are set out. I need not refer to them. In that case DENNING, J., came to the conclusion, and, if I may say so with respect, the right conclusion, that the transaction was within the provisions of the section because there was, in fact, a settlement of the property for the reasons which are set out in the judgment.

These are, I think, the essential features of the authorities to which I have referred and I ought now to mention *Chalmers v. Chalmers* (9), *Hubbard v. Hubbard* (10) and *Brown v. Brown* (11) which were relied on by counsel for the wife as showing that the case before me is not affected by those on which counsel for the husband particularly relies. In *Chalmers v. Chalmers* (9), there was an absolute assignment of property subject to mortgages. SIR FRANCIS JEUNE, P., in his judgment used this phrase (68 L.T. 29) :

“A settlement means the settlement of property subsisting between husband and wife, and the Act gives power to alter or vary it when, and

only when, the relation of husband and wife has ceased to subsist. The power to dispose of it absolutely does not seem to be the test."

That was a case in which the court held there was no settlement variable under the Matrimonial Causes Act, 1859, s. 5, because there was a complete and completed assignment by the wife to the husband and the property had entirely passed. *Hubbard v. Hubbard* (10) was somewhat, though not exactly, similar. There the husband had assigned to a trustee a leasehold house and some furniture, on trust to assign the same at once to the wife absolutely, and the trustee assigned the same accordingly. The wife having obtained a decree of nullity, the Court of Appeal held that the assignment was not a settlement within the provisions of s. 5 of the Matrimonial Causes Act, 1859. *Brown v. Brown* (11) was a case in which a wife had purchased an annuity and the society granting the annuity had covenanted to pay it to the husband or his assigns. The wife had parted with her money and there was no possibility of anything coming back to her on the terms of the transaction, and the court held that that could not be a settlement within the meaning of this section.

In my opinion, the transaction here was a settlement within the meaning of this section, and one, therefore, that the court has jurisdiction to vary. I want to make it quite clear that I do not intend to decide that in every case in which a policy is issued by a husband or a wife in favour of the other under the provisions of or regulated by the terms of s. 11 of the Married Women's Property Act, 1882, there is a settlement that can be varied. That is not now before me, and there may be many variations in the terms of a policy which can take advantage of the express trust to which it becomes subject when it is issued in pursuance of the provisions of that section. There may be an infinite variety of circumstances in and about the issue of the policy. There may be other accompanying documents, or there may be evidence of oral declarations and of suggestions made and accepted and of facts which show that, whatever the terms of the policy may be when construed strictly, the intention of the parties is to create, in effect, a settlement variable under this section, or there may be evidence which would alter the character of the transaction in such a way as to make it differ fundamentally from the transaction in the present case. I want to make it plain, therefore, that my decision rests on the facts and documents in this case only.

That disposes of the main point before me which is the question submitted by the learned registrar: Can the policy be regarded as a settlement? I think it can, and I have so held.

Application to vary the settlement granted.

Solicitors: *Kenneth Brown, Baker, Baker* (for the husband); *Evill & Coleman* (for the wife).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

BOWN v. BOWN AND WESTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), May 13, 1948.]

Variation of Settlement—Insurance policy—Sum payable on death of husband—Wife specified as beneficiary—Wife's rights dependent on her surviving husband—Policy obtained on payment of single premium—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192.

On payment of a single premium, a husband obtained from an insurance company a policy whereby a certain sum was payable on his death. The wife was specified in the policy as the beneficiary, being described therein as the "wife." On obtaining a decree absolute of divorce from the wife, the husband applied to the court to vary the policy, as being a settlement within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192:—

HELD : the effect of the policy was that the wife would be the beneficiary during her lifetime, but her rights were contingent on her surviving the husband, and, if she did not survive him, the policy moneys would be payable to the personal representatives of the husband ; no trust, therefore, was created ; but, although there was no trust, the result of the transaction was to create a settlement within the meaning of s. 192 of the Act of 1925.

Gunner v. Gunner and Stirling ([1948] 2 All E.R. 771), considered.

[AS TO VARIATION OF SETTLEMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800, 801, paras. 1275, 1276 ; and FOR CASES, see DIGEST, Vol. 27, pp. 520, 521, Nos. 5622-5631, and Supplement.]

Case referred to :

(1) *Gunner v. Gunner and Stirling*, [1948] 2 All E.R. 771.

ADJOURNED APPLICATION on the registrar's report as to the variation of a settlement.

The husband petitioner, who had obtained a decree absolute of divorce, sought to vary a policy of insurance as being a post-nuptial settlement within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. WALLINGTON, J., held that, in view of the form of the policy, the result of the transaction was to create a settlement within the meaning of the section. The facts appear in the judgment.

Victor Williams for the husband.

D. Potter for the wife.

WALLINGTON, J. : In this case the same point is raised as was raised in *Gunner v. Gunner and Stirling* (1) where I held that the policy under consideration was a settlement within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192.

There are distinguishing features between that and the present case. The most important distinction is that in *Gunner v. Gunner and Stirling* (1) the policy was expressly issued under the provisions of the Married Women's Property Act, 1882, s. 11, with the result that all the provisions of that section applied to it and the assured became a trustee, with certain rights as to the appointment of new trustees and so on, for the wife, the main beneficiary under the policy, who became the *cestui que trust*. There was created a trust which existed down to and over the time when the decree absolute was made, a trust created in such form as to give to the wife, the main beneficiary, an immediate vested interest in the rights under the policy. As the wife had an immediate vested interest, those rights, if they ever matured, would come into the hands of her legal personal representative if she had previously died. That is not the position here because the wife has no such rights in the policy as had the wife in *Gunner v. Gunner and Stirling* (1). This is a policy whereby, on the payment of a single premium by the husband to the County Life Assurance Co., that company issued a policy whereby they undertook to pay the sum of £2,082 on the death of the assured. The effect of that policy is plainly that, as the wife of the assured is specified as the beneficiary, she would be the beneficiary during her lifetime and the policy moneys would be paid to her if she survived the assured, but, if she did not survive him, the policy moneys would be payable to the legal personal representatives of the assured and the legal personal representatives of the beneficiary would have no right to it. I have no doubt that the wife attained under the policy an immediate vested interest in whatever rights were conferred on her by the policy, but those rights were and are contingent on her surviving the assured, an event the date of which it is impossible to ascertain and one, therefore, which must be awaited. It may be that the wife will eventually receive the sum assured ; it may be that she will never receive any of it.

This policy was procured by the husband for the benefit of his wife in the limited sense indicated in it, and I entertain no doubt that it was so procured by him because he desired to make such provision for his wife as he could. Without repeating any of the considerations that led to the conclusion at which I arrived in *Gunner v. Gunner and Stirling* (1), viz., that the policy in that case was a settlement within s. 192 of the Act of 1925, I am satisfied that the circumstances in the present case were similar to those in that case. The motive of the husband was the same in both cases. The conclusions that I draw from the circumstances in the present case and from the form of the policy are the same as controlled my judgment in *Gunner v. Gunner and Stirling* (1), except that this case does not depend on the existence of a trust because the policy was not issued under s. 11 of the Married Women's Property Act, 1882. The absence of a trust, however, in my opinion, makes no difference to the result of the transaction which is to create a settlement that comes within the provisions of s. 192 of the Act of 1925. The learned registrar has arrived at that conclusion and has reported accordingly and I confirm his report.

Report confirmed.

Solicitors: *Gregory, Rowcliffe & Co.* (for the husband); *Isadore Goldman & Son* (for the wife).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

ed. C.A. [1949] 1 All E.R.

WILSON v. KINGSTON-UPON-THAMES CORPORATION.

[KING'S BENCH DIVISION (Morris, J.), October 14, 15 and 18, 1948.]

Highway—Non-repair—Liability of local authority—Non-feasance—Road temporarily repaired by highway authority—Subsequently becoming out of repair.

Part of an asphalt roadway had twice been repaired by the highway authority, on the second occasion as a temporary repair by putting tar-macadam into a hole. The road again became in need of repair, and a cyclist riding over the hole was thrown over the handlebars and severely injured.

HELD: the lack of repair of the highway arose from non-feasance and not from misfeasance in repairing the road negligently, and, therefore, the highway authority were not liable.

[AS TO LIABILITY OF A HIGHWAY AUTHORITY FOR NON-FEASANCE AND MISFEASANCE IN THE REPAIR OF A HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 26, pp. 332-336; and FOR CASES, see DIGEST, Vol. 26, pp. 393, 404, 419, Nos. 1197, 1270, 1333.]

Cases referred to:

- (1) *Great Central Railway Co. v. Hewlett*, [1916] 2 A.C. 511; 85 L.J.K.B. 1705; 115 L.T. 349; 80 J.P. 365; 26 Digest 419, 1383.
- (2) *McClelland v. Manchester Corporation*, [1912] 1 K.B. 118; 81 L.J.K.B. 98; 105 L.T. 707; 76 J.P. 21; 26 Digest 404, 1270.
- (3) *Sheppard v. Glossop Corporation*, [1921] 3 K.B. 132; 90 L.J.K.B. 994; 125 L.T. 520; 85 J.P. 205; 26 Digest 393, 1197.

ACTION for damages for personal injuries arising from negligence.

The plaintiff was thrown from his bicycle owing to the defective condition of the surface of a road. He claimed damages from the highway authority on the ground that they had recently carried out temporary repairs to that part of the highway so negligently that it had again become out of repair by the time of the accident. The court held that the cause of the accident was the lack of repair of the road, due to non-feasance and not to negligence by the highway authority, and was, therefore, not actionable. The facts appear in the judgment.

H. G. Garland for the plaintiff.

Sir Shirley Worthington-Evans for the defendants.

MORRIS, J. : On June 12, 1946, the plaintiff, Mr. Frederick Harold Louis Wilson, was riding his bicycle along Alfred Road, Kingston-upon-Thames, when, owing to the existence of a hole or depression in the surface of the roadway, he was projected over the handlebars of his bicycle and sustained injuries. The defendants are the mayor, aldermen and burgesses of the Royal Borough of Kingston-upon-Thames, and they are sued as the highway authority for the royal borough and as being the highway authority responsible for the road along which the plaintiff was cycling. [His LORDSHIP referred to the evidence on the state of the road and proceeded :] The testimony of all these witnesses is to the effect that there was in existence on the surface of the roadway an area approximately 12ins. or 15ins. in diameter in the nature of a saucer-like depression or hole, the depth of which at the centre would be about 3ins.

The matter is put on behalf of the plaintiff in the statement of claim as follows :

“ During the year before June 12, 1946, the defendants as such highway authority carried out repairs on the said Alfred Road but the said repairs were carried out so negligently that a large hole formed in the said road near to the junction of the same with Glenthorne Road. The plaintiff can give no better particulars of the said repairs until after discovery.”

Later, particulars were given setting out the dimensions of the hole. The scene of this accident was near to the junction of Alfred Road and Glenthorne Road. The surface of Alfred Road is an asphalt surface. When repairs to the roadway became necessary they were undertaken, not by the defendants, but by a company called Highways Construction Co., subject to this, that certain repairs not of a complete nature but performed by applying cold asphalt were effected from time to time by the defendants themselves. Occasionally it happened that a patch was put on an asphalt road composed of tar-macadam, but if that was done, it was done simply as an emergency and temporary measure, and no record of any such repairs would be kept. [His LORDSHIP reviewed the evidence as to actual repairs done to the road and continued :] The evidence suggested that, if tar-macadam had been put into a hole of this kind, it might, by the action of traffic passing over it be entirely displaced, for there would be no expectation that by putting tar-macadam filling into a hole or depression in an asphalt road any permanent repair would be achieved. I accept, therefore, that at some date earlier than the end of July, 1945, some repairs were made at this point, and it may well be that the workmen employed by the defendants, seeing a depression in the roadway, thought that it would be better to put some filling in the hole than to leave it as it was. The evidence, however, satisfies me that at the time immediately before this accident, there was a hole or depression in the roadway which was in need of repair. A plan which was put in by the defendants sets out the areas and dates of repairs or re-instatements effected either by the defendants or by Highways Construction Co. Areas 1 and 2 were re-instated by the Highways Construction Co. in October, 1946, at the same time as area No. 5 was re-instated. In April, 1948, a gully was taken up and more permanent work was done so as to avoid the recurrence of flooding for the future. When that gully was taken up, all the asphalt near to it was taken up, and at that time some tar-macadam was put by the employees of the defendants into the hole when the asphalt was removed. That was not a departure from ordinary practice, which was that repairs to asphalt were effected either by the corporation by the use of cold asphalt, or, if the repairs were to be more permanent, by the Highways Construction Co.

On that view of the facts it was stipulated by counsel for the plaintiff that the position here was that the plaintiff was injured as a result of misfeasance on the part of the defendants. He did not challenge the rule of law that a highway authority is not responsible for an accident which results from non-repair of a highway. It is clear, stating the matter generally, that no action is maintainable

by an individual who is injured in consequence of the non-repair of a highway, but counsel for the plaintiff argued that, if he satisfied the court that some repair was done at the point where the accident later happened, and those repairs could have been achieved so that they would last and be effective at the time of the accident, he could say that the accident resulted from an act of misfeasance on the part of the defendants. He referred to some words used by LORD PARKER in *Great Central Railway Co. v. Hewlett* (1). LORD PARKER said ([1916] 2 A.C. 519):

"My Lords, it is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered."

Counsel for the plaintiff submitted that, if he has shown that some repairs were done at that point, but that those repairs were done badly, the defendants should be liable, for, he says, if the repairs were done properly the accident would not have happened. Counsel further relied on *McClelland v. Manchester Corporation* (2). That authority has, however, to be read in the light of the observations made by the Court of Appeal in *Sheppard v. Glossop Corporation* (3).

In my judgment, the submission of counsel for the plaintiff is not a valid one. The position was simply that certain repairs were at one time effected, but that after the date of such repairs the roadway had again become in a state of non-repair, and during the weeks before the date when the plaintiff had his accident the position was that this roadway was again in need of repair. This is an ordinary situation that may often happen of an accident occurring because a roadway is out of repair. The words of LORD PARKER, particularly relied on by counsel for the plaintiff, were:

"... so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered."

The injury to the plaintiff was not caused by the exercise on the part of the defendants of their duty to repair. It was not because they effected some temporary repair at some date before July, 1945, that this accident happened. The accident happened because the roadway was out of repair. Were I to accede to the submission made on behalf of the plaintiff, I would be not merely straining but also going in the face of the established law on this matter.

Judgment for the defendants with costs.

Solicitors: *J. C. Brookhouse and C. L. MacDougall* (for the plaintiff); *William Charles Crocker* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

LLANDUDNO URBAN DISTRICT COUNCIL v. GREAT ORME RAILWAY, LTD.

[CHANCERY DIVISION (Jenkins, J.), October 13, 1948.]

Tramway—Purchase by local authority—Purchase price—"Total capital of company actually invested in undertaking at time of purchase"—Sale by purchasers from original company—Tramways Act, 1870 (c. 78), s. 44—Great Orme Tramways Act, 1898 (c. xxvii), s. 57 (1).

By the Great Orme Tramways Act, 1898, a tramway company was incorporated to make and maintain a tramway. The expression "company" in the Act was defined by s. 3 as meaning the company incorporated by the Act. By s. 5 of the Act: "The capital of the company shall be £25,000 in 5,000 shares of £5 each." By s. 14: "All moneys raised by

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the company under this Act whether by shares or borrowing shall be applied only to the purposes of this Act to which capital is properly applicable." Section 57 (1) gave the local authority power, exercisable at stated periods, to require the company to sell to them their undertaking "upon terms of paying a price equal to 28 years' purchase of an aggregate dividend or return calculated at the rate of $4\frac{1}{2}$ per cent. on the total capital of the company actually invested in their undertaking at the time of purchase and properly expended on capital account." The Tramways Act, 1870, s. 44, which was incorporated in the Act of 1898, empowered the promoters of a tramway undertaking to sell their undertaking, after a certain period and with the necessary consent, and provided that after a sale "all the rights, powers . . . and liabilities of such promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by . . . the person, persons, corporation, company, or local authority to whom the same has been sold, in like manner as if such tramway was constructed by such person, persons, corporation, company, or local authority under the powers conferred on them by special Act, and in reference to the same they shall be deemed to be the promoters." In 1933, the tramway company went into liquidation, and in 1935 the tramway undertaking was sold to a railway company for £5,600. The Great Orme Tramways Act, 1936, recognised the railway company as the statutory undertaker in place of the tramway company. The paid-up share capital of the railway company was £6,000 in £1 shares. In October, 1947, the local authority, wishing to exercise the power of purchase conferred by s. 57 (1) of the Act of 1898, served a notice on the railway company requiring the company to sell the undertaking to them, and the court was asked to determine the proper method of ascertaining the purchase price, having regard to the formula in s. 57 (1) :—

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HELD : (i) the effect of a sale under the power conferred by the Tramways Act, 1870, s. 44, was to substitute the purchaser of the undertaking for the original statutory undertaker for all purposes, and, therefore, the words "total capital of the company actually invested in their undertaking at the time of the purchase," in s. 57 (1) of the Act of 1898, referred to the capital of the railway company.

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(ii) on the true construction of the Act of 1898, "the capital of the company," for the purposes of s. 57 (1) was not confined to share capital, but included capital, whether derived from loans or any other source, which was actually invested in the undertaking at the time of the purchase.

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(iii) the effect of the words, "at the time of purchase," in s. 57 (1) was that the capital referred to was not capital which had from time to time been invested in the undertaking down to the time of purchase, but capital in the state of being actually invested at the time of purchase, and, therefore, the price payable by the local authority was 28 years' purchase at $4\frac{1}{2}$ per cent. of the total sums expended by the railway company in the acquisition of the capital assets of the tramway company and any other capital assets belonging to the railway company in respect of the undertaking, or as part of the undertaking, at the date of purchase, less any sum written off in respect of depreciation.

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[AS TO PURCHASE OF TRAMWAYS BY LOCAL AUTHORITY, see HALSBURY, Hailsham Edn., Vol. 32, pp. 731-733, para. 1054 ; and FOR CASES, see DIGEST, Vol. 43, pp. 354, 355, Nos. 113-119.]

ADJOURNED SUMMONS to determine questions relating to the method of ascertaining, under the Great Orme Tramways Act, 1898, s. 57 (1), the purchase price payable by the local authority on acquiring the tramway undertaking from a railway company which had purchased it on the liquidation of the original statutory company. The facts appear in the headnote and the judgment.

FitzGerald, K.C., and *Maurice Berkeley* for the local authority. .
Gray, K.C., and *Wilfrid Hunt* for the railway company.

JENKINS, J. : This summons concerns the acquisition by the Llandudno Urban District Council, to which I will refer as "the council," of a tramway undertaking now carried on by the Great Orme Railway, Ltd. The questions which I have to decide relate to the method of ascertaining the price payable by the council on the acquisition of the undertaking under a power reserved in the special Act.

The tramway in question is a statutory undertaking which was originally carried on by the Great Orme Tramway Co., to which I will refer as the tramway company. The tramway company was a statutory company incorporated by a private Act entitled the Great Orme Tramways Act, 1898. The preamble to that Act recited *inter alia* :

"Whereas the making and maintaining of a tramway and tramroad from Llandudno to or near the summit of the Great Ormeshead in the county of Carnarvon would be of local and public advantage : And whereas the persons in that behalf in this Act named with others are willing at their own expense to construct such tramway and tramroad if authorised by Parliament so to do and are desirous of being incorporated into a company with adequate powers for the purpose and it is expedient that they be incorporated and empowered accordingly as by this Act provided . . ."

Sections 1 and 2 of the Act provide :

"1. This Act may be cited as the Great Orme Tramways Act, 1898.
 2. The Companies Clauses Consolidation Act, 1845, and pt. I (relating to cancellation and surrender of shares) of the Companies Clauses Act, 1863, as amended by subsequent Acts the Lands Clauses Acts, s. 3 (interpretation of terms) and pts. II and III of the Tramways Act, 1870 (except s. 43 of the said Act) and the provisions of the Railways Clauses Consolidation Act, 1845, with respect to mines lying under and near to the railway are so far as they are applicable to and except where expressly varied by this Act incorporated with and form part of this Act."

Section 3 contains certain definitions :

"In this Act the several words and expressions to which meanings are assigned by the Acts wholly or partially incorporated herewith have (unless the context otherwise requires) the same respective meanings And in this Act the expression 'company' means the company incorporated by this Act . . ."

I go to s. 5 :

"The capital of the company shall be £25,000 in 5,000 shares of £5 each."

Section 14 says :

"All moneys raised by the company under this Act whether by shares or borrowing shall be applied only to the purposes of this Act to which capital is properly applicable."

Section 57 contains the power of acquisition which gives rise to the present question. It provides :

"For the protection of the Llandudno Urban District Council (hereinafter called 'the council') the following provisions shall have effect (that is to say) :—(1) The council may if by resolution passed at a special meeting they so decide within 6 months after the expiration of a period of 28 years from the passing of this Act and within 6 months after the expiration of every subsequent period of 7 years or within 3 months after any order made by the Board of Trade under s. 41 or s. 42 of the Tramways Act, 1870, by notice in writing require the company to sell and thereupon the company shall

sell to them their undertaking upon terms of paying a price equal to 28 years' purchase of an aggregate dividend or return calculated at the rate of $4\frac{1}{2}$ per cent. on the total capital of the company actually invested in their undertaking at the time of purchase and properly expended on capital account. When any such sale has been made all the rights powers and authorities of the company in respect to the undertaking sold or where any order has been made by the Board of Trade under either of the said sections all the rights powers and authorities of the company previous to the making of such order in respect to the undertaking sold shall be transferred to vested in and may be exercised by the council in like manner as nearly as may be as if the tramways were constructed by the council under the powers of this Act and in reference to the same they shall be deemed to be the company."

The Act of 1898 contains many other provisions relative to the capitalisation and working of the tramway, but for the present purpose I think those are the only provisions to which I need refer.

Under that Act the tramway company duly executed the authorised works and carried on the tramway undertaking with a reasonable degree of success down to 1932. In or about that year an accident occurred to one of the tramway company's vehicles which resulted in heavy claims being made against the company and also in a certain diminution of public confidence in the safety of the tramway cars. The consequence was that the tramway company became insolvent and was put into compulsory liquidation. In that liquidation the liquidator sold the undertaking of the tramway company to a syndicate of individuals who re-sold to a new company called the Great Orme Railway, Ltd., which is the defendant to this summons, at a price of £5,600. That transaction was authorised by the provisions of the Tramways Act, 1870, s. 44, which is one of the provisions incorporated in the Act of 1898. That section is in these terms :

"Where any tramway in any district has been opened for traffic for a period of 6 months the promoters may, with the consent of the Board of Trade, sell their undertaking to any person, persons, corporation, or company, or to the local authority of such district; and when any such sale has been made all the rights, powers, authorities, obligations, and liabilities of such promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by, and shall attach to the person, persons, corporation, company, or local authority to whom the same has been sold, in like manner as if such tramway was constructed by such person, persons, corporation, company, or local authority under the powers conferred upon them by special Act, and in reference to the same they shall be deemed to be the promoters."

The effect of the sale by the liquidator, having regard to the terms of s. 44 of the Act of 1870—the sale having been effected with the requisite consent of the Ministry of Transport which had succeeded to the powers of the Board of Trade in the matter—was, if I may use the expression, to put the Great Orme Railway, Ltd., in the shoes of the tramway company for all purposes as if the Great Orme Railway, Ltd., had been the promoters who had constructed and who operated the railway under the Act of 1898. That position was recognised by a further private Act called the Great Orme Tramways Act, 1936, the purpose of which was to authorise the Great Orme Railway, Ltd., to which I will refer as the railway company, to make certain modified or increased charges. I do not think there is any provision of the Act of 1936 to which I need refer in detail, but it clearly recognises the position that the railway company was now the statutory undertaker in respect of the tramway undertaking which was begun by the tramway company under the Act of 1898.

That being the position in 1947 the council was minded to exercise the power of acquisition conferred on it by s. 57 (1) of the Act of 1898. It proceeded to exercise that power by a notice dated Oct. 18, 1947, given to the railway company which, in the circumstances I have stated, was the only body to which such a notice could be given. It is not disputed that the notice in question was a valid exercise by the council of the power of purchase conferred on it, and it is not disputed that the railway company is bound to carry out the sale accordingly, but questions do arise as regards the terms of sale, and, in particular, the proper method of ascertaining the purchase price, having regard to the formula dealing with that subject contained in s. 57 (1) of the Act of 1898, *viz.*, that the council may :

“ . . . by notice in writing require the company to sell and thereupon the company shall sell to them their undertaking upon terms of paying a price equal to 28 years' purchase of an aggregate dividend or return calculated at the rate of $4\frac{1}{2}$ per cent. on the total capital of the company actually invested in their undertaking at the time of purchase and properly expended on capital account.”

What, in the events which have happened, is the effect of that formula ? Two questions arise : First, is the total capital of the company actually invested in the company at the time of purchase and properly expended on capital account capital of the company which is now carrying on the undertaking, namely, the railway company, or is it capital of the original statutory company, namely, the tramway company. In my judgment, it is reasonably plain that in the events which have happened the company referred to can only be the railway company. As I read s. 44 of the Tramways Act, 1870, the effect of a sale under the power thereby conferred is to substitute the purchaser of the undertaking for the original statutory undertaker for all purposes. I think the old tramway company has faded out of the picture altogether and the only company now relevant is the railway company.

The relevant company thus being, in my judgment, the railway company, the second question is : What is the total capital of that company actually invested in their undertaking at the time of purchase and properly expended on capital account ? The two views are, on the one hand, that “ capital ” here means, and is confined to, paid-up share capital, the paid-up share capital of the railway company, as I understand it, being £6,000 in £1 shares, and, on the other hand, that no such limitation should be placed on the expression “ capital ” in the context afforded by s. 57 (1) of the Act of 1898. According to this view, the capital here in question is capital whencesoever derived, provided it is actually invested in the undertaking at the time of the purchase and properly expended on capital account. In support of the first view, the limited view of the expression “ capital,” I have been referred to s. 5 of the Act of 1898, which provides that the capital of the company shall be £25,000 in 5,000 shares of £5 each, and to certain references to capital in the incorporated provisions of some of the Acts mentioned in s. 2 of the Act of 1898. I am invited to hold that by definition, in effect, “ capital ” in s. 57 (1) must mean the share capital. On the other hand, I have been referred to s. 14 of the Act of 1898 which seems to recognise loan capital as being, for some purposes, at all events, capital of the company.

In my judgment, s. 57 (1) affords a sufficient context to make it reasonably plain that the capital of the company there referred to is not confined to share capital. The object of the section, quite obviously, is to provide a conventional, but reasonably fair, index of the capital value of the undertaking which the council is acquiring. For that purpose the amount of paid-up share capital of the company need not necessarily have any relevance at all. The company might well have financed itself by means of debentures or loans, and, with

money so raised, have acquired capital assets of great value. I see no justification whatever for excluding capital assets thus acquired from the calculation. It is to be remembered that the phrase which I have to construe is not merely "the capital of the company," or "the total capital of the company," but :

" . . . the total capital of the company actually invested in their undertaking at the time of purchase and properly expended on capital account."

- A I think that that phrase itself indicates that something not necessarily confined to paid-up share capital is meant. There is, further, this consideration. Incorporating, as it does, s. 44 of the Tramways Act, 1870, the Act of 1898 must clearly be assumed to contemplate the possibility that the power of purchase conferred on the council might be exercised, not against the original statutory undertaker but, as, indeed, has happened, against some person or body acquiring the undertaking under s. 44. Section 44 clearly contemplates that the purchaser need not necessarily be a company. Still less need it be a company limited by shares. So that, if one considers "the capital of the company" in s. 57 (1) as meaning paid-up share capital, one must find that the sub-section has provided a formula which, in certain circumstances contemplated by the incorporating of s. 44 of the Act of 1870, might be wholly inapplicable, namely,
- C in the event of the acquisition of the undertaking by some person or body other than a company limited by shares. That is a conclusion from which one should shrink and is an added reason for holding that the capital of the company, for the purposes of s. 57 (1), is not confined to paid-up share capital. So far, therefore, the result appears to me to be that the price must be ascertained by taking 28 years' purchase at $4\frac{1}{2}$ per cent. on the total capital of the railway company, whether paid-up share capital or capital provided in any other way,
- D actually invested in the undertaking at the time of the purchase.

- It remains to consider what is the effect of the words "at the time of purchase." The capital in question is not, it is to be observed, the capital which has from time to time been invested in the undertaking down to the time of purchase. It must be capital invested, and, furthermore, in the state of being
- E actually invested, at the time of the purchase. At one stage of his argument counsel for the railway company seemed to invite me to hold that what had to be done was to arrive at the total of capital at any time invested either by the tramway company or by its successor, the railway company. If that method was followed without qualification, very remarkable results might ensue. For instance, there would be the possibility, which I suggested in the
- F course of the argument, of some calamity destroying the tramway lines, on which, say, £10,000 had been expended, followed by a further expenditure of £10,000 to put up a new line in substitution for the line destroyed. It can hardly be that in such circumstances the council would have to pay a price calculated on the footing that the capital invested in the lines amounted to £20,000. Counsel for the railway company eventually agreed with me, I think, that some
- G provision must be made for depreciation. I think that must be right, *i.e.*, at all events, amounts written off in the accounts as capital lost must not be written back for the purpose of arriving at the capital expended. So, in the result, the formula, as I understand it, means that the council must pay the given number of years' purchase at the stipulated percentage on a capital sum representing in substance the amount of capital assets of the railway company
- H comprised in the tramway undertaking at the date of the purchase taken at a sum representing cost less amounts written off. I appreciate that that formula leaves open a possibility of controversy in the event of there being assets which, it might be alleged by the council, were assets in respect of which some writing off ought to have taken place which has not taken place, but, if the books of the company have been properly kept, it is not a point which ought to give rise to any great difficulty.

That, I think, answers, in effect, the main question on which a decision is

sought, although, perhaps, not in a form exactly according with the terms of the question in the summons. Substantially, I think it does come to a declaration in the terms of question 3 (b) of the summons, *i.e.*, the total amount of all sums expended by the railway company prior to the relevant date in respect of capital assets belonging to the railway company as part of the undertaking at the date of purchase, less any amount written off in respect of depreciation.

Does that answer the question? It is rather a difficult question to answer clearly.

Gray, K.C.: It is a little difficult to make this clear. I understand your Lordship is intending to include, although they are the assets of the railway company, any assets of the tramway company which will exist as assets in the hands of the railway company?

JENKINS, J.: Yes. The only company which has any assets now, the only company in the picture at all, must be the existing railway company. The only undertaking the purchase of which is in question is the statutory undertaking acquired by the railway company from the tramway company. The assets to be paid for are the assets comprised in that undertaking, and the price to be paid is the amount of the capital actually invested in those assets at the date of the purchase.

Fitzgerald, K.C.: Invested by the railway company?

JENKINS, J.: In a state of being invested.

Gray, K.C.: I think, with respect, is it not what my learned friend is saying, invested by the railway company? I was going to submit that the accurate way of expressing it would be this, "the total amount of sums expended by either company."

JENKINS, J.: No. The only company which can be said now to have got any capital invested in anything for this purpose is the railway company. It has invested whatever it has paid to acquire the capital assets which it now owns in respect of this statutory undertaking, *i.e.*, the £5,600 which it paid to the liquidator of the tramway company *plus* any other items of expenditure which have been applied in the acquisition of capital assets, whether the amounts were borrowed or represented money subscribed by them.

Gray, K.C.: I thought your Lordship was treating the railway company as having succeeded to the rights of the tramway company, and, therefore, as the person who had spent anything by either company so far as it still represented capital assets.

JENKINS, J.: No, that is wrong. The company is the railway company for this purpose. You have to see what capital the railway company has invested in capital assets.

Gray, K.C.: May I make sure of that by referring to the affidavit of the chairman of directors of the railway company. Assuming that we prove that the items are capital, it will be really the sums spent in acquiring the shares of the tramway company *plus* the sum of £1,370 17s. 7d. (as set out in sched. IV to the affidavit) which was stated in the affidavit as being a further sum actually invested in the undertaking.

Fitzgerald, K.C.: It is £5,600 *plus* such part of the £1,370 17s. 7d. as can be either agreed or determined to be properly spent on capital account.

JENKINS, J.: Yes. It is wrong to say the acquisition of the shares of the company. It was the undertaking which was bought. That is a very different thing. If they had bought the shares, the old company would be still there. We had better try to settle a form of declaration that everyone can agree to. It will be a declaration that the price payable by the council is 28 years' purchase at $4\frac{1}{2}$ per cent. of the total sums expended by the defendant company in the acquisition of the capital assets of the tramway company and any other capital assets belonging to the defendant company in respect of the said undertaking, or as part of the said undertaking, at the date of purchase, less any sum written off in respect of depreciation.

Declaration accordingly. Liberty to apply for an inquiry as to what items were properly charged. Each party to pay its own costs.

Solicitors : *Sherwood & Co.*, agents for *The Town Clerk*, Llandudno (for the local authority) ; *Vizard, Oldham, Crowder & Cash*, agents for *Chamberlain, Johnson & Parke*, Llandudno (for the railway company).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

ANSELL v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), October 4, 1948.]

Pension—Aggravation of pre-war disability—Power of tribunal finding aggravation to determine duration thereof.

The appellant contracted bronchitis while serving in the army before the war. In 1939 he re-enlisted and was passed fit for service. His duties involved guard duties in the performance of which he was exposed to the weather, and in January, 1940, he became ill with influenza and the specialist reported that he was suffering from chronic bronchitis. He continued to serve for a further two years during which time he was constantly on the sick list. In May, 1942, he was discharged, and seven months later a medical board found that his working capacity was reduced owing to shortness of breath. In 1944 his claim for a pension was rejected by a pensions appeal tribunal, and in 1947 it was rejected by a special review tribunal who found that the appellant had been in the army for "a period of service amounting to nearly three years, during which he was subject to no conditions which could be supposed to have exercised any influence on his bronchitis." His LORDSHIP held that the finding of the special review tribunal could not be reconciled with the evidence, and that the only reasonable conclusion was that at the date of the appellant's discharge his complaint had been aggravated by war service.

HELD : a tribunal which awards aggravation can itself decide how long the aggravation has continued and if and when it has passed away, provided that the parties have notice that that matter is to be considered.

Shipp v. Minister of Pensions, Minister of Pensions v. Pretty, ([1946] 1 All E.R. 417 ; [1946] K.B. 386 ; 175 L.T. 140 ; (1946), Reports of Selected War Pension Appeals, vol. 1, p. 91), *distinguished*.

[AS TO WAR PENSIONS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 779, 780, paras. 1098, 1099 ; and FOR CASES, see DIGEST, 2nd Supplement, Royal Forces, Nos. 266b-266mg.]

Cases referred to :

- (1) *Shipp v. Minister of Pensions, Minister of Pensions v. Pretty*, [1946] 1 All E.R. 417 ; [1946] K.B. 386 ; 115 L.J.K.B. 269 ; 175 L.T. 140 ; 2nd Digest Supp. ; (1946), Reports of Selected War Pension Appeals, vol. 1, 91.
- (2) *Knight v. Minister of Pensions*, (1948), Reports of Selected War Pension Appeals, vol. 1, 1143.
- (3) *Revely v. Minister of Pensions*, (1948), Reports of Selected War Pension Appeals, vol. 3, 1573.

APPEAL from a decision of a special review tribunal rejecting a claim to a pension put forward on the ground of aggravation of a pre-war complaint by war service. The appeal was allowed. The facts appear in the headnote.

The appellant appeared in person.

H. L. Parker for the Minister.

DENNING, J.: This case was heard by a pensions appeal tribunal on Apr. 27, 1944, and by a special review tribunal on Nov. 14, 1947. On each occasion the appellant's claim was rejected. Under the procedure laid down in *Revely's* case (3) I have given leave to appeal from the original decision of Apr. 27, 1944, but have treated the reasons of the special review tribunal as the Case Stated. This is, in effect, therefore, an appeal from the special review tribunal, the first of its kind. [HIS LORDSHIP stated the facts and his finding thereon and continued:] The important question arises whether a tribunal which awards aggravation can itself say for how long the aggravation continued, and if and when it has passed away. I think it can. Some people seem to have thought that it could not do so because of the decision in *Shipp's* case (1). If so, they are under a misapprehension as to the effect of that case. In *Shipp's* case (1) a claim was made immediately on discharge and I held that the Minister and the tribunal ought to have confined their award to aggravation at the date of discharge and ought not to have gone on to hold that the aggravation had passed away at a later date. The reason for that decision was that Mr. Shipp had no notice that the point (as to the cessation of aggravation) was to be considered and had no opportunity of dealing with it. The decision turned on that special consideration. In cases where the applicant knows that the point is to be considered, the Minister and the tribunal are entitled to consider the duration of the aggravation, not only in the case of a belated claim (as in *Knight's* case (2)), but also in the case of an immediate claim. A claim which is made immediately on discharge takes some time to reach a pensions appeal tribunal, and the claimant usually claims not only that the disease was aggravated at the date of discharge, but also that it remains aggravated at the date of hearing. When the Minister rejects the claim, he says that the disease was not aggravated either at the date of discharge or at the date of the hearing. The evidence before the tribunal consists not only of the man's medical history during his service but also after it, such as the findings of medical boards, the opinions of medical attendants, the examination by the medical member, and so forth, all of which bring the position right down to the date of hearing. In those circumstances it is obviously undesirable that the tribunal should confine itself to the moment of discharge and leave the question of duration to another tribunal. In my judgment, in the absence of special circumstances, it is right and proper that the tribunal should consider not only the question whether aggravation remained at the date of discharge, but also the question whether it remained aggravated at the date of hearing, and, if it had passed away, at what date it passed away. There is no legal objection to that course so long as both parties have notice of the case they have to meet. The claim is a continuing claim and the rejection is a continuing rejection, and in the ordinary way, as I said in *Pretty's* case (1) ([1946] 1 All E.R. 419), "not only existing disablement and aggravation can be dealt with by the Minister, and on appeal by the Tribunal, but also past disablement and past aggravation." *Shipp's* case (1) is distinguishable because in the special circumstances of that case the claim was not a continuing claim, but was confined to the moment of discharge.

In all cases, therefore, of aggravation which come before the tribunals, whether they be cases where aggravation is considered for the first time, or cases in which a tribunal is considering whether aggravation still remains, I am of opinion that it is open to the tribunals to find that any aggravation passed away at an earlier date, that is, at any time since discharge. In the present case I shall allow the appeal and direct that an award be made of aggravation as at the date of discharge, but I shall remit the case to a tribunal to determine whether the aggravation still remains, or, if it has already passed away, at what date it did so.

Solicitor: *Treasury Solicitor* (for the respondent).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

ROBINSON v. BAILEY.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Evershed, L.JJ.), October 13, 14, 1948.]

Right of Way—Excessive user—Grant of right of way to part of residential estate—User for business purposes.

The plaintiff acquired a piece of land of some 15 acres which he began to develop as a residential estate. He sold a plot of about $\frac{1}{4}$ acre to the defendant, at the date of the sale certain roadways having been laid out on the estate in a rudimentary fashion. The defendant's plot faced one of these roadways which was called Oak Way and led into a public highway, being 20ft. wide at one end and 30ft. wide at the other. By the conveyance the defendant covenanted that one house only would be erected on the plot and the conveyance also included a grant of a "right of way over Oak Way and the right to connect with the sewers and services laid under the said road." The plaintiff also covenanted with the defendant that he "will duly make up and complete and maintain the road called Oak Way and the footpaths thereof . . . and will duly pay all charges in respect thereof until the said road shall have been taken over as a public road by the local authority . . ." The defendant, who was a builder, began himself to build a dwelling-house on his plot, but was unable to complete it owing to the limits of his licence. He, therefore, used the land and the partially built house for storing building materials, and from time to time lorries used Oak Way to deliver or collect such materials. The plaintiff sought to restrain this user of Oak Way as excessive, on the ground that an increased burden in respect of maintenance was thereby thrown on him and such user was not permissible under the grant of the right of way.

HELD: the question of the scope of a right of way expressed in a grant or reservation was *prima facie* one of construction of the words used, but if those words were susceptible of being cut down by some implication from surrounding circumstances—if, to construe them properly, it were necessary to look at the surrounding circumstances—they would be cut down; there was nothing in the circumstances in the present case limiting the words by which the grant was effected; the user complained of was covered by those words; and it was, therefore, rightful.

Todrick v. Western National Omnibus Co., Ltd., ([1934] Ch. 561; 151 L.T. 163), distinguished.

White v. Grand Hotel, Eastbourne, Ltd. ([1913] 1 Ch. 113; 107 L.T. 695), applied.

[AS TO EXCESSIVE USER OF RIGHT OF WAY, see HALSBURY, Hailsham Edn., Vol. 11, p. 336, para. 592; and FOR CASES, see DIGEST, Vol. 19, pp. 106-116, Nos. 677-771.]

Cases referred to:

- (1) *Tedrick v. Western National Omnibus Co., Ltd.*, [1934] Ch. 190; *affmd.*, [1934] Ch. 561; 103 L.J.Ch. 224; 151 L.T. 163; Digest Supp.
- (2) *White v. Grand Hotel, Eastbourne, Ltd.*, [1913] 1 Ch. 113; 82 L.J.Ch. 57; 107 L.T. 695; *affmd.*, *sub nom.*, *Grand Hotel, Eastbourne, Ltd. v. White*, 84 L.J.Ch. 938; 110 L.T. 209; 19 Digest 114, 738.

APPEAL by the plaintiff from an order of HARMAN, J., dated Feb. 25, 1948, refusing damages for trespass and an injunction to restrain the defendant's user of a right of way, which the plaintiff, the servient owner, alleged to be excessive. The Court of Appeal dismissed the appeal. The facts appear in the judgment of LORD GREENE, M.R.

Paget, K.C., and *P. H. R. Bristow* for the plaintiff.

Pascoe Hayward, K.C., and *D. A. Ziegler* for the defendant.

LORD GREENE, M.R.: Both parties are builders. The plaintiff, Mr. Robinson, acquired a piece of land at Ashstead, in Surrey. It was registered, and in the transfer under which he acquired it he entered into certain covenants with his vendors, restrictive of the user of the land. Those relevant were as follows :

"No building shall be erected on the said land except private detached dwelling-houses of not less than [a certain cost]. No trade manufacture or business shall be carried on upon the said land or any part thereof and nothing shall be done or permitted on the said land which shall be or become a nuisance or injury to the company or the owners or occupiers of any of the adjoining land."

The plaintiff proceeded to develop this piece of land, which comprises some 15 acres, as a residential estate. Whether or not the dealing with this land was such as to bring into existence a building scheme with the resulting rights of purchasers of plots *inter se* under such a scheme, I do not know, but I am prepared to assume in the plaintiff's favour that any purchasers of other plots on this land would have been entitled to enforce, had they so chosen, against another purchaser, the original restrictive covenants in the conveyance to the plaintiff. I am assuming that, but, of course, anyone acquainted with the law relating to building schemes knows that there is many a slip 'twixt the cup and the lip when one tries to establish such mutual obligations between purchasers of plots.

The defendant purchased a plot, and, at the date when he purchased, certain roadways on the estate had been laid out in the more or less rudimentary way with which one is familiar in the development of such estates. Apparently, certain plots had been sold and houses had been erected on them. The defendant purchased a plot facing on one of the sites of roadways known as Oak Waye. According to the plan with reference to which that transfer was made, the whole of Oak Waye on both sides was at that stage open land with no buildings erected thereon. The defendant purchased the plot, and the registered transfer to him, dated July 7, 1945, conveyed the plot together with a certain right of way which is the subject of the present controversy.

At the moment I will pass that over and will come down to the covenants as to user and so forth that the plaintiff chose to impose on the defendant. They were : "That one house only shall be erected on the said land . . . in accordance with plans approved by the transferor." There followed a covenant as to building line and a covenant as to maintenance of a hedge, and then there came this :

"When the purchaser decides to erect a house on the said land he shall give the vendor the first opportunity of tendering for the erection thereof."

For a reason which, no doubt, appeared good to him, the plaintiff did not exact from the defendant a covenant in any way commensurate with the covenant which he himself had entered into with his own vendors. There is no restrictive covenant confining any house built to private residential purposes. All that the covenants come to appears to me to be that, if a building were erected, it was to be a house. It is not confined to a private dwelling-house. So long as it is a house, that would be in compliance with the covenant. There is no covenant to erect a house, nothing to prevent the purchaser leaving the land completely vacant. There is no restrictive covenant as to the use of the land and, therefore, assuming that a building erected on it could only be used as a house, so long as no house was built there, the soil and the surface could be used for any purpose whatsoever, including the carrying on of a trade or business. I should add that this plot is about a quarter of an acre in size. This estate was subject to the Leatherhead and Ashstead Building Scheme under the Town and Country Planning Act, 1932, and under that Act certain restrictions on the erection of buildings on the land were imposed. Those building restrictions had the effect,

unless waived, of preventing any houses being built other than residential houses, but it is important to remember that the local authority concerned in preparing this scheme had, in appropriate circumstances, the right to waive those restrictions or to modify or obtain the modification of the scheme.

I will now refer to the right of way comprised in the assurance. It was in the following language :

A "With right of way over Oak Waye and the right to connect with the sewers and services laid under the said road."

Oak Waye is shown on the map as a road of 20ft. breadth at one end and 30ft. breadth at the other. It leads into a public highway, or what appears to be a public highway. The assurance further contains this covenant :

B "The transferor hereby covenants with the transferee that he the transferor will duly make up and complete and maintain the road called Oak Waye and the foot paths thereof and the sewerage paving and lighting thereof and will duly pay all charges in respect thereof until the said road shall have been taken over as a public road by the local authority and will keep indemnified the transferee from and against all such charges and all actions claims and payments in respect thereof."

C In so far, therefore, as the nature of the road is to be collected from this document coupled with the plans, it is to be a road paved, sewered and lit and such a road as eventually will be taken over as a public road by the local authority. Merely taking the language of that document, there is no restriction whatsoever imposed on the nature of the right of way being conferred. There is nothing there which in any way limits what on the face of it is a perfectly unrestricted right of way, and, if the matter had stood there, I should have thought that there was no question that the user now complained of was permissible and was contemplated at that time. As EVERSHED, L.J., pointed out during the argument, it was competent for the vendor to restrict the right of way which he was granting, if he had wished, and there are well-known formulae for doing that. He did not do so. He chose what, in language, at any rate, is unrestricted.

E Counsel for the plaintiff invokes the principle which he finds stated in the judgment of FARWELL, J., in *Todrick v. Western National Omnibus Co.* (1). The principle on which he relies I can take from the headnote.

F "... in judging whether there is an excessive user of the right regard must be had to 'the circumstances of the case, the situation of the parties and the situation of the land'."

G Before I come to examine that principle and the case on which it was founded, I ought to say a word or two more on a subject I have not yet dealt with, and that is the nature of the user which is complained of. The learned judge did not find that the user complained of went anything like as far as the plaintiff asserted that it did, but for the purpose of dealing with the point I am not concerned with whether the plaintiff's allegations are to be supported or not on the evidence because we have not gone into that aspect of the matter. The defendant himself began to erect a house on this plot, but certain parts were never completed as the building was not covered by the licence which the defendant had obtained. It is said against him that he used the plot for the purposes of his business as a builder in that he stored builder's materials in the garden and the unfinished part of the house, and in connection with that business that he had encouraged or permitted or invited heavy lorries containing builder's materials to go up Oak Waye and deposit their contents at the house or to go up empty and take materials away. It is not said that the user of this road for a lorry was illegitimate. The right of way given, it is agreed, includes the right to bring a lorry up the road to the plot in question. It is said, however, that there has been an excessive user of that right because the

quantity of lorry traffic that one would expect in the case of user as a private house is limited, and something far in excess of that has been brought up the road, this user of the road by lorries being an extended and repeated user as distinct from the limited and occasional class of user that would be expected in the case of a private dwelling-house. It is, therefore, quantity and purpose that are complained of, and not the actual nature of the vehicle. Counsel for the plaintiff says that the effect of that business user has been to impose on the vendor, the plaintiff, under his covenant an excessive burden in the maintenance of the road.

As I have said, this plot is under no restriction as to user, *vis-a-vis* the plaintiff, save possibly to the extent that, if a building is erected on the plot, it must be used as a house and nothing but a house. In so far as, under building scheme law or under the town planning scheme, there were at the date of the transfer restrictions on the user of the land which would bind the purchaser at the instance of third parties or, in the case of a town planning scheme, at the instance of the local authority, these were all restrictions that could be got rid of next week. I use the language of HAMILTON, L.J., in *White v. Grand Hotel, Eastbourne, Ltd.* (2) in relation to the facts then before the court. He said ([1913] 1 Ch. 117) :

"The house in the present case was used as a private dwelling-house in 1883, but with the consent of a third person it might be, as in fact it was, turned into a house which could be used for the purpose of trade."

I will assume that at the date of the transfer in the present case any house erected on this site could only be used as a private dwelling-house in the sense that any other user could be restrained either by the purchasers of other plots, or by the original vendor to the plaintiff, or by the local authority. The position, as HAMILTON, L.J., said, was that with the consent of a third party—that is to say, those parties—those restrictions could all be avoided. Counsel for the plaintiff says that at the date of this transfer it must have been in the contemplation of the parties that this plot could never be used for any other purpose than the building of a residential house. As between the parties there is nothing so to confine the user, and I cannot see how it can be said that as between the parties a limitation on user could not be lifted when the only effective restrictions were under the control, not of the plaintiff, the vendor, but of third parties, with whose consent they might be waived. That the parties must have contemplated that for ever this plot of land would be subject to these restrictions seems to me to be an assumption which we cannot possibly make. In my view, in those circumstances it is impossible to treat the sort of surrounding circumstances which counsel for the plaintiff relies on, that is to say, the contemplated user that he says must have been in the minds of the parties, as effective to limit the wide words which the vendor has chosen to use in making this grant of the right of way.

That appears to me to be sufficient to dispose of this case, but there are certain authorities to which counsel for the plaintiff referred and to which I desire to make reference. The first was the case I have already mentioned, *Todrick v. Western National Omnibus Co.* (1), in which a right of way was reserved in the following terms, stating what is essential for this purpose :

"Excepting and reserving in fee simple unto the vendor his heirs and assigns . . . from time to time of all or any part of the vendor's said adjoining property . . . and all persons going to or from any part of the last mentioned property a perpetual right of way . . . for all purposes with or without vehicles and animals from and to the public highway . . . over across and along the private road or way coloured yellow on the said plan . . . and the right to construct an extension of such road . . ."

The defendants had become the persons entitled to exercise that right of way, which was a peculiar one. The roadway was very narrow and it was held up

by a retaining wall to prevent it slipping down the valley. The defendants were attempting to use this road for their motor omnibuses which they were garaging on the land, and the argument put forward was : " Here is a reservation of a right of way in unlimited language, and, therefore, we can use this right of way for any type of vehicle and any purpose for which the most extensive right of way can be used ". In relation to that proposition FARWELL, J., stated the principle which I have already read from the headnote. While not in any

A way dissenting from that statement as a general proposition, I would like to give this word of caution, that it is a principle which must not be allowed to carry the court blindly. Obviously the question of the scope of the right of way expressed in a grant or reservation is *prima facie* a question of construction of the words used. If those words are susceptible of being cut down

B by some implication from surrounding circumstances, it being, to construe them properly, necessary to look at the surrounding circumstances, of course they would be cut down. *Todrick's* case (1) is a very good example of the sort of application of the rule which FARWELL, J., was enunciating. Finding, as he did, a right of way reserved over a hereditament which was in such a physical condition that it was not capable of carrying such heavy traffic as omnibuses,

C he said he was unable to construe the grant in such a way that the grantee would be entitled to take over the road vehicles which were wider or heavier than the road could be asked to bear. There were two factors. The breadth of the omnibus, which would only allow $1\frac{1}{2}$ ins. margin at either side as it went through a certain arch, and the strength of the retaining wall and the effect on it of the passage of motor omnibuses and heavy vehicles over the part

D of the road held up by it made it clear that that kind of thing never could have been contemplated. The learned judge, I think, really came to his conclusion on this ground. He looked at the subject-matter of the reservation, namely, the piece of ground over which the easement was to exist, and, finding it in the condition which I have mentioned, he construed the right of way as limited in its user. Counsel for the plaintiff argued that the user which FARWELL, J., found was wrongful was not the user for omnibuses, but the user for a

E frequent passage of omnibuses. I do not so read the judgment. The case went to the Court of Appeal where the point was not really argued, but LORD HANWORTH, M.R., in referring to it, stated the width of the bus and the narrowness of the roadway as the things which impressed his mind in coming to the same conclusion as that to which the learned judge had come. MAUGHAM, L.J., on the other hand, was prepared to pay more attention to the weight

F of the vehicle. However that may be, this court expressed its approval of the decision to which FARWELL, J., had come.

The present case appears to me to be entirely different. There is no limitation to be extracted from the nature of the land over which the right was granted. The land over which the right was granted was not only laid out or going to be laid out as a 20ft. to 30ft. roadway, but it was to be a road of such a character

G that the local authority in due course would take it over as a public road. It seems to me there is nothing in the nature of the land which makes it in any way inconsistent with the user described in the same sense as the user in *Todrick's* case (1) was inconsistent with the physical condition of the road. Counsel points to the fact that the vendor is under covenant to make complete and maintain the road, but he cannot rely on that as proving his case, because,

H if he says that " maintain the road " means only maintain it in a condition suitable for a road in a private building estate, he is really begging the question. I read the covenant to make up, complete, and maintain the road in the manner described until it shall be taken over as a public road as of importance in deciding whether the unrestricted words as to the right of way are in some way to be cut down. I read that as, if anything, having the opposite effect. They tend to confirm the view that the right of way granted is to be a right of way of the ordinary character which you would find in the case of a road of this size which

is to be taken over by the local authority. Counsel says: "No, you must limit the right of way granted by reference to what must have been in the contemplation of the parties, namely, that this house was only going to be used as a private dwelling-house on an estate containing nothing but private dwelling-houses." It is, however, contemplated that it will eventually be a public roadway, and as a public roadway there will be nothing to prevent heavy traffic going down it. Moreover, as I have pointed out, it cannot have been contemplated that any restrictions would have lasted for ever. That seems to me really to dispose of that point.

I do not think there is any other matter which arises on the argument, but one case to which counsel for the plaintiff referred us is, in my opinion, strongly against him. He very frankly admitted that the highest case in his favour was *Todrick's case* (1) and that he had no other case which helped him more than that case did. The other case to which reference was made was *White v. Grand Hotel, Eastbourne, Ltd.* (2), from which I have already read a passage from the judgment of HAMILTON, L.J. There a private road leading from a certain mews was used by the defendants who had acquired the dominant tenement for the purpose of providing garage accommodation and access for customers to their hotel. At the time when the roadway came into existence the dominant tenement was used as a private house and it was said that the user of this right of way must be limited to the sort of user that was in existence and was contemplated by the parties at the time when the right was created, namely, such user as would be necessary and convenient for the occupier of a private residence. JOYCE, J., rejected that argument and he said, quoting from THEOBALD'S LAW OF LAND, pp. 90, 91, with approval (106 L.T. 788):

"Where there is an express grant of a right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant."

In this court COZENS-HARDY, M.R., said ([1913] 1 Ch. 116):

"It is not a right of way claimed by prescription. It is a right of way claimed under a grant, and, that being so, the only thing that the court has to do is to construe the grant; and unless there is some limitation to be found in the grant, in the nature of the width of the road or something of that kind, full effect must be given to the grant, and we cannot consider the subsequent user as in any way sufficient to cut down the generality of the grant."

FARWELL, L.J., took the same view and so did HAMILTON, L.J. It appears to me that, though the facts of this case are not precisely on all fours with the facts in that case, the principle there laid down is one which is applicable to this case. For these reasons, without going into the facts of this case, I am of opinion that the appeal must be dismissed.

SOMERVELL, L.J.: I agree.

EVERSHED, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Wilkinson, Howlett & Woodhouse* (for the plaintiff); *Hancock & Scott* (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

LANCASTER v. LONDON PASSENGER TRANSPORT BOARD.

[HOUSE OF LORDS (Lord Porter, Lord Uthwatt, Lord du Parcq, Lord Normand and Lord Morton of Henryton), June 30, October 29, 1948.]

Master and Servant—Common employment—Linesman and trolley bus driver.

On Sept. 10, 1945, the appellant, who was employed by the respondents, the London Passenger Transport Board, as a linesman, was working on

the platform of a tower wagon repairing the overhead wires spanning the highway which supplied electric power to the respondents' trolley buses when he was injured through the negligence of the driver of one of the respondents' trolley buses which came into collision with the tower wagon. The tower wagon consisted of a driving motor attached to a skeleton tower which could be swivelled into the position required for the work. When the accident occurred the platform was projecting from the side of the wagon and was struck by the trolley bus which was passing along the road.

HELD (LORD PORTER and LORD DU PARCQ *dissentiente*): the trolley buses and the possible carelessness of their drivers did not constitute a special risk to the appellant, but the risk to which he was exposed by the nature of his employment was a general risk of the highway, and, therefore, he was not in common employment with the driver of the trolley bus and the respondents were liable to him in damages.

Miller v. Glasgow Corporation ([1947] 1 All E.R. 1; [1947] A.C. 368; 176 L.T. 142), *distinguished*.

Glasgow Corporation v. Neilson ([1947] 2 All E.R. 346), *applied*.

Decision of the Court of Appeal ([1947] 2 All E.R. 267; 177 L.T. 207), *reversed*.

[AS TO COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 207-220, Nos. 1697-1824.]

Cases referred to:

- (1) *Graham (or Miller) v. Glasgow Corporation*, [1947] 1 All E.R. 1; [1947] A.C. 368; [1947] L.J.R. 239; 176 L.T. 142; *affirming*, 1946 S.C. 109; 2nd Digest Supp.
- (2) *Glasgow Corporation v. Neilson*, [1947] 2 All E.R. 346; [1948] A.C. 79; [1947] L.J.R. 1416; 111 J.P. 523; 39 B.W.C.C. 122; 2nd Digest Supp.
- (3) *The Petrel*, [1893] P. 320; 62 L.J.P. 92; 70 L.T. 417; 34 Digest 213, 1747.
- (4) *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] 1 All E.R. 637; [1939] A.C. 215; 108 L.J.K.B. 320; 160 L.T. 420; Digest Supp.
- (5) *Bartonshill Coal Co. v. Reid*, (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 34 Digest 126, 971.
- (6) *Metcalf v. London Passenger Transport Board*, [1939] 2 All E.R. 542; 108 L.J.K.B. 733; 160 L.T. 599; 103 J.P. 246; Digest Supp.

APPEAL from a decision of the Court of Appeal (TUCKER, SOMERVELL and EVERSHED, L.J.J.), dated June 30, 1947, reported [1947] 2 All E.R. 267, affirming the decision of HENN COLLINS, J., dated Nov. 6, 1946, and reported [1946] 2 All E.R. 612.

While on a tower wagon, engaged in repairing the overhead gear which supplied current to the respondents' trolley buses, the appellant, who was employed by the respondents as a linesman, was injured through the negligence of the driver of one of the respondents' trolley buses. The Court of Appeal, affirming the decision of HENN COLLINS, J., found that the trolley bus driver was in common employment with the appellant, who, therefore, could not recover against the respondents in respect of his injuries. The House of Lords (LORD PORTER and LORD DU PARCQ *dissenting*) now reversed this decision. The facts appear in the opinion of LORD PORTER.

Russell Vick, K.C., and *Aarvold* for the appellant.

Paull, K.C., and *Armstrong-Jones* for the respondents.

The House took time for consideration.

LORD PORTER: My Lords, this case raises once again the problem which is now becoming obsolete but has exercised the courts on numerous

occasions and has recently been discussed more than once in your Lordships' House, *viz.* :—In what circumstances can two persons be said to be in common employment.

The facts in the present instance are as follows. The appellant was a linesman working in the Overhead Electrical Department (Maintenance) of the respondents and on Sept. 10, 1945, in the course of that employment was engaged in repairing the overhead span wires which pass from a pole on one side of the road to a pole on the other and support the electrified wires which drive the trolley buses. For this purpose he was standing on the elevated platform of a tower wagon which consists of a driving motor attached to a tall skeleton tower on the top of which is a platform which can be swivelled into the position most suitable for doing the work required and when swivelled will extend some distance out beyond the base of the tower. The approximate position of the tower at the material time was somewhere between the two lines of rails in London Road, Isleworth, and at this spot the road is 32ft. 3ins. from pavement to pavement. While in that position the platform was struck by a trolley bus proceeding towards Hammersmith. These trolley buses derive their power from an overhead wire making contact by means of an arm which slopes backwards and can, if necessary, be lowered so as to disconnect it from the wire. The bus itself can then proceed for a short distance on a storage battery, but, even if the arm is not disconnected, the bus can swing some 13ft. to either side of the overhead wire. These wires are placed above a spot in the roadway which at the relevant position is 10ft. 3ins. from the pavement edge so that without disconnecting the arm the trolley bus could have passed safely on the near side of the tower wagon and possibly, but more doubtfully, could have swung round on its far side. The platform was turned so as to overhang the roadway towards the side of the road along which the trolley bus was proceeding. The roof of the bus itself would have cleared the platform, but, rising above the roof, is a turret supporting the driving arm, and the driver failed to steer close enough to his near side in passing the tower wagon with the result that this turret struck the platform and caused the accident. Admittedly this was a negligent piece of driving for which the respondents are liable unless they are excused because the driver of the bus and the appellant were in common employment when the accident took place and it was the driver's negligence which caused the injury to the appellant.

My Lords, the general principle on which it is to be determined whether two persons are in common employment is simple enough, but its application to particular facts is often supremely difficult. That principle has been re-stated with care and clarity in two cases which have lately received consideration in your Lordships' house, *viz.* :—*Miller v. Glasgow Corporation* (1) and *Glasgow Corporation v. Neilson* (2). In the former two tramcars came into collision because when one ran backwards the other could make no lateral movement, and, therefore, was unable to avoid an accident. The driver of one tram and the conductress of the other were held to be in common employment because they were engaged in the task of running the corporation's trams and in so doing were exposed to the special risk of one tram colliding with another, a risk which was not shared with all other users of the highway. The latter was the case of two buses colliding, the running of which was held to expose the drivers and conductors to no special risk from the collision of one bus with the other beyond that to which any vehicle on the road is exposed from collision with any other vehicle.

The principle is, perhaps, most clearly expressed in *Miller's* case (1) when it is said that to establish the defence of common employment the two persons concerned must be not only employed by the same persons but also engaged at the time of the accident in a common work, and common work embraces a case where the work of the one is so related to the work of the other that the risk of injury to the one owing to the carelessness of the other is not shared

by the world at large but is a special risk which must be deemed to have been contemplated as possible when the workman entered into the service. If the risk of collision between the two vehicles is merely the ordinary risk arising from contiguity in traffic of being run into by another vehicle, whoever the driver of that other vehicle may be, then the injured party has no special interest in the skill and care of the driver though that driver works under the same employer. He is taking an ordinary risk of the road, not a risk which is due to the special relationship between himself and a fellow employee. But if the work of the two is such that one of them depends for his safety in a special degree on the skill and care of the other, then they are engaged in a common work and each must be deemed to have undertaken the risk of negligence on the part of the other.

It is said, however, that the principles set out in *Miller's* case (1) must be read in the light of the later case of *Glasgow Corporation v. Neilson* (2) and that the reasoning in that case compels one to come to the conclusion that there is no particular association in the present case between the driver of the trolley bus and the appellant working on the supporting wires, and that the appellant was exposed to no greater risk of injury from a trolley bus than from any other vehicle, or, at any rate, from any other vehicle of sufficient height to strike the platform. No doubt, a reasonably skilful driver of a trolley bus would in the circumstances of this case have avoided striking the tower without difficulty, but the arm of his trolley bus was attached to the driving wire and unless he lowered the arm, which is inconvenient and causes delay, he might well feel that he ought not to go too far from the wires through which he obtains his driving force. The question is not what a skilful driver would do, but whether an ordinary driver would not feel himself more circumscribed in his course than would the driver of a vehicle not dependent for its motion on a flow of electricity from the wires, and, in particular, it is, I think, not unworthy of note that the space through which the trolley bus had to pass was narrowed by the extension of the platform in the direction of the pavement. In my view, the driver of a trolley bus would be more likely to drive near the tower, and, forgetting the height of the turret supporting the arm, to strike it, than would the driver of a non-electrical vehicle of a height sufficient to strike the platform, nor do I think that the construction of trolley buses with their raised turret or the frequency with which they must pass the tower can be altogether neglected. As TUCKER, L.J., said in the Court of Appeal ([1947] 2 All E.R. 268):

“I think that there was a special risk attached to the plaintiff of suffering injury from the stream of trolley vehicles which was passing throughout the day along this defined route, and the mere fact that there might occasionally be other vehicles which would constitute some danger to the plaintiff would not make his risk an ordinary traffic risk.”

I find myself in agreement with this statement and with the decision of the Court of Appeal and for my part would dismiss the appeal.

LORD UTHWATT [read by LORD MORTON OF HENRYTON]: My Lords, there is no dispute as to the facts of the case and I do not propose to re-state them. It is sufficient to draw attention to the general features which emerge from them. To these general features it is permissible to add the knowledge of the man in the street as to traffic conditions in London. The trolley bus system involves, in addition to the use of the overhead wires by a trolley bus, work on the overhead wires at a time when vehicles, including high vehicles, may in the ordinary course of road traffic, pass under or near the wires. The work is carried out on a platform carried by a tower wagon. The platform is at such a height that a high vehicle, but not a low vehicle, might collide with it. Among the high vehicles which may collide with the platform there are to be included trolley buses. The trolley bus is, within the limits of area imposed by its arm, as readily manoeuvrable as any other vehicle. Within

that limit it is just as able as any other vehicle to avoid other traffic and to avoid road obstructions, and, in particular, to avoid a stationary tower wagon. In this case the length of the arm of the trolley bus and the width of the road were such that all the nearside of the road and most of the offside was within the area of free movement open to the trolley bus. The argument for the respondents is that on these facts the appellant and the trolley bus driver were engaged in a common work, that a special risk was involved in the relation between the appellant and the trolley bus driver, and that the risk of collision between the tower wagon and the trolley bus was not an ordinary traffic risk arising from contiguity of traffic.

The test to be applied in determining whether the defence of common employment has been made out has been often formulated and your Lordships in recent years have had more than one occasion to consider the matter. I do not propose to review the authorities or to add to the many formulations of the test. I am content to recall that *The Petrel* (3) was approved in *Radcliffe v. Ribble Motor Services, Ltd.* (4), and to observe that your Lordships' decision in *Glasgow Corporation v. Neilson* (2) was not given until after the present case was decided in the Court of Appeal. The specific question which arises in this case out of the test—the general terms of which are not questioned—is whether there was here a special risk arising out of the relation between the driver and the appellant. In my opinion, the risk to which the appellant was exposed by the nature of his employment was a general risk of the highway and not a special risk arising out of the relation between the driver and the appellant. The work of both the driver and the appellant was being carried out in a public thoroughfare. The risk from the operations of a trolley driver did not, to my mind, differ, either in character or in probability of maturing into an accident, from the risk attaching to the operations of any other driver of a high vehicle in that road. I emphasise that the trolley bus was for all relevant purposes just as manoeuvrable as other vehicles. The demands made by the presence in the road of the tower wagon on the skill of the driver of the trolley bus were no greater than the demands so made on the skill of the drivers of other high vehicles. The driver of a trolley bus was at least as likely—I should think probably more likely—to have in mind the risks incident to the superstructure of his vehicle as the driver of any other high vehicle. In the end one is left merely with the fact that only a high vehicle could cause such an accident as here happened and that the trolley bus is a high vehicle. That is irrelevant, unless, evidence being absent, one is to assume that trolley buses stand in respect of their height in a class apart. That assumption I decline to make. As a man in the street I take the view that equally high vehicles are not so uncommon as to be negligible in making an estimate as to the ordinary risks of the road to which the appellant was exposed. In the light of these considerations there was, to my mind, no relevant special risk.

The noble and learned Lord on the Woolsack has drawn from the circumstances a conclusion different from that which appeals to me, but I do not, I trust, differ from the noble and learned Lord on any question of law or in the method of approach to the solution of the case. I would allow the appeal. Such allowance would entail that, in accordance with the estimate made by HENN COLLINS, J., judgment should be entered for the appellant in the sum of £1,600.

LORD DU PARCQ: My Lords, the doctrine of common employment had long been regarded as troublesome before it received its death blow from the legislature. Your Lordships now have to apply it, perhaps for the last time, and the problem with which it thus posthumously confronts the House is worthy of the reputation which it bore during its life, as is shown by the difference of opinion which unhappily exists in a case where the facts are simple and not in dispute.

A The case is, perhaps, not far from the border line, but, for myself, I am satisfied that the defence of common employment ought to succeed. I will refer to only a few passages which I take from cases which must be regarded as authoritative in this House. Let me take first the words of SIR FRANCIS JEUNE, P., in *The Petrel* (3), which seem to have sowed the seed from which the more recent decisions were developed, with debilitating effects on the vitality of the doctrine. The learned President, whose observations have been approved in your Lordships' House, carefully considered earlier authorities, including *Bartonhill Coal Co. v. Reid* (5), in which it was made clear that it is not necessary, in order to establish that two men working for the same employer are engaged in a common work, to show that they are both engaged in performing similar acts: see *per* LORD CRANWORTH (3 Macq. 295). I will not quote at length the passage in the judgment of the learned President in which he states the principle to be applied. I am content to extract the principle and to apply it to the facts of this case. Following the language which I find in the judgment ([1893] P., 326) I put to myself this question: Can it be said that the safety of a man whose work demands that he should stand on a tower wagon and repair the overhead wires used by trolley buses is in the ordinary and natural course of things dependent on the skill and care of the drivers of the trolley buses?

C My Lords, in my opinion, the answer to this question should be "Yes." The man on the tower wagon is, no doubt, exposed to many risks from the traffic on the highway, but in order to give an affirmative answer to the question it is not necessary to be satisfied that he is immune from the general risks of the road. In *Miller v. Glasgow Corporation* (1), where the driver of one tram-car and the conductress of another were held to be carrying out a common work, and the corporation was held free of liability in respect of injury caused to the conductress by the negligence of the driver, LORD PATRICK, who had tried the action as Lord Ordinary, had said (1946 S.C. 112) that the pursuer was not subject in any greater degree to the risk of her car being in collision with the other:

E " . . . than she was to the risk of it being in collision with one of the countless vehicles in whose vicinity it would be while traversing the streets of Glasgow."

This view was rejected by your Lordships' House, although it is, of course, true that a tram car is by no means immune from the risk of collision with vehicles other than tram cars. The reason for rejecting it was stated by F VISCOUNT SIMON when, speaking of the phrase "common work," he said ([1947] 1 All E.R. 4):

G "The phrase covers the case where the work of one is so related to the work of the other that the risk of injury to the one, due to the carelessness of the other, is not merely fortuitous, but is a special risk involved in the relationship itself, so that that risk must be deemed to have been in contemplation of the injured servant when he entered into his contract of service."

I omit a few lines, not because they are unimportant, but in the interests of brevity. Finally, LORD SIMON contrasted cases in which the risk which a man runs is "a mere risk of the road in the sense that he might equally well be run into by anyone else driving in his vicinity" with those in which "the relation between the work of the two fellow-servants is such that one of them depends for his safety from harm in a special degree on the care and skill of the other," and said that in cases of the latter class the fellow-servants "are engaged in a 'common work' and the term in the contract of employment exonerating the common employer from liability has to be implied."

H My Lords, if the conductress of a tram car depends for her safety from harm in a special degree on the care and skill of drivers of other tram cars (as, even apart from authority, your Lordships will hardly doubt that she does), I can

find no adequate reason for holding that the worker on the tower wagon does not equally depend in a special degree on the care and skill of the drivers of trolley buses, who are taking part with him in the conduct of a single department of the traffic on the roads in circumstances which make it certain that many of them will constantly pass along the road below him, often very close to him, and normally with a rather more limited mobility than other vehicles. If one must imagine the workman, when he enters into his contract of service, applying his mind to the question whether the care and skill of trolley bus drivers is of special importance to him, I think that he could hardly fail to say that it was. It is beside the point to say that a careful driver of a trolley bus need never cause him injury. The question is not what will come of careful driving, but what is likely to happen if there is careless driving, and by reason of their inevitable and frequent proximity and the somewhat restricted field of the normal lateral movement, to which must be added their unusual height, I can only come to the conclusion that trolley buses and the possible carelessness of their drivers constitute a special risk to the worker overhead. Though I should not expect any of your Lordships to greet with enthusiasm the triumph of a now defunct doctrine in what may be its final appearance in your Lordships' House, I am bound to say that, in my opinion, this appeal should be dismissed.

LORD NORMAND : My Lords, the respondents, on whom the onus lay, succeeded in the defence of common employment in the courts below. The facts have already been stated, but I would emphasise that the case arises out of a collision in broad daylight in a busy London street between two vehicles owned by the respondents, and driven by their servants, and that it belongs to the class of common employment cases relating to traffic collisions in public thoroughfares or on the high seas and in public navigable waters. The test, therefore, is whether the injury was suffered in consequence of a negligent act which was one of the general risks of public traffic or of a negligent act which was a risk connected with a relation between the two servants constituted by the work they were performing at the time. Decisions dealing with the defence of common employment where the two servants are employed on private premises give little help towards solving this problem.

I am of opinion that the appellant and the fellow servant whose negligence caused the injury were brought by their employment into a relation which was different from the relation in which the appellant stood to all others in the same street who were not his fellow servants. The appellant was engaged in repairing the overhead wires, and I think it is immaterial that he was working, not on the live wire, but on a cross wire supporting it. The other employee was driving a trolley bus which derived its power from the live wire by contact with it through the runner arm. The work of the two men thus brought them into a relation which involved the appellant in a special risk of a particular kind of negligent act by the trolley bus driver. I do not know whether this example is technically correct, but it illustrates my meaning. If the trolley bus driver by some negligent operation of his controls had caused an electric flash from the live wire and the appellant had been injured in that way, there would, I think, have been a close connection between the negligent act and the relation between the two fellow servants established by the work which each was performing, and the defence of common employment would have succeeded. But the connection between the negligent act and the relation established between the fellow workmen may vary from a clear case like that to one where the connection is so remote as to be negligible. The question is one of degree. Here the issue is whether there was any substantial connection between the negligent act which brought about a road collision and the relation established by the work being done by the appellant and by the negligent driver. The work each was doing involved that the appellant would be in proximity to other

vehicles including trolley buses on the same side of the street, but proximity is not enough and I respectfully agree with TUCKER, L.J. (quoting from the judgment of LORD SIMON in *Miller v. Glasgow Corporation* (1) ([1947] 1 All E.R. 4)) that :

“ If the risk of collision between them is merely the ordinary risk arising from contiguity in traffic, *i.e.*, the risk of being run into by another vehicle, whoever is its driver, then the injured party has no special interest in the skill and caution of a driver who is his fellow servant.”

The projection over the street at a height of 11ft. 8ins. of the tower wagon's platform on which the appellant was standing and the corresponding height of the trolley bus which made the collision with the platform possible do not add anything. The peculiar structure of the tower wagon involved risk of collision with any other high vehicle passing in the street, the driver of which was careless, but that was an ordinary traffic risk, for vehicles of the necessary height are not so uncommon as to be outside the category of ordinary traffic. It was, however, not the roof of the trolley bus that struck the tower wagon platform. It was not high enough to do so, but on the roof and occupying a comparatively small space near the centre of it, there is a structure from which springs the runner arm that makes contact with the live wire. This structure is called the trolley base platform and it was it that struck the tower wagon platform. It is, therefore, necessary to consider the suggestion that the driver of a trolley bus would be more prone to leave out of account the height of the trolley base platform than the driver of (*e.g.*) a high motor van would be to leave out of account the height of the van's roof, the forward part of which might be within the range of his vision. There is no finding of fact to support the suggestion and it is not even mentioned in the judgments of the courts below. I can only deal with it as a matter of impression and my impression is against the respondents. I think that a trolley bus driver has more practical concern with the height, not so much of the trolley base platform as of the runner arm which rises above it, than the driver of a motor van has with the height of its roof, and he would be less likely than the van driver to take a risk in passing under the tower wagon platform. I think that it should be expected that he would have in mind the runner arm and the damage which it might suffer by the slightest contact with the other vehicle, and that no special risk of negligence by the trolley bus driver has been established.

To my mind, the power of manoeuvre possessed by the driver of the trolley bus is crucial. If he had been unable to steer so as to avoid the tower wagon where it stood in the middle of the street while the appellant was working at the overhead wires the case would have been indistinguishable from *Miller v. Glasgow Corporation* (1), in which a collision between two tramway cars was brought about by the negligence of the driver of one of them and caused injury to a fellow servant, the conductress of the other, but the trolley bus in this case could have been steered clear of the tower wagon without any difficulty, for, without dipping its runner arm and breaking contact with the live wire, it could have gone close to the near kerb leaving ample room between its other side and the tower wagon at all levels. There would have been nothing exceptional in steering close to the kerb. A trolley bus must do that many times on every journey that it takes, and the advantage claimed for the trolley bus over the tram car lies precisely in this power of manoeuvre. The driver was, therefore, in no greater difficulty than the driver of any other high vehicle would have been and I am unable to distinguish this case from *Glasgow Corporation v. Neilson* (2). In that case LORD SIMON reserved his opinion on the application of the defence of common employment to a collision between two buses drawing up one behind the other at an appointed stopping place. Counsel for the respondent sought to liken the case which LORD SIMON had in view to the present case. I see no resemblance. There is, on the other hand, a

close resemblance between the present case and one where a bus standing at a stopping place appointed for it is negligently run into by another bus on its way along the road and not destined for that stopping place, and it is a resemblance which brings out more clearly that the appellant's injury was caused by a general traffic risk and that the negligent act was independent of and not connected with any special relation constituted by the employment of the appellant and of the trolley bus driver.

The judgment of HENN COLLINS, J., seems to me to have gone astray, if I may respectfully say so, in testing the application of the defence by asking whether it would have applied if the street in which the accident occurred had been confined to the use of the respondent's trolley buses. By using that test the real problem is avoided. In the judgments of the Court of Appeal attention was concentrated on the question whether there was a special relation between the two servants arising out of their work, but the connection between that relation and the collision was not, it appears to me, sharply raised as an issue for decision. It might have been otherwise if the appeal in *Neilson's* case (2) had been decided in time to be cited to the court. The decision in the Court of Session, which was affirmed by this House, was not cited. I would allow the appeal and award to the appellant the sum of £1,600 at which HENN COLLINS, J., assessed the damages.

LORD MORTON OF HENRYTON : My Lords, the only question arising on this appeal is whether the defence of common employment enables the respondent Board to defeat the appellant's claim for damages—in other words, whether at the time of the accident the appellant was in “common employment” with the driver of the trolley omnibus whose negligence was the cause of the accident.

In the very recent case of *Glasgow Corporation v. Neilson* (2) this House had to consider whether the appellant corporation could make good the defence of common employment. The facts, as stated by LORD SIMON ([1947] 2 All E.R. 347) were as follows :

“The respondent was employed by the appellant corporation as a bus-conductress, and on Dec. 7, 1944, was on duty in such employment on a motor-bus engaged on service No. 19. At about 11.40 a.m. this bus was run into from behind by another of the corporation's motor-buses, which was being driven by a servant of the corporation named Pantrini. This bus was engaged on service No. 2. A substantial portion of the routes followed in these two services is common to both. The accident occurred while both buses were travelling westwards along Great Western Road, Glasgow, which is one of the main arteries of the city for traffic of all sorts. The time-tables of the two services show that the buses operating thereon run at frequent intervals, and it must often happen that such buses travel in close proximity to each other, though, if the prescribed timing could always be strictly observed, there would be a larger space between successive vehicles than there was in this instance. The cause of the collision was that the leading bus had to apply its brakes to avoid a pedestrian, and that the following bus, which happened to be close behind, skidded into the former on the ice-bound road, thus injuring the respondent. The respondent brought her action against both Pantrini and the corporation, alleging that Pantrini had caused her injuries by driving negligently and that the corporation were answerable as his employer. Pantrini put in no defence, and the corporation admitted that the collision and consequent damage were caused by the negligence of Pantrini, but they went on to plead that Pantrini and the respondent were fellow-employees engaged in a common work, and that, consequently,

the corporation were not liable to the respondent. This defence raised the sole issue in the appeal."

A This House was unanimous in thinking that the defence of common employment could not succeed. That case was the last of a series of four cases dealing with collisions on the highway between vehicles, in each of which the injured person and the driver who was responsible for his injuries were in the service of the same employer. The preceding three cases were *Radcliffe v. Ribble Motor Services, Ltd.* (4), *Metcalfe v. London Passenger Transport Board* (6), and *Miller v. Glasgow Corporation* (1). *Radcliffe's* case (4) and *Miller's* case (1) were decisions of this House, and *Metcalfe's* case (6), a decision of the Court of Appeal, was referred to with apparent approval in *Miller's* case (1) by LORD SIMON, with whose speech LORDS THANKERTON, SIMONDS, and DU PARCQ
B concurred.

In my view, these three cases, considered in conjunction with *Neilson's* case (2), show that it is extremely difficult for the defence of common employment to succeed when the injured person, or the vehicle carrying the injured person, is, at the time of the accident, on the open highway, exposed to the risk of being run into by any other vehicle using the highway. In the first
C two cases it was held that the defence of common employment failed. In *Miller's* case (1) that defence succeeded, but it is important to note how the last-mentioned case was distinguished when this House came to consider the later case of *Neilson* (2). In *Neilson's* case (2) LORD SIMON observed ([1947] 2 All E.R. 348):

D "In *Miller's* case (1) the collision occurred between two of the corporation's tram-cars engaged in the same service and following the same uphill route on the same pair of rails. The significant circumstance was that, if danger of collision between them arose, neither car could avoid it by lateral movement, for each car could move only along the same fixed grooves. It was this circumstance which led the House to take the view, affirming the
E Court of Session, that the risk of collision was not merely the ordinary risk arising from contiguity in traffic of two vehicles, but that the injured party serving on one car had a special interest in the skill and caution of the driver of the other car who was his fellow-servant."

My Lords, I do not think that the present case is an easy one, and I have, of course, considered with great care the views expressed by my noble and learned
F friends LORDS PORTER and DU PARCQ, and (before the decision in *Neilson's* case (2)) by the Court of Appeal and HENN COLLINS, J. In the end, however, I have come to the conclusion that this appeal should be allowed, for reasons which I can state quite shortly and simply. It has been said, more than once, in this House, that every case in this branch of the law depends on its own facts, but I do not think that there is any satisfactory ground on which the present
G case can be distinguished from *Neilson's* case (2). The two cases are not, of course, identical in their facts, but in each case there was a collision between two vehicles on the open highway, and in each case the vehicle on which the injured person was standing was exposed to the risk of being run into by any other vehicle using a busy road. It is true that only vehicles of a certain height could actually strike the extended platform on which the appellant was standing,
H but I see no reason why the accident might not have been caused by some lower vehicle dashing into the vehicle carrying this extended platform and thereby causing the appellant to fall. Finally, I attach great importance to No. 6 of the facts agreed between the parties: "The extent of the area of mobility of the trolley bus is at least 13ft. either way." Thus, in the present case, as in *Neilson's* case (2), the drivers of all vehicles on the road, including the drivers of the respondent Board's trolley omnibuses, were quite free to pass the vehicle on which the injured person was standing, without touching it.

This fact, as it seems to me, distinguishes the present case from *Miller's* case (1), in which "each car could move only along the same fixed grooves," and renders it indistinguishable from *Neilson's* case (2). For these reasons I would allow this appeal and direct that judgment in the action be entered for the appellant for £1,600 damages and costs.

Appeal allowed.

Solicitors: *William Gorringe & Co.* (for the appellant); *A. H. Grainger* (for the respondents).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

Reversed in part. C.A. [1949] 1 All E.R. 997.

VICTORIA LAUNDRY (WINDSOR), LTD. v. NEWMAN INDUSTRIES, LTD. (COULSON & CO., LTD., Third Party).

[KING'S BENCH DIVISION (Streetfeild, J.), October 13, 14 and 15, 1948.]

Contract—Breach—Default of sub-contractor—Liability of contractor—Contract by defendant to deliver plant to plaintiff—Contract between defendant and sub-contractor to dismantle plant—Delay in delivery to plaintiff through fault of sub-contractor.

Damages—Remoteness of damage—Loss of profit—No notice to defendant of special circumstances—Purchase of boiler for use in business—Need to extend business—Seller ignorant of need—Delay in delivery.

A company, who were not manufacturers of boilers and had no special knowledge of them, undertook to sell a second-hand boiler to a company of launderers and dyers for use in their business. They did not know that the boiler was required to extend the business. The boiler was damaged while being dismantled by the third parties, sub-contractors employed by the sellers to load it on to the purchasers' transport, and considerable delay in delivery resulted:

HELD: (i) as the sellers had contracted to load the boiler, they were liable for breach of contract to the purchasers, although the delay arose from the default of the sub-contractors.

(ii) the boiler being part of an entire plant and the sellers being unaware of the purpose for which it was required (beyond use in the business), damages could not include loss of profit through delay in delivery, since such loss was not in the contemplation of both parties as the probable result of the breach.

The second rule in Hadley v. Baxendale ((1854), 9 Exch. 341), *applied*.

[AS TO DAMAGES BEING IN THE CONTEMPLATION OF BOTH PARTIES AT THE TIME OF THE CONTRACT, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 97-102; and FOR CASES, see DIGEST, Vol. 17, pp. 93, 112, Nos. 101, 230.]

Cases referred to:

- (1) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J. Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 17 Digest 93, 101.
- (2) *Portman v. Middleton*, (1858), 4 C.B.N.S. 322; 27 L.J.C.P. 231; *sub nom.*, *Portman v. Nichol*, 31 L.T.O.S. 152; 17 Digest 112, 230.
- (3) *Simpson v. London & North Western Railway Co.*, (1876), 1 Q.B.D. 274; 45 L.J.Q.B. 182; 33 L.T. 805; 24 W.R. 294; 8 Digest 140, 921.

ACTION for damages for negligence and breach of contract.

The plaintiffs were a company of launderers and dyers who required a boiler for use in their business. They contracted to purchase a second-hand boiler from the defendants who employed the third party to dismantle and load the boiler on to the plaintiffs' transport sent to collect it. In the course of dismantling the boiler was damaged, and considerable delay resulted in delivery. The court held that the defendants were liable for damages for breach of

contract notwithstanding that the delay arose from the default of the third party, a sub-contractor employed to carry out the dismantling. The plaintiffs claimed to include as damages the loss of profits resulting from the enforced delay in extending their business for which the boiler was required, the ground for this claim being that the contract with the defendants was made on the basis that the boiler was required for use in the plaintiffs' business. The court held that these damages were too remote.

Beney, K.C., and Morle, K.C., for the plaintiffs.

Paull, K.C., and A. J. Hodgson for the defendants.

Sir Valentine Holmes, K.C., and Caplan for the third party.

STREATFEILD, J. : Counsel for the defendants submits that on the pleadings, on the admissions made in this court, and on the evidence the plaintiff company could not recover damages for loss of profits. He does not submit that damages under two other heads are irrecoverable, but counsel for the third party, as he is entitled to do, steps into the shoes which counsel for the defendants vacates for this purpose, and submits that the plaintiffs are not entitled to any damages at all. In my opinion, the submission of counsel for the defendants must prevail, though I do not accede to the other submission made by counsel for the third party.

The action is for damages for breach of contract for the supply of a boiler for use by the plaintiffs in their Victoria Laundry, at Windsor, and it is important to consider, first, the circumstances in which the contract was entered into and the circumstances in which the laundry found themselves just before it was concluded. They wished to extend their activities. They desired, not only to increase the laundry part of their business, but also, in particular, to extend the dyeing portion of it which is the more profitable. They anticipated being able to obtain contracts from the Ministry of Supply and they were in process of installing additional and larger vats to enable them to cope with additional work. They required a larger boiler than the one which was then actually in use, and, seeing the advertisement of the defendants in a newspaper, they wrote, on Jan. 17, 1946, for particulars of the boilers which were advertised for sale. It has been pointed out that not only did they ask for particulars of the boilers, but they also asked whether the defendants were in a position to undertake the carriage and re-erection of those boilers. The evidence does not show that the defendants are manufacturers of boilers, or have any particular knowledge of boilers, or are experts in boilers or experts in carrying out a laundryman's or dyer's business. They were merely a company who happened to have two second-hand boilers for disposal at Harpenden, and when they were asked for particulars, they wrote a letter which sets out with great particularity a description of the boilers and their capacity, and a price of £2,200 each. That price was to include the service for loading free on transport at Harpenden. In a letter of Jan. 31, 1946, the defendants quote the price of "£2,150 loaded on to your transport at Harpenden" as being the minimum price they were prepared to accept. On Feb. 16 there came into existence a report by the insurance company on the boiler, saying that it was suffering from no defects. On Feb. 20, the defendants enclosed their official acknowledgment of the order and asked for payment of 50 per cent. of the purchase price. On April 26, 1946, is the first intimation that the plaintiffs make of any particular urgency in the matter. They enclose their cheque for 50 per cent. of the purchase price and they continue: "We are most anxious that this be put into use in the shortest possible space of time and we shall be pleased if you can arrange to have it dismantled and ready for our transport by Friday, May 3." Later the plaintiff company sent another letter to the effect that the boiler was very urgently required.

It seems to me that by that time the contract was complete in the sense that the one party had agreed to buy and the other had agreed to sell this boiler free on transport at Harpenden. Indeed, it had been paid for, although it

had not been placed on the transport. In due course the intimation was received that the boiler was ready to place upon the transport, and on June 5 a representative of the plaintiff company went to Harpenden. There he found that an untimely accident had taken place. The defendants, in pursuance of their obligation under the contract, had specially contracted with the third party to dismantle and load the boiler on the transport, but in some way with which I am not concerned the boiler was overturned and damage was done to it, with the result that the defendants were not in a position to carry out their contract to load on the transport that which they had contracted to sell, namely, a sound boiler. In that they were in breach of their contract. Thereafter there was an unconscionable delay over many weeks, with the final result that it was not until November that the boiler was repaired and was once more ready to be put on the transport. This was done by the third party, this time without mishap, and it is in respect of those facts that this claim for damages, in particular, for loss of profits, arises.

It is admitted on behalf of the defendants that the defendants knew that the plaintiffs were launderers and dyers, that they were carrying on a business as such at Windsor, that they required the boiler for use in their business, and that the contract was made on that basis. The defendants knew nothing more than those facts. They knew that the plaintiffs required this boiler for use in some way in their business—how, they were not told. In what way it was to be installed and what its function was to be, was never imparted to them. At the very highest, the only information that was ever given to them was after the actual formation of the contract, when they were told that it was urgently required. They were, moreover, in my view, people who had contracted to supply what was obviously only a part of an entire plant. It was not in itself a whole plant, which was capable by itself of being a profit-earning machine. I think that confusion has arisen through regarding the boiler as being in itself a profit-earning machine. I do not think it was. In those circumstances they were providing a part of a machine, the function of which they did not know, except that it was to be used in some way in connection with the laundry and dyers' business. In fact, it was to be used for the purpose of extending that business. That meant that new parts for the dyeing part of the business had to be supplied, and that either had been done, or was going to be done, but the defendants knew nothing about that. They knew nothing more than the bare fact that they were required to supply this part of a profit-earning plant. In those circumstances I have come to the conclusion that this case falls within the second, rather than the first, rule, of *Hadley v. Baxendale* (1). Damages under that rule are recoverable in two circumstances, and I think it is right that, for greater accuracy, I should refer to the words in *Hadley v. Baxendale* (1) which indicate the rule with which I am concerned.

ALDERSON, B., in that case stated the rule in this way (9 Exch. 354):

"Now we think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be"—[and I am inserting the word "either," which I understand appears in the LAW JOURNAL REPORTS, and, indeed, I think it is quite obvious that that word ought to be inserted]—"such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach."

He continues:

"if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to

A both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case ; and of this advantage it would be very unjust to deprive them."

B That is the general principle and I think that the principle running through the cases is that, if there is nothing unusual, if it is a normal user of the plant in question, it may well be that the parties must be taken to contemplate that a loss of profits may result from the non-delivery, or the delay in delivery, of the particular article. On the other hand, if there are—as I think there are here—special circumstances, I do not think that the defendants are liable for loss of profits unless the special circumstances were brought to their notice. In looking at the cases, I think there is a distinction between the supply of a part of the profit-making machine, as against the profit-making machine itself, and I do not think that it is necessary for me to review the cases which have been quoted.

D I think that one of them, however, is of assistance, because it illustrates the distinction between a part of the machine and the entire machine. That case is *Portman v. Middleton* (2). There was a contract for the repairing of a threshing machine before the harvest, and the repairer sub-contracted for the supply of a new firebox which was to be made within a fortnight, but he did not inform the supplier of the firebox of his own contract to put it into the threshing machine so as to have it ready before the harvest. It was held that, in the absence of knowledge that it was required for that purpose, the supplier of the firebox was not liable to pay to the repairer of the threshing machine the loss of profit which he had had to pay to the owner, and which he himself was liable to pay because he had entered into a contract for delivery of the entire machine by a specific time. That case shows that the supplier of part of the machine, namely, the firebox, was in a different position from the person who was repairing the whole machine. Another case to which my attention has been drawn is *Simpson v. London & North Western Railway Co.* (3). In that case, COCKBURN, C.J., used these words (1 Q.B.D. 277) :

G "The law, as it is to be found in the reported cases, has fluctuated ; but the principle is now settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object."

H It is to be observed that, not only must the circumstances be known to the supplier or the carrier, but they must be such that the object must be taken to have been within the contemplation of both parties. I do not think that on the facts it can be said that it was within the contemplation of the suppliers that any delay in the delivery of this boiler was going to lead necessarily to loss of profits. There was nothing that I know of in the evidence to indicate how the boiler was to be used or whether delivery of it by a particular day would necessarily be vital to the earning of profits. I agree that it was no part of the contract and cannot be taken to have been the basis of the contract

that the laundry would be unable to work if there was a delay in the delivery of the boiler, or that the laundry was extending its business or had any special contracts which could be fulfilled only by getting delivery of this boiler.

In my view, therefore, this case falls within the second rule of *Hadley v. Baxendale* (1) under which the defendants would not be liable for the payment of damages for loss of profits unless there were evidence before the court—which there is not—that the special purpose of this boiler was drawn to their attention and that they contracted on the basis that delay in the delivery would make them liable to payment of loss of profits. However much one may sympathise with the plaintiffs, they having been deprived for a time of the use of this boiler, I do not think that they are entitled to claim any damages on the basis of loss of profits.

That leads me to the submission made by counsel for the third party. First, he says that a sum of £12 10s. paid to a transport contractor in respect of his journey in June is not recoverable because there is no evidence that it has been paid. I think it is clear that that £12 10s. was paid and is an item of damage which is recoverable by the plaintiffs against the defendants. With regard to a figure of £50, which is the sum of damages claimed for the extra costs of erection of this plant in November as compared with what it would have cost had the boiler been delivered in June, it seems to me that £50 is a very moderate figure for the extra charges incurred and that the plaintiffs are entitled to claim that figure. Counsel submits that there is no liability for either of these items, because the contract itself does not specify delivery at any specific time, and, therefore, the matter must fall to be decided on the ordinary principle that delivery is to be “in a reasonable time.” Further, he says that it must be shown that the failure to deliver was by reason of the default of the defendants, and he submits that the actual default, if it was a default—and as to that he makes no admission, was that of a reputable contractor who was employed to carry out the work of dismantling and on-loading this boiler. I do not consider, however, that that argument ought to prevail. In my view, it was part of the contract itself that the boiler should be loaded on to the lorry by the defendants free of charge, and, if they cared to delegate that duty to a contractor and if he failed, for whatever reason, to effect that object of loading on to the transport, that becomes their breach of contract although it was done by the hand of a contractor employed by them.

Judgment for the plaintiffs in the action and for the defendants on the issue of damages : plaintiffs' costs in the action ; defendants' costs on the issue of damages.

Solicitors : *Kenneth Brown, Baker, Baker* (for the plaintiffs) ; *Braikenridge & Edwards*, agents for *Veale & Co.*, Bristol (for the defendants) ; *J. G. Bosman Robinson & Co.* (for the third party).

° [Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

PHILLIPS v. DALZIEL.

[KING'S BENCH DIVISION (Humphreys, Lynskey and Byrne, JJ.), October 22, 1948.]

Emergency Legislation—Price control—Footwear—Price in excess of controlled price—Price marked on box containing footwear constituting offer for sale at that price—Goods and Services (Price Control) Act, 1941 (c. 31), s. 1, s. 20 (4) (a)—General Footwear (Maximum Prices and Charges) Order, 1946 (S.R. & O., 1946, No. 1413) (as amended), arts. 1, 5.

The appellant was convicted by justices of offering for sale a pair of shoes at a price exceeding the maximum price, contrary to the Goods and Services (Price Control) Act, 1941, s. 1, and an Order made thereunder. The shoes in question were in a box on which the price of the contents was marked.

HELD : the price on the box constituted a notification by the appellant that he proposed to sell to anyone who chose to give him the amount of money stated the contents of that particular box, and there was, therefore, an offer for sale.

Wiles v. Maddison ([1943] 1 All E.R. 315 ; 168 L.T. 280), *distinguished*.

[FOR THE GOODS AND SERVICES (PRICE CONTROL) ACT, 1941, see HALSBURY'S STATUTES, Vol. 34, p. 301.]

Case referred to :

(1) *Wiles v. Maddison*, [1943] 1 All E.R. 315 ; 168 L.T. 280 ; 107 J.P. 83 ; 2nd Digest Supp.

CASE STATED by Winchester justices.

The facts appear in the judgment. The appeal was dismissed.

J. T. Molony for appellant.

H. L. Parker for the respondent.

HUMPHREYS, J. : This is a Case stated by Winchester justices as the result of a proceeding which took place before them when the appellant, the proprietor of a shoe shop, was summoned for the offence that he did unlawfully, in the course of business of a retailer, offer for sale a pair of men's shoes at a price which exceeded the maximum price, contrary to certain articles of the General Footwear (Maximum Prices and Charges) Order, 1946, and contrary to s. 1 of the Goods and Services (Price Control) Act, 1941, under which those Orders are made.

By s. 1 of the Act it is provided that :

"The Board of Trade may by Order fix the maximum price to be charged, in the course of a business of any class specified in the Order, for goods of any description so specified."

The Act itself is described as :

"An Act to make further provision to prevent excessive prices being charged for goods and excessive charges being made for performing services in relation to goods (including hiring and subjecting to a process), to amend the Prices of Goods Act, 1939, and for purposes connected with the matters aforesaid."

The facts are simple. The appellant carried on business as a retailer of footwear at High Street, Winchester, the shop being of the ordinary, well-known type of boot shop. The footwear in stock was kept in cardboard boxes of uniform shape and size, stacked on shelves against the wall. Some of those cardboard boxes were empty, but at least seven of them on the material day were filled with shoes of different sorts, men's, women's and children's, which come under the terms of the Order. It is stated by the justices as a fact that in the ordinary way no customer would handle or inspect any of those boxes, but the prices thereon were marked in plain, ordinary numerals, not in any cypher, and the boxes with the prices marked thereon could be seen by anyone looking at the shelves. An inspector went into the shop, proceeded to the shelves and took out a number of boxes at random. On each box there was the price of the contents marked. On opening the boxes and looking at the contents, the inspector found that in each case the price marked was in excess of the price which could lawfully be charged for those contents. The justices further found that "the prices marked on the said boxes were the prices at which the appellant proposed to sell the footwear contained therein," the offence charged being the offence of offering for sale those articles at too high a price.

The point made on behalf of the shopkeeper was that there was no "offer to sell" within the meaning of s. 1 (1) of the Act of 1941. It may well be that, if we were looking to the ordinary interpretation of the word "offer" in a contract case, here there would be no offer to sell any of those goods at a particular

price, and reference has been made to *Wiles v. Maddison* (1) in which this court made some observations to that effect, observations which would be of great importance, and, indeed, might even form a precedent which would be binding on us, if the statute which was being dealt with in that case were similar to the statute with which we have to deal in this case, but it is not, for this all-important reason, that the Act of Parliament with which we are now dealing has something like a definition of the word "offer" which was absent from the statute under consideration in *Wiles v. Maddison* (1).

It is not necessary to say any more about that authority. Any court which is asked to consider whether a person has committed an offence contrary to s. 1 of this Act is bound to consider s. 20, which provides :

"In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say . . . (4) In this Act and the principal Act, references to an offer to sell goods include references to a notification by a person (a) of the price proposed by him for a sale of goods . . ."

Can it be said here that there is any doubt that there was a price proposed by the shopkeeper for the sale of the contents of any particular box which was taken ? There was the box, which professed to contain shoes for sale, and it is conceded by counsel for the appellant that, if the shoes had been taken out of the boxes and put in the window, there would have been an offer to sell those shoes to anybody who liked to come in, assuming that each pair of shoes had a price attached to it, but he says the fact that there was a price on the boxes does not carry the respondent the length of being able to say that there was an offer to sell this particular pair of shoes at the price which is marked on the box.

To continue reading s. 20 (4), instances are given in which the legislature has almost gone out of its way to make as wide as possible the meaning to be attached to the expression "offer"—"price proposed by him for a sale of goods," "whether made by the publication of a price list," and "by exposing the goods for sale in association with a mark indicating price, by the furnishing of a quotation or otherwise howsoever," so that, if the goods are exposed for sale, it is not necessary that there should be on them a price which can be decyphered by an ordinary member of the public. That is language about as wide as it is possible to conceive.

In my opinion, there was evidence here on which the justices could say that there was an offer for sale, because it is plain that an offer for this purpose includes a notification by the appellant that he proposes to sell to anyone who chooses to give him in return the amount of money stated that particular parcel of goods, the contents of that particular box. I can see no reason for cutting down the terms of the very salutary provision which is inserted in the Act of Parliament by way of definition for the purpose of preventing, if possible, the sale of necessary articles at an unreasonable price, and the legislature has decided what would be an improper and unreasonable price. I think, therefore, this appeal should be dismissed.

LYNSKEY, J. : I agree.

BYRNE, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Cunliffe & Airy*, agents for *Shenton, Pain & Brown*, Winchester (for the appellant) ; *Solicitor, Board of Trade* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

FOX v. HUNTER-PATERSON.

[KING'S BENCH DIVISION (Birkett, J.), October 20, 1948.]

Landlord and Tenant—Notice to quit—Tenancy at will.

On Mar. 13, 1948, H.B., a brother of the defendant, arranged with the plaintiff's agents to rent a flat on a 14 years' lease at an exclusive rent of £290, it being agreed that a premium of £800 should be paid on the flat being taken over. A deposit of £80 was paid by H.B., who requested that the defendant might be allowed to take possession on Mar. 17, 1948. The defendant took possession on that date, but, although the required references were in due course taken up and were all satisfactory, no formal lease was ever executed, the defendant being in possession as a tenant at will. On May 20, 1948, the plaintiff's solicitors wrote to the defendant's solicitors as follows: "Dear Sirs, *Re 15 G. Gardens. Proposed lease to Mrs. H.-P.* Failing your client's settling this matter satisfactorily this week, we have instructions to take proceedings against her for possession and damages."

HELD: the letter was an unambiguous and valid determination of the tenancy at will.

Doe d. Price v. Price, (1832) (9 Bing. 356), *applied*.

[AS TO DETERMINATION OF TENANCY AT WILL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 120, 121, paras. 131, 132; and FOR CASES, see DIGEST, Vol. 31, pp. 41-45, Nos. 1866-1923.]

Case referred to:

(1) *Doe d. Price v. Price*, (1832), 9 Bing. 356; 2 Moo. & S. 464; 31 Digest 43, 1889.

ACTION for possession.

The plaintiff, Mrs. Dorothy Cunliffe Fox, claimed from the defendant, Mrs. Hunter-Paterson, possession of a flat known as 15, Gledhow Gardens, London, which the defendant occupied in the capacity of tenant at will. Judgment was given for the plaintiff. The facts appear in the headnote.

Charles Lawson for the landlord.

Colin Duncan for the tenant.

BIRKETT, J.: It being conceded that the position of the defendant here was that of a tenant at will, the only question before me is whether it has been properly and legally determined? Counsel for the landlord suggested that it had, in fact, been terminated lawfully and properly in two ways—first by the letter of May 20, 1948, written by Messrs. Hall, Bryden & Co., to Messrs. Dod, Longstaffe & Co., the solicitors who were acting for the defendant:

"Dear Sirs, *Re 15, Gledhow Gardens. Proposed lease to Mrs. Hunter-Paterson.* Failing your client's settling this matter satisfactorily this week, we have instructions to take proceedings against her for possession and damages."

Further, counsel says, additionally or alternatively, the issue of the writ itself in this action, the service of which was accepted on June 17, was in itself an unequivocal and unambiguous termination of the tenancy at will. To those matters counsel for the tenant answers that the letter of May 20 is not a proper and legal determination in as much as it is too vague in its terms to determine even a tenancy at will. The essential condition of any such determination, it is said, is that it must be unambiguous, and this letter, which states: "Failing your client's settling this matter satisfactorily this week," imports an ambiguous term in the sense that something might be done, although, in fact, it was not done. The wording of the letter, therefore, is said not to conform with the precise and unambiguous language which a notice requires.

Counsel for the landlord has drawn my attention to *Doe d. Price v. Price* (1), which is over 100 years old, but where the same kind of controversy as that

which we have heard today was indulged. The letter in that case which came up for the determination of the court was this :

"Mr. Thomas Price cannot have given you a correct statement of the transaction between him and his brother. Mr. Robert Price has a conveyance of the property mentioned in your letter, as well as the original title deeds ; but he will be very happy to convey back the property, and deliver up the title deeds, if his brother will pay him what he owes him ; unless, however, he does that, Mr. Robert Price will not only not deliver up the title deeds, but, as his brother has threatened hostilities, he will without delay take measures for recovering possession of the property. The money due to Mr. Robert Price you will find to amount to a great deal more than the value of the property conveyed to him."

On that, at the trial at Gloucester Assizes, the learned judge found for the plaintiff, with leave for the defendant to move to enter a nonsuit instead if the court should be of opinion that there had been no sufficient demand of possession. Accordingly, a rule *nisi* was obtained and TINDAL, C.J. ((1832), 9 Bing. 357) said :

"Upon the facts reported in this action it appears that Thomas Price, the defendant, had conveyed the land in question to his brother Robert Price, the lessor of the plaintiff, 17 years ago. There was some dispute whether Robert Price had or had not paid a consideration for the property ; the one asserting and the other denying that a debt was due from Thomas to Robert Price, to the amount of the value of the land. Thomas Price after an absence of some length, was let into possession by his brother about 15 years ago, upon what terms does not appear, but he continued in possession till the present time and cropped the land. It cannot be contended, therefore, that he had a less interest than a tenancy at will ; because, after an occupation of such length, it would be hard, if, on the determination of the tenancy, he were not entitled to the emblements, which a tenant at will may always claim. The question therefore, is, whether the letter of Robert Price's agent was sufficient to determine the holding at will ; and I am of opinion that it was, because anything which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will. Now it is impossible to read this letter without seeing that it is an answer to some former letter, and that the correspondence was passing between two attorneys clothed with the character of agents. It equally appears that Thomas Price had made claim to the title deeds, a claim inconsistent with any interest other than that of landlord. That alone would be a disclaimer. But, besides that, there is a sufficient manifestation that the tenancy, if any, was to determine—'Unless Mr. Thomas Price pays what he owes, Mr. Robert Price will not only not deliver up the title deeds, but will, without delay, take measures for recovering possession of the property.' The intimation that the lessor of the plaintiff would without delay take measures, unless a certain demand were complied with, throws it on the other party to act. Upon the ground, therefore, that the defendant has made a disclaimer, and that the offer not accepted was a sufficient indication of an intention to eject, I am of opinion that the defendant's tenancy at will was determined, and that this rule must be discharged."

The other two learned judges, GASELEE, J., and BOSANQUET, J., concurred.

That really covers this case. This is a letter written from the agent of the landlord to the agent of the tenant, and it follows on previous letters in which the landlord's solicitors were complaining to the tenant of the delay and of the necessity for immediate settlement. The letter of May 20 is the climax of those

delays, and begins: "Failing your client's settling this matter satisfactorily this week, we have instructions to take proceedings against her for possession and damages." Counsel for the tenant suggested that the statement in *Doe d. Price v. Price* (1), which amounted to the threat, "Unless you pay me what you owe me I shall take immediate measures to recover possession," could be distinguished, but I do not feel that it can. If the letter of May 20 be ambiguous, surely the wording of the attorney's letter of 100 years ago has the same quality of ambiguity. With great respect to the argument of counsel, I fail to see the distinction between the two matters, and I hold that this letter of May 20 is an unambiguous determination of the tenancy at will. I think it left no room for doubt, and I hold that it was a sufficient and proper determination of the tenancy. The other point regarding the writ, therefore, becomes academic, and I need not discuss it further. I hold that there must be judgment here for the landlord.

Judgment for the landlord.

Solicitors: *Hall, Brydon, Harvey & Egerton* (for the landlord); *Capel Cure, Glynn Barton & Co.* (for the tenant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. PWLLHELI JUSTICES. *Ex parte* SOANE AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Byrne, JJ.), October 19, 20, 1948.]

Justices—Fishery board—Chairman of justices member of fishery board instituting proceedings—Qualification to hear case—No part taken in proceedings of board—Salmon and Freshwater Fisheries Act, 1923 (c. 16), s. 8 (1), s. 76.

The chairman of justices was a member of a fishery board which had instituted proceedings against the applicants under s. 8 (1) of the Salmon and Freshwater Fisheries Act, 1923, in respect of the pollution of a river. The chairman took no part in the proceedings of the board when the voting for a prosecution took place.

HELD: the justice was not disqualified from hearing the case.

R. v. Henley ([1892] 1 Q.B. 504; 66 L.T. 675) and *R. v. Lee* (1882) 9 Q.B.D. 394, distinguished.

(AS TO DISQUALIFICATION OF JUSTICES, see HALSBURY, Hailsham Edn., Vol. 15, p. 129, para. 209; and FOR CASES, see DIGEST, Vol. 33, p. 297, Nos. 120, 121.)

Cases referred to:

- (1) *R. v. Henley*, [1892] 1 Q.B. 504; 61 L.J.M.C. 135; 66 L.T. 675; 56 J.P. 391; 25 Digest 63, 525.
- (2) *R. v. Lee*, (1882), 9 Q.B.D. 394; 47 J.P. 118; 25 Digest 112, 358.
- (3) *R. v. Milledge*, (1879), 4 Q.B.D. 332; 40 L.T. 748; *sub nom.*, *R. v. Weymouth JJ.*, 48 L.J.M.C. 139; 43 J.P. 606; 33 Digest 297, 118.

APPLICATION for orders of *certiorari*.

The applicants were convicted by the Pwllheli justices of polluting a river by discharging ammonia into it. It was contended that since the chairman of the justices was also a member of the fishery board which instituted the proceedings the conviction was bad and should be quashed. The application was dismissed.

J. H. L. Royle for the applicants.

Lloyd-Jones for the respondents (the justices).

LORD GODDARD, C.J.: In this case the applicant, one Basil William Soane, applies for an order of *certiorari* to quash a conviction against him at the petty sessions for Pwllheli for an offence under s. 8 (1) of the Salmon and Freshwater Fisheries Act, 1923. He was charged with polluting a river by discharging

into it offensive matter, ammonia, and a fine of £15 was ordered; and he was also ordered to pay a sum for costs which was not specified. The ground on which he moves to quash the conviction is that the chairman of the justices was a member of the fishery board who were the prosecutors in the case. Under the Salmon and Freshwater Fisheries Act, 1923, a prosecution has to be instituted either by the fishery board or by a certificate from the Ministry of Agriculture and Fisheries, and in this case it was a prosecution by the fishery board. Section 76 of the Act, however, provides that :

"A justice of the peace shall not be disqualified for hearing any case arising under this Act by reason only of his being a member of a fishery board, or a subscriber to any society for the protection of fish : Provided that a justice shall not be entitled to hear any case in respect of an offence committed on his own land or in relation to any fishery of which he is owner or occupier."

The chairman of the justices, therefore, was not disqualified from sitting merely because he was a member of the fishery board, but it is said that he was present at the meeting of the fishery board at which it was decided to take proceedings against the applicants. He has sworn that, although he was physically present at the meeting of the board, which would have a considerable amount of business to transact, he took no part in the question whether or not there should be a prosecution. In other words, he acted, during the course of the argument, very much as a justice sometimes acts when he, sitting at petty sessions, finds that a case is called on in which he has an interest. He does not physically leave the court, but he sits at the end of the bench away from the other justices and takes no part in the decision. Of course, if he retires with the justices and takes part in the decision, even though he says: "I took no part in the discussion in the room," that would make a conviction bad, but it does not make the conviction bad that he is physically present on the bench at the time but has taken no part in the decision. In the present case, the solicitor for the defendant took objection to the justice sitting because he was a member of the fishery board, and only because he was a member of the fishery board. On his attention being called to s. 76 of the Act which expressly removes that disqualification if that is the only objection, he withdrew his objection, but at that time he did not know that the justice had been at the meeting of the fishery board. It is now sought to quash these convictions on the ground that the justice was, not only a member of the fishery board, but one of the members of the board who were prosecutors in the case.

The cases to which we have been referred by counsel for the applicants show that, if a member of a fishery board who is also a justice votes for a resolution authorising a prosecution, he cannot sit on the hearing of the summons because the section does not permit him to do so. He is not disqualified from sitting merely because he is a member of the fishery board, but he must not sit if he is one of the active persons in passing the resolution to prosecute. The matter was clearly put by this court in *R. v. Henley* (1), where a justice who was a member of a board of conservators was present at a meeting of the board at which a resolution was unanimously passed to take legal proceedings against the defendant, and his name appeared as being present when the resolution was passed to authorize proceedings. LAWRENCE, J., in giving the leading judgment, said ((1892) 1 Q.B. 507) :

"[The statute] does not authorize him to take part as a member of the board in directing a prosecution to be instituted against a particular individual, and afterwards to act as a justice and hear and determine the very prosecution that he (with others) has already ordered to be instituted."

That seems to me to lay down clearly the reason why the court quashed the conviction in that case. The justice had not only been present, but he had also been a party to the resolution which directed the prosecution. WRIGHT, J.,

who was the other member of the court, referred to *R. v. Lee* (2). There, the prosecution was instituted under the Public Health Act, 1875. Section 258 of that Act provided :

“ No justice of the peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of any local authority . . . ”

A In that case, the prosecution was “ instituted in pursuance of a resolution passed at a meeting of the sanitary committee of the borough and approved by a resolution passed at a subsequent meeting directing the town clerk to take such steps as he deemed advisable against Shaw. W. H. Lee, one of the justices who sat at the hearing of the information when Shaw was convicted, and acted as chairman of the justices, was a member of the corporation and of the sanitary committee and was present at the meeting at which the latter resolution was passed and concurred in the resolution.” He therefore had made himself an active prosecutor in the case.

C In the present case, the justice in question has sworn that, although he was present at the meeting of the board in his capacity as a member of the board, he took no part in this resolution. If he had merely got up and stood outside the door while this resolution was passed, no possible exception could be taken to him. This court is not inclined to look too narrowly at such a case, though we appreciate how important it is that no suggestion of bias should be made and we should always quash a conviction if we thought there was any real reason for suggesting that a justice had authorized or been a party to authorization of proceedings. By the terms of the statute the justice is clearly entitled to sit unless he is a prosecutor in the sense of having taken an active part in directing the prosecution. If he has taken no active part in the direction of the prosecution, the mere fact that he is in the building at the time when some of the other members of the board voted for a prosecution, ought not, in my opinion, to disqualify him from sitting. It is in evidence that the resolution of the fishery board was not unanimous. There was a division, and it is not suggested that the justice took any part in the voting. That distinguishes this case from that on which counsel for the applicants relied, *R. v. Milledge* (3), where the two justices to whom objection was taken were members of the council when the resolution was passed. They denied that they had taken an active part in the proceedings, but that was in issue, and they insisted on sitting when objection was taken. They voted for the resolution, and it is not surprising that in those circumstances the court quashed the conviction.

F In the present case we do not think the facts justify us in saying that this gentleman was doing more than sitting on the bench, hearing a case which he was entitled to do although he was a member of the fishery board, it being a case in which he had not voted or taken any part in instituting the prosecution or in the preliminary proceedings. Therefore, on that ground I would refuse these applications, but the part of the order dealing with costs will have to be quashed. The conviction states that the applicants are to pay a fine of £15 and “ do also pay a sum for costs ” on Dec. 25, 1947. The statute under which justices in petty sessions can award costs expressly states that the justice must fix the costs. Consequently, that part of the order must be quashed, but the rest of the order will stand.

H HUMPHREYS, J. : I agree.

BYRNE, J. : I agree.

Applications dismissed. Order as to costs quashed ; no order as to costs.

Solicitors : William Charles Crocker, agent for Gwyndaf Williams & Roberts, Pwllheli (for the applicants) ; Rhys Roberts & Co., agents for William George & Son, Portmadoc (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

S. STONE & SONS (HOUNSLOW), LTD. v. PUGH.

[KING'S BENCH DIVISION (Humphreys, Lynskey and Byrne, JJ.), October 22, 1948.]

Food and Drugs—Samples—Samples taken after delivery at purchaser's premises—Name and address of consignor not appearing on container—Right of consignor to have part of sample submitted to him—Evidence of public analyst—Food and Drugs Act, 1938 (c. 56), ss. 70 (1), (2), 81 (1).

On Jan. 28, 1948, sausage meat was delivered by the appellants to the purchasers by van, on metal trays which belonged to the appellants but did not bear their name and address, and it was removed from the trays by the purchasers' storekeeper. After the appellants' van driver had left, a sampling officer took samples of the sausage meat, and, in compliance with the Food and Drugs Act, 1938, s. 70, divided the samples into three parts, sending one part to the public analyst for analysis, and retaining the other two parts. The appellants were not notified that samples were taken and were to be analysed, and only became aware of the fact on Feb. 27, 1948. On Mar. 24, 1948, they asked that one part of each sample should be delivered to them, but their request was refused. The appellants were charged under s. 3 of the Act of 1938 with selling to the prejudice of the purchaser articles of food not of the nature, substance and quality demanded. At the hearing of the case, they required the public analyst to be called as a witness, and his evidence was that some of his assistants had helped him to make the analysis on which his certificate was based. The appellants contended that the requirements of ss. 70 and 81 of the Act had not been complied with in that (a) the appellants had not been notified of the fact that samples had been taken for analysis, (b) their request that one part of each of the samples should be sent to them had been refused, and (c) the public analyst who had been called to give evidence was not the analyst who should have been called.

HELD : (i) by the proviso to s. 70 (1) of the Act, in the case of samples taken from goods in transit or at their destination at the premises of the consignee, where the name and address of the consignor do not appear on the container containing the article sampled the provisions of s. 70 (1) in regard to the giving of information to the seller or his agent and the manner of dealing with samples were not incorporated into s. 70 (2). In that case (a) the person taking the sample was under no duty to inform the seller or his agent, and (b) it was the duty of the person taking the sample to retain "the first-mentioned part of the sample"; and, therefore, he was bound to retain it at least until the hearing of the case, and the seller had no right to have one of the samples submitted to him or to compel the sampling officer to deliver it.

(ii) the public analyst who was called to give evidence was the person whom the appellants could require to be called under s. 81 (1) of the Act, and it was for the justices who heard the case to decide whether his evidence was sufficient.

[FOR THE FOOD AND DRUGS ACT, 1938, ss. 3, 70 and 81, see HALSBURY'S STATUTES, Vol. 31, pp. 254, 296 and 304.]

CASE STATED by Hendon justices.

The appellants were charged on an information under the Food and Drugs Act, 1938, s. 3, with selling to the prejudice of the purchaser certain articles of food not of the nature, substance and quality demanded. They were convicted by the justices, and appealed on the ground that the requirements of the Act had not been complied with. The Divisional Court now dismissed the appeal. The facts appear in the judgment of LYNSEY, J.

Collard for the appellants.

F. H. Lawton for the respondent.

HUMPHREYS, J. : I will ask my brother **LYNSKEY** to give the first judgment.

LYNSKEY, J. : In this case, Messrs. S. Stone & Sons (Hounslow), Ltd., are appealing by way of Case Stated against a conviction on three summonses for that they on Jan. 28, 1948, at Redhill County Hospital, Edgware, in the county of Middlesex, sold to the Middlesex County Council, to the prejudice of the purchasers, certain articles of food which were not of the nature, substance and quality demanded, being some beef sausage meat, a second parcel of beef sausage meat, and a third parcel of beef sausage meat, consisting of 100lbs., 50lbs. and 4lbs. respectively. The facts as found in the Case are that the appellants delivered this sausage meat on Jan. 28, 1948, to the hospital, which belonged to the Middlesex County Council, that it was delivered there by van on metal trays, that the driver of the van carried the meat in on the metal trays to the store, that the storekeeper received the meat and took it off the metal trays belonging to the appellants after he had verified the weights and description of the goods. The metal trays on which the sausage meat was carried into the store did not bear the name or address of the appellants, nor, of course, did the sausage meat bear that name or address. As soon as the driver of the appellants' van had departed, Mr. Kenneth Batson Dale, who was a sampling officer employed by the Middlesex County Council, examined the sausage meat, and took samples from each of the three parcels. In compliance with the Food and Drugs Act, 1938, s. 70, he divided the samples taken from each of the three parcels of meat into three parts, sending one of them to the public analyst for analysis. He retained the other two parts in his possession, and he did not notify the appellants at the time that he had taken the samples or that he proposed to have them analysed. The matter did not come to the notice of the appellants until Feb. 27, 1948, just a month after the samples were taken and the meat was delivered. On Mar. 24, 1948, the appellants' solicitors wrote to the respondent, Sydney John Pugh, in these terms :

"Pursuant to s. 70 of the Food and Drugs Act, 1938, I hereby require you to deliver to my clients or to me on their behalf one part of each of the samples of the goods in respect of which you have laid the three informations. It is unfortunate that this was not done at the time."

To that letter a reply was sent by the respondent :

"I regret that I am unable to comply with your request to be supplied with a portion of each of the samples, since the name and address of the seller or consignor did not appear on the container and I am required by reason of the provisions of s. 70 (2) of the above Act to retain such portions of the samples. The reserved portions will of course be produced at the hearing of the summonses and it will be open to your clients if they dispute or require confirmation of the public analyst's certificate to request that portions of the samples be sent to the government chemist."

On Mar. 24, 1948, the solicitors for the appellants required the respondent, pursuant to s. 81 of the Act, to call the public analyst as a witness. The case came on for hearing on Apr. 12, 1948, and at that hearing there was called as a witness Mr. Eric Voelcker, the county public analyst, who gave evidence verifying the certificate that had been granted by him under the Act. In due course he was cross-examined, and it appeared that he was acting as public analyst for six local authorities and agricultural analyst for nine local authorities and that he had the assistance of six assistants in his laboratory who helped him to make his various analyses, and some one or more of them helped to make the particular analysis on which the certificate was based in this action, the analyst himself, Mr. Voelcker, having taken some part in the analysis—what particular part is not very clear.

On that, the appellants have raised three points. The first was that the appeal ought to be allowed because the respondent did not deliver to them one part of the sample which had been taken when he was required by them so to do in writing by the letter from the solicitors of Mar. 24, 1948. The second was that the appeal ought to be allowed because the respondent failed forthwith to notify the appellants of the fact that samples had been taken and were being submitted for analysis. The third was that the analyst who was called to give evidence at the proceedings before the justices was not the analyst who ought to have been called, or, if he was one of the analysts who ought to have been called, his assistants should also have been called to verify the facts stated in his certificate, of which he had no immediate knowledge himself.

The first two points really can be considered together. They depend on the construction of the Food and Drugs Act, 1938, s. 70 (1) and (2). Section 70 (1) provides :

“ A person purchasing a sample of any food or drug with the intention of submitting it to be analysed by a public analyst, or taking a sample of food on any premises with the intention of submitting it to be so analysed, shall, after the purchase has been completed or the sample has been taken, forthwith inform the seller or his agent who sold the sample, or, as the case may be, the occupier of the premises or the person for the time being in charge thereof, of his intention to have the sample analysed by the public analyst, and shall then and there divide it into three parts, each part to be marked, and sealed or fastened up, in such manner as its nature will permit, and shall—(a) if required so to do, deliver one part to the seller or his agent, or, as the case may be, to the occupier of the premises or the person for the time being in charge thereof; (b) retain one part for future comparison; and (c) if he thinks fit to have an analysis made, submit one part to the public analyst : Provided that, in relation to samples taken in such circumstances as are mentioned in either of the two next succeeding sub-sections, the foregoing provisions with respect to the giving of information and the manner of dealing with samples shall have effect as modified by those sub-sections.”

Section 70 (1) is dealing with the case where the sample of food is taken on the premises of a person who is apparently proposing to sell, and may be liable for offering for sale, food not in compliance with the Food and Drugs Act, 1938. Section 70 (2) deals with the case where the sample is taken while the goods are in transit or after they have reached the premises of the purchaser, consignee, or consumer. Section 70 (2) is :

“ A person taking a sample of any food while it is in transit or at the place of delivery to the purchaser, consignee or consumer shall, if he intends to submit it to be analysed by a public analyst, deal with it in the manner provided by the preceding sub-section, except that he shall retain the first-mentioned part of the sample unless the name and address of the consignor appear on the container containing the article sampled, in which case he shall forward that part of the sample to the consignor by registered post or otherwise, together with a notice informing that person that he intends to have part of the sample analysed by the public analyst.”

It is contended on behalf of the appellants that the effect of those two sub-sections, read together, is to incorporate, by reason of the proviso to s. 70 (1), the provisions of s. 70 (1) (a), “ if required so to do, deliver one part to the seller or his agent,” into s. 70 (2), where the sample is taken and no name or address of the consignor appears. It is a pure question of construction, and, in my view, the effect of the proviso is to incorporate the provisions of sub-s. (1) into sub-s. (2), except in so far as the provisions of sub-s. (1) deal with the giving of information and the manner of dealing with samples. Those are the words

of the proviso. By those words, the provisions of sub-s. (2), when one is dealing with samples taken from goods in transit or at their destination at the premises of the consignee or consumer, are substituted for the provisions of sub-s. (1).

In my view, the effect of sub-s. (2) is that, if the name and address appears on the goods, then, instead of a demand being necessary before the obligation is imposed on the sampler to deliver a part to the seller of the goods, there is an obligation imposed on him without any demand to send by registered post the sample and to give the notice. That is to say, in the case of goods on which the name and address appears, different provisions are substituted for those contained in sub-s. (1). The question of demand does not arise; there is an obligation imposed on the sampler without demand. With regard to goods in respect of which no name or address appears, where normally the sampler would not know to whom the goods belong, his obligations are contained in sub-s. (1), subject to the exception set out in sub-s. (2) in regard to retaining the part of the sample dealt with in sub-s. (1) (a), that is to say:

“...if he intends to submit it to be analysed by a public analyst, deal with it in the manner provided by the preceding sub-section, except that he shall retain the first-mentioned part of the sample unless the name and address of the consignor appear...”

In my opinion, those words mean necessarily what they say. They mean that he shall retain the sample, and he is bound to retain it, it seems to me, until the hearing, or, possibly, thereafter. The duties imposed on a sampling officer are purely statutory. The rights given to the person proceeded against are again purely statutory, and, unless the Act confers on the person who is to be charged or whose goods are going to be analysed a right to have one of the samples submitted to him, he is not entitled to compel the sampling officer to deliver it. Such a right is conferred on him when samples are taken on his premises. It is conferred on him when goods are sampled which bear his name and address and the sample is taken in transit or at the destination of the goods, but no such right is conferred on him when the sample is taken from goods in transit, or when they reach their destination, if his name and address do not appear. In those circumstances, although it may seem in some degrees a hardship that the person proceeded against does not get a sample of his goods prior to the hearing at the court, and then only has the right to have it sent to the government chemist to analyse, the words are so clear, in my view, that it is not open to this court to incorporate or read into them any other meaning.

The final point taken is that the public analyst who was called to give evidence was either not the right person, or ought to have had his evidence added to by that of his assistants, and that, because of the absence of those two assistants, the alleged deficiency in the meat had not been proved by the prosecution. In my view, the analyst is the person whom the appellants could require to be called under the provisions of s. 81 of the Act. Section 81 (1) reads:

“In any proceedings under this Act, the production by one of the parties of a document purporting to be a certificate of a public analyst in the prescribed form, or of a document supplied to him by the other party as being a copy of such a certificate, shall be sufficient evidence of the facts stated therein, unless, in the first-mentioned case, the other party requires that the analyst shall be called as a witness.”

In this case “the other party” did require the analyst to be called as a witness, and the effect of that was, of course, that the certificate of the public analyst in its prescribed form ceased to be evidence, and it was a matter, therefore, for the justices, having heard the evidence given by the analyst who was called, to say whether in their view there was evidence which they could accept which would justify them in coming to the conclusion that there was a deficiency. The

analyst was called, the justices heard him, they heard the cross-examination, and apparently they were satisfied by the evidence he was able to give that the prosecution had proved the offence. In my view, it was a matter for the justices, and they came to, and were entitled to come to, the conclusion to which they did. The result is, in my view, that this appeal ought to be dismissed.

HUMPHREYS, J. : I agree entirely with the judgment just delivered.

BYRNE, J. : I agree.

Appeal dismissed with costs.

Solicitors : *P. R. Kimber* (for the appellants); *C. W. Radcliffe*, solicitor to Middlesex County Council (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

DUNN v. DUNN.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Pilcher, J.), October 18, 19, 1948.]

Desertion—Burden of proof—Rebuttal of charge by respondent—Matrimonial home—Right to decide where matrimonial home shall be.

Per DENNING, L.J., and PILCHER, J. : The legal burden of proof, where a husband petitions for a decree of divorce on the ground of his wife's desertion, is on the husband to show that she deserted him without cause. If the husband shows that he asked her to join him and she refused, that is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. The wife may seek to rebut the inference of desertion by proving just cause for her refusal, but there is no legal burden on her to do so. Even if she does not prove just cause, the court has still to ask itself whether the husband has discharged the legal burden resting on him.

Per DENNING, L.J. : There is no proposition of law that a husband has the right to say where the matrimonial home should be. The decision where the home is to be is one affecting both parties and their children, and it is the duty of the parties to decide it by agreement, each having an equal voice. If such an arrangement is frustrated by the unreasonableness of one or the other and this leads to a separation, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion.

Mansey v. Mansey ([1940] 2 All E.R. 424; [1940] P. 139; 163 L.T. 157), considered.

[AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-659, paras. 963-969; and FOR CASES, see DIGEST, Vol. 27, pp. 306-316, Nos. 2837-2939.]

Cases referred to :

- (1) *Emanuel v. Emanuel*, [1945] 2 All E.R. 494; [1946] P. 115; 114 L.J.P. 60; 173 L.T. 118; 2nd Digest Supp.
- (2) *Mansey v. Mansey*, [1940] 2 All E.R. 424; [1940] P. 139; 109 L.J.P. 83; 163 L.T. 157; Digest Supp.

APPEAL by a husband from an order of JONES, J., dated Mar. 15, 1948, refusing a decree of divorce.

The husband was in the Navy, and from 1937-1941 he was on the China station. In May, 1941, on his return to England, and again at Christmas, 1941, he went to see his wife at the matrimonial home at Morpeth, but quarrels arose over money matters. They did not live together after 1941. The husband on a number of occasions after April, 1942, asked the wife to stay with him in England at various places where he was stationed, but she would not do so

because she suffered from acute deafness which made her unhappy away from home among strangers, because her son had started work at Morpeth, and for various other reasons. The husband petitioned for a decree of divorce on the ground of his wife's desertion without just cause, and asked for the discretion of the court to be exercised in respect of his own adultery, but JONES, J., accepting the wife's evidence, held that having regard to all the circumstances the wife did not desert the husband and was justified in the course she took. The majority of the Court of Appeal (PILCHER, J., *dissentiente*) affirmed his decision.

G. R. F. Morris (Norman Porter with him) for the husband.

Ackner for the wife.

BUCKNILL, L.J. [after stating the facts, and examining the arguments and the judgment in the court below, concluded :] The learned judge tried the case very carefully. He saw the witnesses, he investigated the whole matter. He had to decide whether, in the circumstances, what the wife did was reasonable, and he decided that what she did was reasonable. Speaking for myself, I cannot say that that conclusion of his was wrong and ought to be reversed. For these reasons, in my view, this appeal should be dismissed.

DENNING, L.J. : I agree. In his able argument counsel for the husband put forward the proposition that the husband has the right to decide where the parties shall live, and that, if the wife refuses to join him, she is guilty of desertion unless she can prove that she had a just cause for her refusal. The burden, he said, was on her to prove just cause. This argument contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to distinguish between a legal burden of proof laid down by law and a provisional burden raised by the state of the evidence. I have endeavoured to explain the distinction in an article I wrote in 61 LAW QUARTERLY REVIEW, p. 379, and *Emanuel v. Emanuel* (1).

The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal ; and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself : Is the legal burden discharged ? Has the husband proved that she deserted him without cause ? Take this case. The wife was very deaf, and for that reason could not explain to the court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case : Has that burden been discharged ?

I want to say a word also on the proposition that a husband has the right to say where the home should be, for, indeed, it is the same fallacy in another form. If that were a proposition of law it would put a legal burden on the wife to justify her refusal, but it is not a proposition of law and I am sure HENN COLLINS, J., in *Mansey v. Mansey* (2) did not intend it as such. It is simply a proposition of ordinary good sense arising from the fact that the husband is usually the wage-earner and has to live near his work. It is not a proposition which applies in all cases. The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over the other. Each is entitled to an equal voice in the ordering of the affairs which are their

common concern. Neither has a casting vote, though, to be sure, they should try so to arrange their affairs that they spend their time together as a family and not apart. If such an arrangement is frustrated by the unreasonableness of one or the other, and this leads to a separation between them, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion. The situations which may arise are so various that I think it unwise to attempt any more precise test than that of unreasonableness. Views as to unreasonableness may vary, and the decision is essentially one for the trial judge with which this court should not interfere unless the conclusion is one which could not reasonably be drawn. If a wife refuses to join her husband at a place when he is ready to receive her, that is, of course, a factor of great weight, but it is not necessarily decisive. Take this case. The judge has held that the wife's refusal was not unreasonable. She was living with the two children, aged 14 and 7, in the matrimonial home at Morpeth. She had never been away from Morpeth except for a few days in 1934. The husband wanted to uproot them for a stay in wartime at Immingham or Barrow. The stay was to be of uncertain duration and it might be for a few weeks or a few months. It was to be in rooms. The wife was deaf and had difficulty in making herself understood by strangers. A considerate husband would have recognised her difficulty and not have insisted on her coming. A considerate wife would have put up with the difficulties and gone. Neither was considerate. Neither was unreasonable. From his point of view he was not acting unreasonably; from her point of view she was not acting unreasonably. Each insisted on their own point of view, and hence the marriage came to an end. The decisive matter, to my mind, is that throughout the matrimonial home was at Morpeth and the wife was ready and willing to have him there on his leave whenever he could get there, and that is where the family were. Her refusal to go for a short stay elsewhere in the circumstances which I have mentioned, it seems to me, was not unreasonable. At all events, there was ample ground on which the learned judge could come to the conclusion which he reached, that it was not unreasonable on her part to fail to go and stay with him. Unless I could say that finding was unreasonable I do not think this court should interfere. I cannot say that, and, therefore, I think the appeal should be dismissed.

PILCHER, J., accepted the findings of **JONES, J.**, that in December, 1941, the husband was reasonable in wanting his wife to join him and that she ought then to have done so, but he held that the learned judge had misdirected himself on the facts by relating to this point of time certain abusive letters written by the husband some six months later and that his finding that the wife was justified in not returning, based as it was on this misconception of the facts, could not be supported. He agreed with the observations of **DENNING, L.J.**, about the onus of proof in cases of desertion involving disputes as to the *locus* of the matrimonial domicile.

Appeal dismissed with costs.

Solicitors: *Peacock & Goddard*, agents for *Goodman & Kent*, Portsmouth (for the husband); *Hewitt, Woollacott & Chown*, agents for *Swinburn G. Wilson & Son*, Newcastle-upon-Tyne (for the wife).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

LORD HOWARD DE WALDEN v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Porter, Lord Uthwatt, Lord du Parcq, Lord Normand and Lord Morton of Henryton), July 12, 13, October 29, 1948.]

Sur-tax—"Income arising under a settlement"—Undistributed income of foreign company—Apportionment and sub-apportionment—Taxpayer controlling chain of foreign companies—Finance Act, 1922 (c. 17), s. 21—Finance Act, 1938 (c. 46), s. 41 (4) (a) (ii)—Finance Act, 1939 (c. 41), s. 13 (3).

H. was beneficially entitled to 15,000 shares in the D. company which were held on his behalf by the E. company as trustee. The D. company was incorporated in Canada, and was associated with six other companies incorporated either in Canada or Kenya, the share capitals of which were held either by others of the same companies or by the D. company. By reason of his majority shareholdings in the E. and D. companies, the associated companies were indirectly also under the control of H. On Aug. 20, 1934, H. executed a marriage settlement, which was a "settlement" within ss. 38 and 41 (4) (b) of the Finance Act, 1938. The D. company had declared no dividends, and, consequently, the trustees of the settlement of 1934 had neither received nor distributed any income. H. was assessed to sur-tax on the footing that income of the six companies could be apportioned and sub-apportioned so that ultimately a due proportion would devolve on the trustees of the settlement as holders of the shares in the D. company and become income "arising under a settlement" within s. 41 (4) (a) (ii) of the Act of 1938. Section 41 (4) provides: "For the purposes of this Part of this Act—(a) the expression 'income arising under a settlement' includes . . . (ii) where the amount of the income of any body corporate has been apportioned under the Finance Act, 1922, s. 21, for any year or period, or could have been so apportioned if the body corporate were incorporated in any part of the United Kingdom, so much of the income of the body corporate for that year or period as is equal to the amount which has been or could have been so apportioned to the trustees of or a beneficiary under the settlement . . ." The Finance Act, 1939, s. 13, provides: "(3) . . . any reference in any enactment to apportioning income under or for the purposes of the provisions . . . of s. 21 or of . . . sched. I [of the Finance Act, 1922] shall be construed as a reference not only to apportioning by means of an original apportionment but also to apportioning by means of an original apportionment together with one or more sub-apportionments or series of sub-apportionments . . ."

HELD: (i) before the passing of the Act of 1939, s. 41 (4) (a) (ii) of the Act of 1938 referred only to an original apportionment, and the effect of s. 13 (3) of the Act of 1939 was that not only the original apportionment but every possible sub-apportionment that could flow from an original apportionment was to be taken into account, but s. 41 (4) (a) (ii), as amended by s. 13 (3), had not been expanded so as to embrace foreign companies to which income had been apportioned, and, therefore, the D. company was outside the operation of the section as regards the income apportioned to it from the six associated companies.

(ii) the undistributed income of the six companies attributed to the D. company did not form part of the "actual income from all sources" of the D. company within s. 21 of the Act of 1922. "Actual income" could mean only income which was in some real sense capable of distribution.

Decision of the Court of Appeal ([1947] 2 All E.R. 502), reversed.

[FOR THE FINANCE ACT, 1938, s. 41 (4) (a) (ii), see HALSBURY'S STATUTES, Vol. 31, p. 353. FOR THE FINANCE ACT, 1939, s. 13 (3), see *ibid.*, Vol. 32, p. 181.]

Cases referred to :

- (1) *Salomon v. Salomon & Co.*, [1897] A.C. 22 ; 66 L.J.Ch. 35 ; 75 L.T. 426 ; 42 Digest 622, 225.
- (2) *Crawford v. Spooner*, (1846), 6 Moo. P.C.C. 1 ; 4 Moo. Ind. App. 179 ; 42 Digest 677, 885.

APPEAL by a taxpayer from an order of the Court of Appeal ([1947] 2 All E.R. 502), reversing an order of ATKINSON, J., dated Apr. 1, 1947.

By a deed of gift dated June 7, 1923, Lord Howard de Walden gave the taxpayer (his son) 25,000 shares in Dufferin Investment Co., Ltd. (hereinafter called "Dufferin"), a company incorporated in Canada. The shares had previously been transferred into the name of Established Investments, Ltd. (hereinafter called "Established"), another Canadian company, who were parties to the deed of gift and thereafter held the shares as trustees for the taxpayer. By a further deed, dated Dec. 11, 1933, the taxpayer, who had come of age on Nov. 27, 1933, gave back to his father 5 shares, which continued to be registered in the name of Established as trustees. On Aug. 20, 1934, the taxpayer, in view of his intended marriage, executed a deed whereby he created trusts over 15,000 out of the 24,995 shares in Dufferin then held by Established as trustees for him. Under this deed the whole income from the 15,000 shares was payable to the taxpayer during the joint lives of himself and his father, on the death of either the intended wife became entitled to an annuity of £1,000, and on the death of the survivor that annuity was increased to £5,000. The unexpended income of the trust property was to be held in trust for the children, and the taxpayer had a power of appointment among them. The taxpayer and his father were alive during the whole of the years under appeal, so that the former was entitled to any income arising from the 15,000 shares. By deed dated Oct. 28, 1937, the taxpayer and his father purported to terminate certain provisions of the deed of Dec. 11, 1933, and the father returned to the taxpayer the 5 shares which had been given him. At all material times there were in existence besides Established and Dufferin six other companies incorporated in Canada or Kenya. Dufferin held shares in five of them, and there was considerable reciprocal shareholding. By virtue of the voting rights attached to the classes of shares in the various companies and the shareholdings, the taxpayer directly controlled Established, and, by means of his control of Established, was able indirectly to control all the companies in the chain. Dufferin had declared no dividends and the trustees under the deed of 1934 had consequently made no distribution of income.

The taxpayer was assessed to sur-tax on the footing that the deed of Aug. 20, 1934, was a "settlement" within the meaning of that term in ss. 38 and 41 (4) (b) of the Finance Act, 1938, and that the income arising under that settlement was to be treated as the income of the taxpayer in accordance with s. 38 (3) of that Act since he had an interest in such income. The Court of Appeal, differing from the Special Commissioners and ATKINSON, J., held that the additional assessments were in order. The House of Lords now reversed that decision.

Frederick Grant, K.C., and *L. C. Graham-Dixon* for the taxpayer.

The Solicitor-General (Sir Frank Soskice, K.C.), *J. H. Stamp* and *R. P. Hills* for the Crown.

The House took time for consideration.

Oct. 29. **LORD PORTER** : My Lords, I have had the advantage of reading beforehand the speeches of my noble and learned friends who will succeed me. I find myself in agreement with their reasoning and the result, and I have not thought it necessary to provide a speech of my own.

LORD UTHWATT (read by LORD PORTER) : My Lords, under a settlement dated Aug. 20, 1934, made by the appellant, Established Investments, Ltd., as the trustees of the settlement, held 15,000 shares (part of a total issue of 25,000

shares) in Dufferin Investment Co., Ltd. (hereinafter called "Dufferin") on trusts under which at all material times the whole of the income arising from such shares was payable to the appellant. Dufferin is a company incorporated in Canada and six other companies which were incorporated either in Canada or in Kenya come into the picture. All the share capital of each of these six companies was held beneficially either by others of the same companies or by Dufferin. All the companies are under the control of the appellant. In these circumstances a question arose whether, on the true construction of the Finance Act, 1938, s. 41 (4) (a) (ii), when read in conjunction with the Finance Act, 1939, s. 13 (3) and (4), income of the six companies could be apportioned and sub-apportioned thereunder so that ultimately a due proportion was sub-apportioned to the trustees as holders of shares in Dufferin and became income "arising under the settlement." Additional assessments to sur-tax were made on the footing that such income could be so dealt with. The Court of Appeal, differing from the view taken by the Special Commissioners and ATKINSON, J., held that the additional assessments were in order.

The Finance Act, 1938, s. 41, provides :

"(4) For the purposes of this part of this Act—(a) the expression 'income arising under a settlement' includes . . . (ii) where the amount of the income of any body corporate has been apportioned under the Finance Act, 1922, s. 21, for any year or period, or could have been so apportioned if the body corporate were incorporated in any part of the United Kingdom, so much of the income of the body corporate for that year or period as is equal to the amount which has been or could have been so apportioned to the trustees of or a beneficiary under the settlement . . ."

The Finance Act, 1939, s. 13, provides :

"(3) Subject to the last preceding sub-section and to any other express provision of this Act, any reference in any enactment to apportioning income under or for the purposes of the provisions, or any specified provisions, of the said s. 21 or of the said sched. I shall be construed as a reference not only to apportioning by means of an original apportionment but also to apportioning by means of an original apportionment together with one or more sub-apportionments or series of sub-apportionments . . . (4) In this section the expression 'sub-apportionment' means such an apportionment of income as is provided for by the Finance Act, 1927, s. 32 (which applies the said s. 21 to inter-connected companies) and the expression 'original apportionment' has the same meaning as in the said s. 32."

The effect of the amendment on the wording of the relevant provision of the Act of 1938 was conveniently and accurately stated by COHEN, L.J., by re-writing that provision as follows ([1947] 2 All E.R. 505) :

"Where the amount of the income of any body corporate has been apportioned by means of an original apportionment under s. 21 of the Finance Act, 1922, for any year or period or by means of such an original apportionment together with one or more such sub-apportionments or series of sub-apportionments as is provided for by s. 32 of the Finance Act, 1927, or could have been so apportioned if the body corporate were incorporated in any part of the United Kingdom, so much of the income of the body corporate for that year or period as is equal to the amount which has been or could have been so apportioned to the trustees of or a beneficiary under the settlement."

Before dealing with the section it is desirable to recall the principles on which the Finance Act, 1922, s. 21, and the Finance Act, 1927, s. 32, proceed. I will refer to bodies corporate incorporated in the United Kingdom as British companies and to bodies corporate incorporated elsewhere as foreign companies. Under the Act of 1922, the actual income of British companies which

are under the control of not more than five persons and which are neither "subsidiary companies" nor companies in which the public are substantially interested (I will call them "controlled British companies") is alone capable of an original apportionment. Under the Act of 1927, it is that income when apportioned (less such part of it as has been distributed in a particular way) which is sub-apportionable, but sub-apportionment may be made only as respects income apportioned or sub-apportioned to a controlled British company. Income apportioned or sub-apportioned to a foreign company, in whosoever hands the control of that foreign company may be vested, is not sub-apportionable. A foreign company finds a place in the process, but only as a body to whom income may be apportioned or sub-apportioned. At no stage in the process is the income attributed on an apportionment or sub-apportionment to a controlled British company mixed up with that company's own income. Where an apportionment is directed to be made as respects the actual income of that company, a new departure affecting only that income is made.

It is outside one's province to speculate why foreign companies were excluded from the class of bodies corporate whose actual income might be apportioned, or why income of a controlled British company attributed to a foreign company on an apportionment or sub-apportionment was excluded from sub-apportionment wherever control of that foreign company might lie. It is, however, pertinent to observe that there is no necessary or logical connection between the two exclusions. If income of a controlled British company attributed on any apportionment to a foreign company had been made sub-apportionable, the sanctity accorded to the foreign company's own income would not be affected, nor would the foreign company, under the provisions relating to collection, be liable to be assessed if income so sub-apportioned reached the hands of a person liable to sur-tax. The facts that emerge are that, as a means of tracing the income of a controlled British company down to individuals through controlled concerns, the scheme of sub-apportionment is obviously defective, and that this defect is not dictated by or due to the circumstance that only the income of controlled British companies can be the subject of an original apportionment. The legislature for good or bad reason has chosen that the flow of apportioned income along any particular channel is to be stopped by the appearance of a foreign corporate body in that channel. As a result of the way in which the relevant sections are drafted, the extension of the definition of the expression "company" so as to include a foreign company would not only make its actual income liable to apportionment, but would also render actual income of any body corporate apportioned or sub-apportioned to a foreign company sub-apportionable, but if a provision is made which merely treats as subject to apportionment and sub-apportionment the actual income of a foreign company, and nothing else is done, the machinery of sub-apportionment remains unaffected and will work in exactly the same way as before, and, in particular, will suffer from exactly the same lack of completeness.

Turning now to s. 41 of the Act of 1938, it was common ground that, as unamended, it applied only to income which resulted from an original apportionment. The contention of the appellant was to the effect that the amendment made by the Act of 1939 was merely to bring into play the ordinary machinery of sub-apportionment both to income apportioned under the first limb of the section and to income treated as apportionable under the second limb. Any such income duly sub-apportioned to trustees or a beneficiary under a settlement would thereby become income arising under that settlement. In the particular case, as *Dufferin* was a foreign company no income apportioned to it would on this basis be sub-apportionable. The contention of the respondents was to the general effect that in the circumstances, s. 41 of the Act of 1938, as amended, on its true construction required it to be assumed that, for

the purposes of sub-apportionment, any foreign company to which income was apportioned or sub-apportioned was incorporated in some part of the United Kingdom. The machinery of sub-apportionment was altered. Unless the section bore this construction, income apportioned or sub-apportioned to a foreign company could not become "income arising under a settlement." The section, as amended, was in their submission patient of a construction which would

A give effect to their contention, if, indeed, its terms did not demand it. All that was needed was to read the first reference in s. 41 to "the body corporate" as a reference to "the relevant bodies corporate" or as a reference to "the relevant body corporate." The respondents were concerned to establish their proposition only in the case where a hypothetical apportionment was made under the second limb of s. 41 (4) (a) (ii). It was left in doubt whether the assumption for which

B they contended was also to be made where an actual apportionment and sub-apportionment had been made as envisaged by the first limb of the section. For the purpose of disposing of this case it is not, however, necessary to consider the exact ambit of the respondents' contention.

The Court of Appeal accepted the respondents' contention. With all respect to the Court of Appeal, I am unable to see that the section, as amended, is patient

C of the construction sought to be placed on it by the respondents. In my opinion, the section, as amended, is unambiguous and its proper construction clear. In its original form the only operation to be taken into account was an original apportionment, and any such original apportionment might be made as respects income of a foreign company as well as income of a British company. In the amended form, the results, not only of the original apportionment, but of every

D possible sub-apportionment that can flow from an original apportionment, are to be taken into account, but otherwise no attempt has been made to alter any word contained in the section and no attempt has been made to alter the process of sub-apportionment. The machinery of sub-apportionment is brought in *sans phrase*. Read without a gloss the section appears to me to be precise in expression. The only bodies corporate referred to in the wording of the

E section, as amended, are those whose income has been actually apportioned with or without sub-apportionment, or whose income on a certain assumption as to place of incorporation could have been apportioned with or without sub-apportionment. In the process of apportionment and sub-apportionment British companies and foreign companies may or may not appear as bodies to whom income of the original body corporate is attributed. I fail to see any line of

F reasoning by which references in a section to bodies whose income is apportionable can be expanded so as to embrace bodies to whom that income is apportioned. Taking this view of the section as I do, I need not examine in detail the particular gloss suggested by the respondents. I would merely observe that "the relevant bodies corporate" would as a matter of language still appear only as bodies in respect of whose income an apportionment, followed

G may be by a sub-apportionment, could on a certain hypothesis be made and that the possibility of making such an apportionment is in no way dependent on any matter affecting the status of the recipients under it.

There is no doubt that, under the appellant's contention, the amendment made by the Act of 1939 may well add to the income arising under the settlement. Under the first limb, income of a controlled British company apportioned to another controlled British company and then sub-apportioned to the trustees of a settlement or a beneficiary under the settlement, would for the first time become income arising under the settlement. Exactly the same result emerges where income of a foreign company is hypothetically apportioned under the second limb to a controlled British company. It cannot therefore be said that the amendment is futile, but I must not be taken as suggesting that futility is a reason for the courts, under the guise of construing an enactment, to depart from the plain meaning of unambiguous language

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appearing in it. The case for the respondents appears to me to rest merely on the indisputable fact that, on the appellant's reading of the section, income apportioned or sub-apportioned to a foreign company can never in any circumstances become income arising under a settlement. With all respect to the Court of Appeal I think they have attributed to this fact consequences which sound principles of construction deny to it.

COHEN, L.J., thought that bringing in sub-apportionments necessarily involved giving an enlarged meaning to the expression "body corporate" since, applied to sub-apportionments, the expression would otherwise be inept. The only possible ineptitude is failure to bring within sub-apportionable income any income apportioned or sub-apportioned to a foreign body corporate. That may or may not be a *casus omissus*, but I am unable to see any expression of an intention that such income shall be sub-apportionable. ASQUITH, L.J., thought s. 13 (3) of the 1939 Act inartistically drafted but its intention unmistakable. With all respect to the Lord Justice, I cannot agree with his criticism of the drafting of s. 13 (3). An exact technical description is given in s. 13 (3). No difficulty arises by reason of the application of that section to s. 41 of the Act of 1938 unless an assumption is made that the intention was to bring in the omitted income. I differ too from him as to the intention. To my mind the only intention expressed is to bring in all possible sub-apportionments for what they are worth. I agree with the Court of Appeal to the extent that the introduction of new words into an existing section may alter the meaning of words already there. But no such alteration can result unless (1) the requirements of the English language demand it, or (2) those requirements permit it and the sense of the section demands it. The alteration suggested by the Court of Appeal does not, in my view, fulfil either condition. I do not further criticize the gloss made by the Court of Appeal, for the real objection is not to the gloss selected to be made, but to the making of a gloss at all.

My Lords, with all respect to the Court of Appeal it appears to me that, while recognising the well settled principle that a statute must be construed according to the intention expressed in the statute itself, they failed to apply it. The principle was put thus by LORD WATSON in *Salomon v. Salomon & Co.* (1) ([1897] A.C. 38):

" 'Intention of the legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

It is an application of this principle that a statute may not be extended so as to meet a *casus omissus*. As appears in the judgment of the Privy Council in *Crawford v. Spooner* (2) (6 Moo. P.C.C. 8):

" . . . we cannot aid the legislature's defective phrasing of the Act, we cannot add, and mend, and, by construction, make up deficiencies which are left there."

In the present case I cannot but think that the absence of any stateable reason for not including foreign companies as part of the machinery for tracing actual income of a body corporate in any circumstances has led the Court of Appeal to read in the Act of 1939 words which are not there. In my opinion, therefore, no gloss falls to be put on the section and the respondents' contention is wrong.

A second contention was preferred by the respondents in the alternative. This contention was to the effect that where actual income from all sources

of company No. 1 is attributed to company No. 2 as the result of an apportionment, that attributed income forms part of the "actual income from all sources" of company No. 2 within the meaning of the Finance Act, 1922, s. 21. For this contention reliance was placed on the fact that the Act in terms provided that the attributed income is to be deemed to be the income of company No. 2, and that the phrase "actual income" elsewhere appears in the Income Tax Acts as descriptive of income for tax purposes. The contention is somewhat surprising. ATKINSON, J., passed it over in silence, and the Court of Appeal rejected it, and, in my opinion, rightly rejected it. The phrase "actual income from all sources" appears but once in s. 21. It there appears in this sentence (I omit the immaterial words):

"(1) Where it appears to the Special Commissioners that any company . . . has not . . . distributed . . . a reasonable part of its actual income . . . the commissioners may, . . . direct that . . . the said income . . . shall, . . . be deemed to be the income of the members, and the amount thereof shall be apportioned among the members . . ."

It is elementary that no part of the "deemed income" resulting from the application of the section in fact enters into the coffers of a company to which it is attributed. It is worth while stating the consequences that emerge if the respondents' contention be correct. First, the result would be ridiculous—a pertinent matter if the relevant phrase is ambiguous. The income deemed to be the income of the members of company No. 1 is the whole of the actual income of that company, no deduction being made of sums in fact distributed thereout to its members. The actual income of company No. 2 to be apportioned among its members would therefore include (a) all sums received by way of dividend out of the actual income of company No. 1, and (b) its due proportion of the whole of such actual income. Sur-tax would be payable by members of company No. 2 in respect of a sum they never could have got. Secondly, as ASQUITH, L.J., pointed out ([1947] 2 All E.R. 509), if this contention be correct, no useful purpose to the Revenue was served by the enactment of s. 32 of the Finance Act, 1927. The application of s. 21 of the Act of 1922 to companies entering into a chain would do all that was necessary. That again is a relevant consideration if the words "actual income" are ambiguous. Thirdly, the direction to the commissioners is to decide at the outset whether a reasonable part of the actual income of a particular company has been distributed. It would be more than curious if in that task they were to direct their minds to an arithmetical total composed of income which is capable of distribution and of "deemed income" (such deemed income being merely a figure—not even a book entry) which is incapable of distribution. In a case where company No. 2 owned nothing but shares in company No. 1 the arithmetical total to be considered might well be only "deemed income."

My Lords, for myself I am content to take the view that in light of the context the words "actual income" can mean only income which is in some real sense capable of distribution. Apart from that context, indeed, the phrase "actual income" is hardly apt to include fictional income, and non-existent income composed of amounts deemed to be income is fictional income. I would allow the appeal.

LORD DU PARCQ : My Lords, I agree that this appeal should be allowed for the reasons given in the opinion which has just been read by my noble and learned friend on the Woolsack. I also desire to express my agreement with the opinions about to be read which I have had the pleasure of reading.

LORD NORMAND : My Lords, I agree with the speeches delivered by my noble and learned friends. I have had the advantage of reading in print the speech which my noble and learned friend, LORD MORTON OF HENRYTON, is about to deliver, and with it also I agree, but, since I have had the misfortune to differ from the Court of Appeal, I shall state as succinctly as I can

the broad ground on which I think that the Crown's case most clearly fails.

The Finance Act, 1939, s. 13 (3), so far as material to the appeal, is clear in its terms. It requires that any reference to apportionment for the purposes of the provisions of s. 21 or of sched. I of the Finance Act, 1922, shall be construed as a reference, not only to apportioning by means of an original apportionment, but also to apportioning by means of an original apportionment together with one or more sub-apportionments. It requires no more than that, and that requirement has been exactly applied to the Finance Act, 1938, s. 41 (4) (a) (ii), by COHEN, L.J., in his judgment ([1947] 2 All E.R. 505). The effect is that s. 41 (4) (a) (ii) reads as follows:—

“Where the amount of the income of any body corporate has been apportioned by means of an original apportionment under s. 21 of the Finance Act, 1922, for any year or period or by means of such an original apportionment together with one or more such sub-apportionments or series of sub-apportionments as is provided for by s. 32 of the Finance Act, 1927, or could have been so apportioned if the body corporate were incorporated in any part of the United Kingdom, so much of the income of the body corporate for that year or period as is equal to the amount which has been or could have been so apportioned to the trustees of or a beneficiary under the settlement.”

This amended version of s. 41 (4) (a) (ii) is not abortive or inept, for it is common ground that this amendment widens the scope of both branches of the original enactment though not sufficiently to enable the Crown to succeed. The counsel who represented the Crown, therefore, argued that logically it was necessary to add to this amended version words which are not to be found in the Finance Act, 1939, s. 13 (3), and without which according to the argument the intention of s. 13 (3) would be defeated. They presented the argument in a variety of forms, all of them ingenious, and all, in my opinion, fallacious, for they arbitrarily assumed an intention, not discoverable from the terms of s. 13 (3) of the Finance Act, 1939, to deal with a chain into which foreign companies enter on precisely the same footing as a chain of companies incorporated in the United Kingdom and they branded as illogical any construction which failed to give effect to this assumed intention. Liberties like these are not allowable in construing any statute, and they are peculiarly out of place in construing a taxing act.

LORD MORTON OF HENRYTON: My Lords, for the sake of brevity I shall refer to Dufferin Investment Co., Ltd., and Finance and Trusts, Ltd., respectively as “Dufferin,” and “Finance and Trusts.” It is now admitted by the appellant that 15/25th of the income of Dufferin must be computed as income arising under the settlement of Aug. 20, 1934, and it is common ground between the parties that for the purpose of this appeal any reasoning which applies to the case of Finance and Trusts will also apply to the cases of the “other foreign companies” mentioned in para. 15 of the Stated Case. It is, therefore, only necessary to consider what is the effect of the Finance Act, 1938, s. 41 (4) (a) (ii), coupled with the Finance Act, 1939, s. 13 (3), in regard to the income of Finance and Trusts. COHEN, L.J., after observing that the latter section was a good example of bad referential legislation, continued (*ibid*):

“Applying that section literally to s. 41 of the Finance Act, 1938, s. 41 (4) (a) (ii), would read as follows: ‘Where the amount of the income of any body corporate has been apportioned by means of an original apportionment under s. 21 of the Finance Act, 1922, for any year or period or by means of such an original apportionment together with one or more such sub-apportionments or series of sub-apportionments as is provided for by s. 32 of the Finance Act, 1927, or could have been so apportioned if the body corporate were incorporated in any part of the United Kingdom,

so much of the income of the body corporate for that year or period as is equal to the amount which has been or could have been so apportioned to the trustees of or a beneficiary under the settlement’.”

I entirely agree with the passage just quoted, and, with all respect to those who have thought otherwise, I feel no doubt that the phrase “the body corporate” bears the same meaning on the two occasions on which it occurs, and that on each occasion the phrase refers back to the body corporate mentioned in the first line of the subsection. This was, undoubtedly, so in s. 41 (4) (a) (ii) before s. 13 (3) of the Act of 1939 was passed. Counsel for the Crown endeavoured to persuade your Lordships that the phrase “the body corporate” where it first appears does not now refer back to the body corporate mentioned in the first line of the subsection, but has some such meaning as “any appropriate or relevant body corporate.” They are constrained to admit, however, that the phrase “the body corporate” where it last occurs does refer back to the body corporate mentioned in the first line of the subsection. My Lords, I can find no good reason why this phrase should now bear two different meanings when it occurs twice, in rapid succession, in one and the same subsection. There is nothing in s. 13 (3) of the Act of 1939 which justifies this wholly artificial construction of s. 41 (4) (a) (ii) of the Act of 1938, and I can find no other reason which compels your Lordships to depart so far from the ordinary and well-founded rules of construction. As has been pointed out, even if the Crown’s contention is rejected, s. 13 (3) of the Act of 1939 substantially widens the scope of s. 41 (4) (a) (ii) of the Act of 1938. I now proceed to apply the latter subsection, in the modified form set out by COHEN, L.J., to the case of Finance and Trusts. The income of that body corporate has not been apportioned in the manner mentioned in the modified sub-section, but it could have been so apportioned if that body corporate were incorporated in the United Kingdom. This fact would have helped the Crown if Dufferin had been incorporated in the United Kingdom, because income of Finance and Trusts could have been apportioned to Dufferin and then (by means of a sub-apportionment) to the trustees of the 1934 settlement; but as Dufferin was not in fact incorporated in the United Kingdom there can be no sub-apportionment of any income apportioned to it. Thus, no income of Finance and Trusts can be apportioned to the trustees of the settlement of 1934 by means of an original apportionment, because they are not shareholders in Finance and Trusts, and no income of Finance and Trusts can be apportioned to the trustees by means of a sub-apportionment of income apportioned to Dufferin, because Dufferin was not incorporated in the United Kingdom. As the same reasoning admittedly applies to the income of the other foreign companies in question, I am of opinion that ATKINSON, J., and the Special Commissioners arrived at the right conclusion, that this appeal should be allowed, and that the respondents should pay the appellant’s costs here and below.

Appeal allowed with costs here and below.
Solicitors: *Wiley & Powles* (for the appellant); *Solicitor of Inland Revenue.*
[*Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.*]

LONGHURST *v.* METROPOLITAN WATER BOARD.

[HOUSE OF LORDS (Lord Porter, Lord Uthwatt, Lord du Parcq, Lord Normand and Lord Morton of Henryton), July 7, 8, October 29, 1948.]

Negligence—Highway—Leakage in water-pipe—Paving-stones on footpath affected—Water undertakers not aware of danger—Liability.

Nuisance—Waterworks—Statutory powers—Damage occasioned without negligence—Liability.

Waterworks—Statutory duty—Damage due to defective water-pipe—Duty to re-instate and repair road confined to portion taken up—Waterworks Clauses Act, 1847 (c. 17), s. 32.

For the purpose of their water supply, a water board, which had statutory authority to lay down pipes for the supply of water, placed a stop-cock in the surface of the road outside the appellant's house. On June 30, 1945, the appellant noticed that some of the paving-stones outside her gate had become dislodged and reported the matter to the highway authority. On July 4 the highway authority, finding that there was moisture around the stones owing to a leakage in the stop-cock, informed the water board, who immediately sent workmen to carry out the necessary repairs. To stop the leakage the workmen had to take up and replace six of the paving stones round the stop-cock. While the repairs were being carried out, a foreman of the highway authority visited the site and saw what was being done. At 9 a.m. on the following morning the water board delivered a notice to the highway authority informing them that the work had been done and requiring them to effect a permanent re-instatement of the paving-stones. At 11.30 a.m., before a permanent re-instatement had been effected, the appellant slipped on the roadway outside her house and twisted her ankle owing to a paving-stone, which was loose, tilting as she stepped on it. This stone had been affected by the leakage, but was not one of those which had been taken up and replaced by the water board on the previous day. Although this and the adjoining stones were uneven, they looked perfectly safe, and the water board did not know that they were in a dangerous condition.

HELD : (i) since the board had no knowledge of the danger to the public at the place in question and no reason to suspect the danger, and since there was no evidence that they had failed to exercise due care, they were not guilty of negligence.

(ii) since the board were acting under statutory authority, they were not liable for nuisance in the absence of negligence.

Geddis v. Bann Reservoir Proprietors, (1878) (3 App. Cas. 430), and *Green v. Chelsea Waterworks Co.*, (1894) (70 L.T. 547), *applied*.

(iii) (*per* LORD PORTER) the Waterworks Clauses Act, 1847, s. 32, under which the board carried out the works in question, obliged the board to re-instate and repair such portion of the road as they had taken up in the course of their statutory authority, but had no bearing on their liability to answer for any other damage to the street.

Decision of the Court of Appeal (1947) (177 L.T. 483; 111 J.P. 477), *affirmed*.

[AS TO KNOWLEDGE, OR OPPORTUNITY OF KNOWLEDGE, AS AN INGREDIENT OF NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, p. 570, para. 823; and FOR CASES, see DIGEST, Vol. 36, pp. 18, 19, Nos. 80-86.]

Cases referred to :

- (1) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest 187, 311.
- (2) *Mourton v. Poulter*, [1930] 2 K.B. 183; 99 L.J.K.B. 289; 143 L.T. 20; *sub nom.*, *Moulton v. Poulter*, 94 J.P. 190; Digest Supp.

- (3) *Slater v. Worthington's Cash Stores*, (1930), *Ltd.*, [1941] 3 All E.R. 28 [1941] 1 K.B. 488; 111 L.J.K.B. 91; 2nd Digest Supp.
- (4) *Dollman v. Hillman, Ltd.*, [1941] 1 All E.R. 355; 2nd Digest Supp.
- (5) *Pope v. Fraser & Southern Rolling & Wire Mills, Ltd.*, (1938), 55 T.L.R. 324; Digest Supp.
- (6) *Noble v. Harrison*, [1926] 2 K.B. 332; 95 L.J.K.B. 813; 135 L.T. 325; 90 J.P. 188; 36 Digest 189, 316.
- (7) *Geddis v. Bann Reservoir Proprietors*, (1878), 3 App. Cas. 430; 38 Digest 25, 137.
- (8) *Green v. Chelsea Waterworks Co.*, (1894), 70 L.T. 547; 38 Digest 23, 125.

APPEAL from a decision of the Court of Appeal (TUCKER, SOMERVELL and EVERSLED, L.J.J.), dated July 8, 1947, allowing the appeal of the respondents, the Metropolitan Water Board, from a judgment of HUMPHREYS, J., dated Feb. 25, 1947.

The appellant suffered injuries as a result of slipping on a paving-stone which had become loose owing to a leakage in a stop-cock placed in the surface of the road by the respondents, acting under statutory authority. Other paving-stones near to the one in question had been removed and replaced by employees of the respondents on the day before the accident, but the respondents did not know, and had no reason to believe, that this particular stone was in a dangerous condition. In an action brought by the appellant against the respondents claiming damages for negligence or nuisance, HUMPHREYS, J., gave judgment for the appellant, but an appeal by the respondents from his decision was allowed by the Court of Appeal and the House of Lords now dismissed the appeal from the decision of the Court of Appeal. The facts appear in the opinion of LORD PORTER.

R. F. Levy, K.C., and *F. G. Paterson* for the appellant.

Pritt, K.C., and *Roy Wilson* for the respondents.

The House took time for consideration.

Oct. 29. LORD PORTER: My Lords, the respondents are a statutory body and as such are authorised to supply water in the borough of Dartford. The material powers which they possess are to be found in the Waterworks Clauses Act, 1847, in ss. 28 to 32 inclusive which are worded as follows:

"And with respect to the breaking up of streets for the purpose of laying pipes, be it enacted as follows:

28. The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter, or remove the same, and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers.

30. Before the undertakers open or break up any street, bridge, sewer, drain, or tunnel, they shall give to the persons under whose control or management the same may be, or to their clerk, surveyor, or other officer notice in writing of their intention to open or break up the same, not less than 3 clear days before beginning such work, except in cases of emergency arising from defects in any of the pipes or other works, and then so soon as is possible after the beginning of the work, or the necessity for the same shall have arisen.

31. No such street, bridge, sewer, drain, or tunnel shall, except in the cases of emergency aforesaid, be opened or broken up, except under the superintendence of the persons having the control or management thereof, or of their officer, and according to such plan as shall be approved of by such persons or their officer, or in case of any difference respecting such plan, then according to such plan as shall be determined by two justices; and such justices may, on the application of the persons having the control or management of any such sewer or drain, or their officer, require the undertakers to make such temporary or other works as they may think necessary for guarding against any interruption of the drainage during the execution of any works which interfere with any such sewer or drain: Provided always, that if the persons having such control or management as aforesaid, and their officer, fail to attend at the time fixed for the opening of any such street, bridge, sewer, drain, or tunnel, after having had such notice of the intention of the undertakers as aforesaid, or shall not propose any plan for breaking up or opening the same, or shall refuse or neglect to superintend the operation, the undertakers may perform the work specified in such notice without the superintendence of such persons, or their officer.

32. When the undertakers open or break up the road or pavement of any street or bridge, or any sewer, drain, or tunnel, they shall with all convenient speed complete the work for which the same shall be broken up, and fill in the ground, and re-instate and make good the road or pavement, or the sewer, drain, or tunnel, so opened or broken up, and carry away the rubbish occasioned thereby, and shall at all times, whilst any such road or pavement shall be so opened or broken up, cause the same to be fenced and guarded, and shall cause a light sufficient for the warning of passengers to be set up and kept thereagainst, every night during which such road or pavement shall be continued open or broken up, and shall, after replacing and making good the road or pavement which shall have been so broken up, keep the same in good repair for 3 months thereafter, and such further time, if any, not being more than 12 months in the whole, as the soil so broken up shall continue to subside."

For the purposes of their water supply the respondents place stop-cocks in the surface of the roads in (amongst others) that borough of Dartford, and one of their stop-cocks is situated in Holly Road. On the north of that road and close to the stop-cock lies a house numbered 17 in which the appellant lives. The footpath in front of this house and contiguous to the stop-cock is paved with square stone slabs. For convenience sake, 16 of these slabs, which lie in front of the appellant's garden, have been numbered 1 to 8 and 1A to 8A. The unlettered numbers represent slabs lying in sequence alongside her garden front and the lettered numbers those which lie next to them but further out towards the roadway. Numbers 1 and 1A lie east of the entrance to No. 17 and numbers 6, 6A, 7, 7A, 8 and 8A are placed round the stop-cock. All these stones are 2ft. wide, some are 2ft. and others 2ft. 6ins. long, and they are placed lengthwise across the pavement so that each combination of stones measures 2ft. across and 4ft. 6ins. in length. The salient facts of the case as proved or admitted are summarised as follows in chronological order: (a) June 30, 1945. The appellant noticed that some of the paving stones outside her gate had become dislodged, and reported the fact to the surveyor of Dartford Corporation, which was the local highway authority. (b) July 4, at about 8.40 a.m. A foreman employed by the Dartford Corporation (one Turner) found that there was moisture around the paving stones in the footpath as the result of a leakage, and telephoned the information to the respondents' district foreman. The latter immediately instructed the turncock, the assistant turncock, and a trenchman to go and carry out the necessary repairs. (c) July 4, from about 9.30

or 10 a.m. until about 4.15 p.m. The respondents' three men were at work on the site. On their arrival they found that the paving stones numbered 3, 3A, 4, 4A, 5, 5A, 6, 6A, 7, 7A, 8 and 8A had become slightly dislodged from their seating, and that a ridge of about one inch had formed between the inside stones (marked 3, 4, etc.) and the outer stones (marked 3A, 4A, etc.). They found that there was water in the stop-cock boxes under the paving stone

A number 7, and that water was leaking as the result of leather washers having become dried up. In order to repair the cause of the leakage, they removed the paving stones numbered 6, 6A, 7, 7A, 8 and 8A. On completion of the repairs they effected a temporary re-instatement of those stones. (d) July 4, during the afternoon. While the respondents' men were engaged on the work, the same Dartford Corporation foreman, who had reported the leakage to the respondents (see (b) above), visited the site and saw what was being done.

B (e) July 4, at about 4 or 4.15 p.m. The respondents' men left the site and returned to the respondents' district foreman's office. Thereupon an emergency works notice and a re-instatement voucher were made out, but it was too late to serve them on the corporation that evening. (f) July 5, shortly after 9 a.m. The emergency works notice and the re-instatement voucher were delivered

C by hand to the corporation. (g) July 5, at about 11.30 a.m. The accident occurred. The facts are not in dispute. When the appellant stepped with her left foot on the paving stone numbered 2A it moved or tilted under her weight, causing her foot to come into contact with the stone numbered 2, with the result that her ankle was twisted and her foot bruised. The appellant stated that the paving stones, although uneven, looked perfectly safe to tread on.

D (h) July 6, in the morning. A pavior employed by the corporation attended at the site to effect permanent re-instatement. He found that at that time the pavement was in a very dangerous condition. He permanently re-instated not only the six stones which the respondents had taken up, but also the other stones which had become dislodged, and left them all safe. (j) July 6. The appellant wrote a letter of complaint to the town clerk of Dartford Corporation.

E (k) July 12. Dartford Corporation passed the matter to the respondents. As the Metropolitan Water Board denied liability for the accident, the appellant brought an action claiming damages against them for negligence or nuisance. She appears to have learnt that, when they came to make repairs, the respondents had themselves found the paving stones dislodged and the stop-cock leaking and not unnaturally came to the conclusion that they had removed or replaced

F all the stones marked from 1 to 8 and 1A to 8A. In this opinion she was supported by some witnesses, but the learned judge thought their observations mistaken. In this belief her statement of claim was framed on the supposition that stones 2 and 2A had been so moved and that their instability was due to that cause. This was the attitude adopted on her behalf when the trial of the action opened. The learned judge, however, accepted the contrary evidence

G of the respondents and thought her mistaken. He, accordingly, found, at any rate inferentially, that stones 6, 6A, 7, 7A, 8 and 8A alone had been touched. On the other hand, he found that stone 2A was dangerously loose and that its condition was caused by the leakage of water from the stop-cock which percolated down hill as far as the spot where it was set. For this leakage he found the respondents responsible and held that, as a public authority, they had a

H duty to see that members of the public were not endangered by a condition of which they were aware, and they should have immediately notified the corporation of Dartford and, until that body took charge, should have taken care that the public were warned of the danger.

The Court of Appeal, on the other hand, thought that the respondents were not liable. EVERSHED, L.J., was of opinion that the respondents owed no duty to give any such warning, whether they knew or did not know of the state of the pavement, and, in particular, that they were under no duty when the

corporation, who were the highway authority, had as much knowledge of the state of the pavement as the respondents had, and, finally, that there was no evidence or no sufficient facts proved from which it could be inferred that the respondents knew or ought to have known of the dangerous condition of the stones. SOMERVELL, L.J., agreed with this view, but TUCKER, L.J., considered that there was ample evidence from which knowledge could be inferred. He agreed, however, that the appeal should be allowed solely on the ground that no duty was cast on the board in a case where the highway authority were in as full possession of the facts as were the respondents. All three of the contentions which appealed to EVERSLED, L.J., were maintained before your Lordships' House, but I do not think it necessary to pronounce on each of them.

It is obvious that the first gives rise to a very difficult and controversial question. The respondents' argument involved the proposition that their only duty was to stop the leak and put back paving stones or soil which they had moved and see that they were safely housed. They might, it was asserted, know that leakage from their pipe had loosened the seating of stones so as to make them dangerous to tread on to their knowledge, or, indeed, so as to wear away a portion of the soil and leave a gaping hole which was invisible at night. In such circumstances they might have a social or moral duty to warn the public, but, it was maintained, no legal one. To accede to the argument and accept the limitation of duty involved would require an elaborate inquiry and very careful consideration. As I do not think a decision on this point is necessary, I should prefer, for my own part, to express no view on it. Nor do I think it necessary to determine whether the knowledge of Dartford Corporation, who were the highway authority, was a factor which relieved the respondents from any further liability. Whatever one may think of its legal effect, the respondents were responsible for the condition of the stone which moved, in the sense that it was the escape of their water which rendered it insecure, and in these circumstances it is at least arguable that they should have set a watchman to warn passers-by until the highway authority had sent, not an observer, but some workman to take charge.

On the third point, however, I think the respondents are entitled to succeed. They knew, no doubt, that a ridge had been formed between the stones and that those immediately round the stop-cock required replacing, but the peccant stone and those in its immediate neighbourhood looked safe to those who did the work and to the appellant. It was urged that she was not an expert and that the workmen who removed the six stones should have known that the percolation of water was likely to make the others unsafe, or, at least, should have tested them to see if they were safe, and until they did so the respondents should have warned the public against a possible danger. My Lords, in my view, the respondents had no reason to suspect any danger. I do not think that one is entitled to infer that a skilled man would suspect a paving stone of working loose or of becoming more liable to tilt owing to the percolation of water. I can imagine the opposite being the case and its being thought that the moistening of the seating would make the stone rest more firmly in its place in spite of the formation of the ridge. Moreover, the appellant is in the further difficulty that, owing to her mistaken belief that the stone which moved under her tread was one of those taken up, the question whether a skilled man would have suspected its firmness was never considered, nor were any questions asked in order to ascertain what an expert would have thought the result of the percolation would be. It is true that on the day after the accident the pavior employed by Dartford Corporation found all the 16 stones, both those re-laid and those untouched, to be in a dangerous state, but he expressed the opinion that the six which were taken up may have been safely re-laid on July 4 and become loose afterwards and a similar explanation may well have accounted for the state of the other ten. He was never asked whether he would have

suspected any danger from any of them as a result of the leakage. Speaking for myself, I am unable to draw an inference from this evidence that danger should have been feared or suspected. If I am to draw such an inference, I should require evidence to support it, and none is forthcoming. In these circumstances, I do not accept the view that the respondents were guilty of any negligence or have been proved to have failed to exercise due care.

A If no negligence is proved, the only remaining basis of claim is that the respondents were liable for nuisance, and a number of cases were cited in which it was maintained that nuisance furnished a ground of action, although negligence in causing the nuisance was not established. My Lords, even in the case of a private individual, liability for nuisance without negligence or deliberate act is not readily established, apart, of course, from cases of the *Rylands v. Fletcher* (1) type. All the cases quoted to your Lordships involved, I think, B a consideration of negligence in some form or other. *Mourton v. Poulter* (2), *Slater v. Worthington's Cash Stores* (1930), *Ltd.* (3), and *Dollman v. Hillman, Ltd.* (4) are cases where the injury was due to some act of negligence on the part of the defendant, amounting, it may be, to nuisance, but still negligence. *Pope v. Fraser & Southern Rolling & Wire Mills, Ltd.* (5), on the other hand, was a case where there was no original negligence on the part of the defendants, but, C after a nuisance had been created, the defendant, with knowledge of its existence, failed to take steps to abate it or warn those endangered of the risk they ran. The principle on which it was decided is stated in and quoted from the judgment of ROWLATT, J. ([1926] 2 K.B. 338) in *Noble v. Harrison* (6):

D " . . . a person is liable for a nuisance constituted by the state of his property : (1) if he causes it ; (2) if by the neglect of some duty he allowed it to arise ; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it."

In the latter case the action failed because no such knowledge was established.

E All these, however, are cases of defendants who were not acting under statutory powers and, whatever may be the liability of private individuals, that of statutory authorities acting under statutory powers has always been held to be more limited. The principle to be adopted has most generally been quoted from the language of LORD BLACKBURN (3 App. Cas. 455) in *Geddis v. Bann Reservoir Proprietors* (7):

F " . . . I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone ; but an action does lie for doing that which the legislature has authorised, if it be done negligently."

An example showing the difference between the position of a statutory authority acting in the course of its duty and that of a private individual is G to be seen in *Green v. Chelsea Waterworks Co.* (8), where the defendants were held not liable for damage due to the bursting of a main without any negligence on their part. *Pope v. Fraser & Southern Rolling & Wire Mills, Ltd.* (5) contains an example of negligence in failing to remedy a danger caused in the course of carrying out the authorised work, but which was or should have been known to the defendants and was not remedied by them in a reasonable time. H Had the danger been unknown to the defendants and had they had no reasonable ground for suspecting it, the result would have been different.

The only further ground of claim was based on the wording of s. 32 of the Waterworks Clauses Act, 1847. This section, it is claimed, imposes a duty on the respondents to fence and guard, re-instate and keep in repair, not only any portion of a road which they have broken up, but also any portion of the road which has become out of repair and unsafe owing to the pipes and their works or the fact that they have laid their pipes in and carried a supply

of water to the neighbourhood. I cannot so read the section. It appears to me to oblige the Water Board to re-instate and repair such portion of the road as they have taken up in the course of their statutory authority, but to have no bearing on their liability to answer for any other damage to the street. I should dismiss the appeal.

LORD UTHWATT (read by **LORD NORMAND**): My Lords, it is common ground that the leakage of the stop-cock was not due to any negligence on the part of the respondents and it was established that the respondents did not in the course of the work of repair interfere in any way with the particular stone on which the appellant slipped. There was no suggestion that the work of repair was not carried out under proper supervision and there was no evidence that when the work of repair was completed the particular stone was loose. I agree with **EVERSHED** and **SOMERVELL, L.JJ.**, that there was no evidence that any of the employees of the respondents had reason to believe that the particular stone would become loose or that otherwise the pavement at that spot might become a source of danger as a result of the leakage that had occurred. Lastly, it is common ground that the highway authority knew the circumstances. It was they who had informed the respondents of the leakage. The fact that the respondents in the matter of the maintenance and user of the water main and stop-cock were acting under statutory authority absolves them, in the absence of negligence, from liability for any damage resulting from that maintenance and user. Liability can attach to them, if at all, only on the ground that it was due to their activities that the particular stone was displaced in the highway to the danger of the public, and that they thereby came under a duty to take such steps as were reasonably necessary to protect users of the highway from harm.

In a proper case, it may be necessary to consider precisely the circumstances in which a person who is responsible for obstructing a highway to the possible or probable danger of its users comes under some such duty and to consider, by reference to the facts of any such case, what particular activities are required for the proper performance of that duty. The present case calls for no such detailed examination. The matter may be summed up in this way. All the activities of the respondents were lawful. They neither knew nor had reason to believe that there was or would be an obstruction of any kind dangerous to the public at the place in question, and the highway authority, on whom rested a duty to repair the highway, knew all the material facts. No step directed to protecting users of the highway could reasonably be expected of the respondents. I desire only to add, with reference to an *obiter dictum* appearing in the judgment of **EVERSHED, L.J.**, that I reserve my opinion on the right of the respondents, had they been aware of the dislocation of the pavement, to make good that dislocation. The matter was not debated before your Lordships and may, I think, require consideration. I would dismiss the appeal.

LORD DU PARCQ: My Lords, in my opinion, it is not necessary for the decision of this appeal that your Lordships should come to a final conclusion on any of the more difficult questions of law which were mooted during the argument. The question involved is one of fact, and the only legal propositions which it is necessary to have in mind are simple and elementary.

The respondent board had statutory authority to lay down pipes for the supply of water, and it is conceded that down to the moment when the stop-cock in Holly Road began to leak, they had done nothing wrongful. There was no evidence that any negligence on the part of the board caused the leak. Having learned from the highway authority that the stop-cock was leaking, the board, in pursuance of its statutory powers and of its duty, did the repairs necessary to stop the leakage. The men who did the work of repair found it necessary to take up and replace paving-stones. The work was done, and,

so far as those paving-stones which were taken up and replaced are concerned, the appellant has no complaint to make. Her complaint, as it was finally formulated, was that other paving-stones had been affected by the penetration of water caused by the leak, and that one of these had become so loose by the morning of July 5, the day after the board's men did the repairs, that it tilted when the appellant stepped on it so that she twisted her ankle and suffered other slight injuries. There was no evidence that any workman or other agent of the board knew or had reason to believe on July 4 that the stone in question was loose or likely to tilt, nor, indeed, was it proved that on July 4, or for any considerable length of time before the mishap to the appellant occurred at about 11.30 a.m. on July 5, the stone had in fact become loose. It is true that the paving-stones were uneven, and that the board's men had noticed the unevenness, but the appellant had noticed it too, and has never alleged that it was a cause of her misfortune for which the board can be blamed.

I have said that the respondent board was told of the leak by the highway authority. That authority was Dartford Corporation, and I have no doubt that from June 30 the corporation came under a duty to see that any part of the highway which was affected by the leak was kept in repair, and to make any inspection that was reasonably necessary. It may be, though I express no opinion as to this, that the corporation was remiss. If that be so, the rule of law which protects it against an action for mere non-feasance sufficiently explains the fact that the appellant did not make it a defendant. I am not prepared to say that one can exclude the possibility that the respondent board might in certain circumstances be liable for negligence in respect of the results of a leak in its system, even though the primary liability rested on the highway authority. HUMPHREYS, J., thought that there was such negligence in the present case. In his view it was the duty of the board, first, to give notice at once to the corporation of the danger, and, secondly, to station a man at the dangerous spot in order that he might warn people off it.

I agree with the Court of Appeal that there could be no duty to warn the corporation of what it not only already knew, but had itself brought to the notice of the board. It may be that in other circumstances the board would have been under a duty to give a warning to the corporation of dangerous possibilities which they knew or had the means of knowing. In a case where the board has knowledge of facts unknown to the highway authority, or means of knowledge of such facts which are not available to that authority, it may well be the board's duty to warn the authority, and, in an emergency, to take immediate steps for the protection of the public. In the present case the board had no knowledge and no special means of knowledge of the particular danger of which the appellant complains, and I do not think that it is a fair inference from the facts proved that its servants or agents omitted to take any step which reasonable care for the safety of the public would have dictated. The leak from the board's stop-cock created a danger, but in all the circumstances the board cannot be held liable either for the occurrence of the leak or for the damage which the appellant suffered as one of its unforeseen consequences. In my opinion, the appeal should be dismissed.

LORD NORMAND : My Lords, the noble and learned Lords who have preceded me have so fully expressed the opinion which I have formed that it would be superfluous of me to attempt to make any addition to their opinions.

LORD PORTER : My Lords, my noble and learned friend, **LORD MORTON OF HENRYTON**, has asked me to say that he concurs in the opinions expressed.

Appeal dismissed.

Solicitors : *Darracotts* (for the appellant) ; *H. R. McDowell* (for the Metropolitan Water Board).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

Re NORTON'S WILL TRUSTS. LIGHTFOOT v. GOLDSON.

[CHANCERY DIVISION (Jenkins, J.), October 20, 1948.]

Charitable Bequest—Gift "for benefit of church and parish"—Support of church school—Upkeep of graves and bier house—No faculty for bier house.

A
B
A testator bequeathed £500 "to the church council of B.N. as a thank offering for 56 years of happiness with my devoted wife to whom I was married in this church. This offering to be applied by the council to any use they may think best for the benefit of the church and parish, but preferably for the support of the church school and a small provision for keeping in repair the graves of my wife's parents J. and S.T., and the bier house given by us on our golden wedding." The bier house had been erected in the churchyard without a faculty, but it did not appear that the testator appreciated that this was so or that a faculty was in fact necessary.

HELD: (i) this was a valid charitable trust for the benefit of the inhabitants of the parish.

Dictum of LORD SELBORNE, L.C., in Goodman v. Saltash Corpn. (1882) 7 A.C. 633, 642; 48 L.T. 239, 242), applied.

Farley v. Westminster Bank, Ltd. ([1939] 3 All E.R. 491; [1939] A.C. 430; 161 L.T. 103), distinguished.

(ii) the upkeep of the graves, not being tombs in a church, was not a valid charitable purpose: *Re Dalziel, Midland Bank Executor and Trustee Co., Ltd. v. St. Bartholomew's Hospital* ([1943] 2 All E.R. 656; [1943] Ch. 277; 169 L.T. 168), *applied*, but the fact that it might not be possible to carry a particular charitable purpose into effect did not invalidate the charitable gift and the amount which might have been applied to the particular purpose, could the trustees lawfully have achieved it, would become available for the general charitable purposes for which the legacy was given.

(iii) the upkeep of the bier house was "for the benefit of the church and parish" and was a good charitable purpose, and the gift for that purpose was not rendered invalid by the absence of a faculty.

[AS TO MAINTENANCE OF TOMB, see HALSBURY, Hailsham Edn., Vol. 4, pp. 129, 130, para. 171; and FOR CASES, see DIGEST, Vol. 8, pp. 260, 261, Nos. 218-239.]

Cases referred to:

- (1) *Farley v. Westminster Bank, Ltd. Re Ashton's Estate, Westminster Bank, Ltd. v. Farley*, [1939] 3 All E.R. 491; [1939] A.C. 430; 108 L.J.Ch. 307; 161 L.T. 103; Digest Supp.
- (2) *Goodman v. Saltash Corpn.*, (1882), 7 A.C. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; H.L. *revsg.*, S.C. *sub nom.*, *Saltash Corpn. v. Goodman*, (1881), 7 Q.B.D. 106 C.A.; 8 Digest 327, 1099.
- (3) *Re Dalziel, Midland Bank Executor & Trustee Co., Ltd. v. St. Bartholomew's Hospital*, [1943] 2 All E.R. 656; [1943] Ch. 277; 112 L.J.Ch. 353; 169 L.T. 168; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether the trusts of a legacy were charitable trusts. The facts appear in the judgment.

R. W. Goff for the plaintiffs (executors of the will).

J. H. A. Sparrow for the first defendant (the parochial church council of Blo Norton).

Mulligan for two persons interested in residue.

Danckwerts for H.M. Attorney-General.

JENKINS, J.: The testator, George William Norton, made a will dated Apr. 26, 1939, and died on Feb. 21, 1940. His will, with one codicil which is

not material for the present purpose, was proved by the plaintiffs on June 4, 1940.

The question which I have to decide relates to a legacy of £500 bequeathed by the will, and is : How far, if at all, the trusts of this £500 legacy are charitable trusts. The gift in question is in these terms :

- A "I give £500 to the church council of Blo Norton as a thank offering for 56 years of happiness with my devoted wife to whom I was married in this church. This offering to be applied by the council to any use they may think best for the benefit of the church and parish but preferably for the support of the church school and a small provision for keeping in repair the graves of my wife's parents John and Sarah Taylor and the bier house given by us on our golden wedding."
- B There are two circumstances which I should mention before turning to the question of construction. The bier house referred to in the gift was a wooden structure, erected in the churchyard. No faculty was obtained for its erection, which means that, unless and until a faculty is obtained, the bier house is an unlawful structure, which could be removed at any time under the order of the appropriate ecclesiastical authority. I am not prepared to assume that the
- C testator knew that a faculty had not been obtained or indeed appreciated the necessity for a faculty.

The defendants to the summons are the parochial church council of the parish of Blo Norton, which is incorporated under the Parochial Church Councils (Powers) Measure, 1921, the two persons who are interested in the residuary estate of the testator under his will, and the Attorney-General representing

D the interests of charity generally.

- Before considering the law applicable to the gift, I will first endeavour to place what I conceive to be the correct construction on it. It is a gift of £500 to the church council of Blo Norton "as a thank offering for 56 years of happiness," which the testator enjoyed with his wife, "to be applied by the council to any use they may think best for the benefit of the church and parish." So
- E far, it is, in my judgment, a gift to the council "for the benefit of the church and parish" with a discretion to the council as to the particular mode of its application within those limits. The testator goes on to express certain preferences or suggestions of a precatory character as to the mode in which he thinks the legacy might preferably be applied—"but preferably for the support of the church school and a small provision for keeping in repair the graves of
- F my wife's parents John and Sarah Taylor and the bier house given by us on our golden wedding." It has been argued that the passage introduced by the words "and a small provision" makes a separate and independent gift of an unascertained sum over and above the £500. I find myself unable to accept that view. The "small provision" is one of the purposes for which the testator expressed a preference in regard to the application of that sum. What he says
- G in this part of the gift amounts to this : "but preferably for the support of the church school subject to a small provision being made for keeping in repair the graves of my wife's parents and for keeping in repair the bier house." That conclusion follows from the grammatical structure of the gift. The only words of gift are : "I give £500 to the church council of Blo Norton," and they introduce one gift only, a gift of £500. It is to be noticed that it is a gift of
- H £500 to the church council of Blo Norton, and not a gift to the church council of Blo Norton of a sum of £500. If the words had been in that order, it would have been less difficult, perhaps, to construe the "small provision" as an additional item of gift. In my view, as the will stands, the testator means the "small provision" to come out of the £500, if the council thinks fit to adopt his recommendation.

That being the meaning of the gift, is a gift to the parochial church council to be applied by the council "to any use they may think best for the benefit

of the church and parish " a valid charitable gift ? It is not disputed that a gift simply for the benefit of the church would be a valid charitable gift. The contest centres on the addition of the words " and parish." For the residuary legatees it is argued that the inclusion of the reference to the parish brings the gift within the principle of *Farley v. Westminster Bank* (1), where it was held that a gift for " parish work " might include objects which were not charitable in the legal sense, with the result that the gift for parish work was held to fail. On the other hand, I have been referred to *Goodman v. Saltash Corpn.* (2), where LORD SELBORNE, L.C., said ((1882) 7 A.C. 642):

" A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust . . . "

I have also been referred to a number of later cases in which the proposition embodied in that passage has been recognised as settled law. In my judgment, there is a real difference between a gift for " the benefit of the parish " and a gift for " parish work." The gift for " parish work " may well embrace all sorts of matters which would not come within the ambit of a gift for the " benefit of the parish." A gift for the benefit of the parish is, in my judgment, a gift for the benefit of the inhabitants of the parish and comes exactly within the principle stated by LORD SELBORNE, L.C., in *Goodman v. Saltash Corpn.* (2). Therefore, in my judgment, the gift here should be upheld on that principle, and the decision in *Farley v. Westminster Bank* (1) with respect to gifts for parish work has no application to this will. It follows that down to the words " and parish " the gift in this will is a valid charitable gift for the benefit of the church and the inhabitants of the parish.

It remains to consider whether that conclusion is displaced by the precatory words which follow. In my opinion, it is not. The main recommendation which the testator has made is that the £500 should be applied for the support of the church school. That is a valid charitable purpose. He adds : " and a small provision for keeping in repair the graves . . . and the bier house." In substance he says that he would prefer that the £500 should be applied for the support of the church school, subject to a small provision being made for the repairs he mentions. Of these two objects for which the " small provision " is contemplated, the first, inasmuch as those graves are not tombs in a church, is not a valid charitable purpose. The consequence of its invalidity is that this passage in the will is ineffective, and the council cannot lawfully make any provision for that purpose.

Does that result in any part of the £500 not being validly disposed of so that it falls into residue ? In my judgment, the answer to that question must be " No," because this is a case in which the testator has devoted the whole of the legacy to charitable purposes, and then has empowered the trustee of the legacy to apply a part of it to the particular non-charitable purpose of keeping in repair two specified graves. That being the position, the result of the invalidity of the power conferred on the council *quoad* this particular object is that the power should to that extent simply be ignored. Any amount which they might have spent on this object, had it been a valid charitable object, will be available for the general charitable purpose to which the legacy as a whole is subjected. That conclusion can also be justified on the principle of the " tomb cases," reference to which is made in the judgment of COHEN, J., in *Re Dalziel* (3), that a provision for the repair of a tomb is to be regarded as imposing only a moral obligation. On this principle the moral obligation, being one which cannot be validly carried out, should simply be ignored and the testator's disposition in favour of valid charitable objects should be treated as extending to the whole of the subject-matter of the gift.

The second purpose for which the testator recommends that provision should be made is the repair of the bier house. In my judgment, the repair of the

bier house, being a bier house in the parish churchyard used for the purpose of housing biers in connection with funerals, would be a purpose "for the benefit of the church and parish," and is a good charitable purpose. It is, however, suggested that this gift is rendered invalid by the absence of a faculty. I think that is wrong and the position is more accurately stated thus. Here is a gift in intention and in character a perfectly valid charitable gift. It may be, however, that the circumstance that no faculty has been obtained will make it impossible to carry that particular charitable purpose into effect. If that is so, then there will be a circumstance not contemplated by the testator, which will make it impossible for the trustee to carry out this particular wish of his. That will not, however, invalidate the charitable gift of the legacy of £500 or any part of it. The result will simply be that any amount which the trustees might have applied in repair of the bier house, could they lawfully have done it, will simply become available for the general charitable purposes for which the legacy of £500 was given.

For these reasons, I propose to declare that, upon the true construction of the will, the bequest of £500 is in its entirety a valid charitable gift to the council for any use they may decide for the benefit of the church, including in particular the support of the church school and keeping in repair the bier house so far as that lawfully can be done. I propose to answer in that sense the question put to me.

Solicitors: *Burton, Yeates & Hart*, agents for *Lightfoot & Lowndes*, Thame (for the plaintiffs); *Field, Roscoe & Co.*, agents for *Hansell, Hales, Bridgwater & Preston*, Norwich (for the church council); *Burton, Yeates & Hart* (for the residuary legatees); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PHILLIPS v. WELTON AND ANOTHER.

[COURT OF APPEAL (Lord Greene, M.R., Tucker and Somervell, L.JJ.), September 29, 30, October 26, 1948.]

Rent Restriction—Possession—Notice of increase of rent in 1920—Death of tenant in 1922—Widow statutory tenant—Whether statutory tenancy passed to daughters on death of widow—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g)—Rent Restrictions (Notices of Increase) Act, 1923 (c. 13), s. 1 (1).

In 1904, W. became the tenant of a dwelling-house to which in due course the Rent Restrictions Acts applied, and in 1920 he was served with notices of increase of rent, which notices the Court of Appeal found to be valid. He died intestate in 1922, and his widow continued to reside in the house with the defendants, her daughters. Rent was paid and accepted until her death in 1947. The plaintiff refused to accept rent from the daughters, and claimed possession.

HELD: although at the date of his death W. was a contractual tenant, the court was bound by the Rent Restrictions (Notices of Increase) Act, 1923, s. 1 (1), to treat the notices of increase given in 1920 as notice to terminate the tenancy so that W. became a statutory tenant; Mrs. W. became tenant on the death of W. by virtue of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g); the defendants could not themselves become tenants by virtue of s. 12 (1) (g) on the death of Mrs. W.; and the plaintiff was entitled to possession.

Pain v. Cobb, (1931) (146 L.T. 13), and *Summers v. Donohue*, ([1945] 1 All E.R. 599; 172 L.T. 310), followed.

Per cur.: if a statutory tenant dies leaving someone living in the house capable of being "tenant" within s. 12 (1) (g), and, without any assertion

of right under s. 12 (1) (g), that person simply continues to pay rent, the proper inference is that he or she is continuing in possession by virtue of the section.

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, para. 400; and FOR CASES, see DIGEST, Vol. 31, pp. 562-563, Nos. 7097-7107.]

Cases referred to:

- (1) *Pain v. Cobb*, [1931], 146 L.T. 13; 95 J.P. 201; Digest Supp.
- (2) *Summers v. Donohue*, [1945] 1 All E.R. 599; [1945] K.B. 376; 114 L.J.K.B. 401; 172 L.T. 310; 2nd Digest Supp.
- (3) *Thynne v. Salmon*, [1948] 1 All E.R. 49; [1948] 1 K.B. 482; [1948] L.J.R. 506.
- (4) *Smith v. Mather*, [1948] 1 All E.R. 704; [1948] 2 K.B. 212; [1948] L.J.R. 1209.
- (5) *Kerr v. Bryde*, [1923] A.C. 16; 92 L.J.P.C. 1; 128 L.T. 140; 87 J.P. 16; 31 Digest 569, 7171.

APPEAL by the defendants from an order of His Honour JUDGE HUNTER, K.C., at Ilford County Court, dated Feb. 19, 1948, granting possession of a dwelling-house to the landlord. JUDGE HUNTER held notices of increase of rent, given in 1920 to the then tenant, to be defective, and that, therefore, since there had been no notice to quit, that tenant must be considered as a contractual tenant at the date of his death (intestate) in 1922, and s. 12 (1) (g) of the Act of 1920 could not apply for the benefit of the defendants, the tenant's daughters. The Court of Appeal now affirmed JUDGE HUNTER's order, but based their decision on different grounds. The facts appear in the judgment of SOMERVELL, L.J.

A. E. Holdsworth for the defendants.

Winn for the plaintiff.

Cur. adv. vult.

Oct. 26. LORD GREENE, M.R.: I have had the advantage of reading the judgment about to be delivered by SOMERVELL, L.J. I can only say that I agree with it and have nothing myself to add.

SOMERVELL, L.J., read the following judgment. In this case the plaintiff asks for and has obtained an order for possession of No. 24, Cooke Street, Barking, on the basis that the defendants are trespassers. A number of points have been raised, but the argument mainly turns on whether the defendants can claim to remain in possession by virtue of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1. The relevant words are as follows:

"... the expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

Mr. Welton, the defendants' father, became tenant of the house in 1904. He died intestate in 1922. No letters of administration were taken out. His widow continued to reside in the house with the defendants, who are her daughters, and paid rent which was accepted until her death intestate in 1947. The plaintiff has refused to accept rent from the daughters. It has been held that the benefit of the words cited from s. 12 (1) (g) cannot be exercised on successive occasions. If, for example, when a husband dies, his widow remains in possession by virtue of s. 12 (1) (g), at her death a member of the family residing with her cannot claim the benefit of the section. The widow is not a "tenant" within the relevant words: *Pain v. Cobb* (1); *Summers v. Donohue* (2). It has been

held by two recent decisions of this court that the words of s. 12 (1) (g) apply only where the deceased is at the time of his death a statutory tenant: *Thynne v. Salmon* (3); *Smith v. Mather* (4).

A The learned judge decided that when Mr. Welton died he was a contractual tenant. This contractual tenancy, assuming that it existed, vested at that time in the judges of the High Court. No notice to quit was served. The county court judge held that by reason of this outstanding contractual tenancy s. 12 (1) (g) could not apply, nor could the plaintiff enter into a new contractual tenancy with Mrs. Welton or anyone else. Mrs. Welton was not a tenant, and the defendants could not rely on s. 12 (1) (g). On the view I take it is unnecessary to decide this issue. I think, however, there is much to be said for the argument that where the deceased intestate had a contractual tenancy at his death, as found here by the judge, a landlord who accepted rent from a widow or anyone else would be estopped from himself disputing the existence of a tenancy as against that person. If he proceeds to serve that person with a notice of increase in the statutory form it may well be that he must recognise him as being a statutory tenant on whose death a member of his family residing with him would become entitled to rely on s. 12 (1) (g).

B
C The position on Mr. Welton's death is complicated. In 1920 he was served with documents purporting to be notices of increase of rent under ss. 2 and 3 of the Act of 1920. The increased rent as set out was paid. In *Kerr v. Bryde* (5) the House of Lords decided that a landlord could not validly increase rent as provided in the statute merely by giving a notice of increase, but that the contractual tenancy must first be determined, and that a notice of increase in statutory form did not itself operate as a notice to quit. The Rent Restrictions (Notices of Increase) Act, 1923, s. 1 (1), then provided :

E
F "Where notice of intention to increase rent has, whether before or after the passing of this Act, been served on a tenant in conformity with s. 3 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (hereinafter referred to as the principal Act), and a notice to terminate the tenancy was necessary in order to make such increase effective, the notice of intention to increase the rent shall have effect and shall be deemed always to have had effect as if it were or had been also a notice to terminate the existing tenancy on the day immediately preceding the day as from which the increase is or was first to take effect, or on the earliest day thereafter on which if it had been a notice to terminate the tenancy, it would have been effective for that purpose, and in the latter case a notice of increase served before the passing of this Act shall be deemed to have had effect as if such earliest date had been specified in the notice as the date as from which the increase was to take effect."

G
H Unless, therefore, the notices of increase suffer from some further defect, this court would have to proceed on the basis that Mr. Welton became a statutory tenant as from the date when the first increase took effect, that is in 1920. The learned county court judge found the notices were defective. They cannot, I think, have been analysed before him as they were before us. All except a line at the foot is in statutory form. The notice dated July 9 sets out an increase in respect of rates, the increase under that head to date from July 19, "being one clear week from the date of this notice." This was correct and in accordance with the Act. The other increases are stated to date from Aug. 9, being "four clear weeks from the date of this notice." This was also in accordance with the Act. The increase in respect of rates was 8½d. a week, the other increases amounted to 1s. 4d. a week. As the rent was paid in arrear the 8½d. became due at least by July 26, and by Aug. 9 three weeks' increase at 8½d., namely, 2s. 1½d. would be due. The 1s. 4d. in respect of the other increases would become due at least on Aug. 16 and the total of the increases would bring the rent up from 5s. 6d. to 7s. 6½d. The words on which the argument turns are

at the bottom of the form below the signature—"7s. 6½d. The rent to be paid on and after Monday, Aug. 9, 1920." The judge held that these words were demanding rent for one week short of the period of "four clear weeks which has to elapse under the 'Act.'" If in respect of all the increases four weeks had had to elapse, the learned judge would have been plainly right. In respect, however, of the increase based on an increase of rates there was due by Aug. 9 a sum of 2s. 1½d. to be added to the 5s. 6d., making 7s. 7½d. No doubt, the words are unfortunate in form. They do not, however, demand a sum in excess of that to which the landlord was entitled under the notice which was admittedly, apart from these words, in proper form and correct. In my opinion, this added sentence does not invalidate the notice. The notice, therefore, comes within s. 1 of the Act of 1923 and has effect and shall be deemed always to have had effect as if it had been an effective notice to terminate the existing tenancy. Under the Act we have to consider the legal position of Mr. Welton and of his widow as if the notice had had effect in July, 1920, as a notice to terminate, and, therefore, creating a statutory tenancy, as from the first day on which the first of the increases became effective.

There remains, however, a further point. In *Summers v. Donohue* (2) it was not disputed that the widow whose child was claiming the protection of the section continued in possession on her husband's death by virtue of s. 12 (1) (g). This is disputed here. If when a statutory tenant dies there is correspondence, and, for example, his widow asserts a right under s. 12 (1) (g), the matter, of course, is clear, and members of her family cannot on her death claim the protection of the section. Suppose, however, nothing is said. The widow—or it might on the "first occasion" be some other relative—simply continues to pay the rent. If it is clear that the person left in possession is within s. 12 (1) (g), then, in my opinion, the proper inference is that he or she is continuing in possession by virtue of the section. That is the position here, except for the fact that Mr. Welton as the law stood at the time of his death was not a statutory tenant. He was a contractual tenant either at the old rent, or at a rent increased by agreement up to the permitted maximum. The court, however, is precluded by the Act of 1923 from considering the position on the basis of the law as it was in October, 1922. By virtue of the retroactive effect of the Act, we have to treat Mr. Welton as a statutory tenant. It follows, in my opinion, that we have to treat Mrs. Welton as the widow of a statutory tenant, and as such entitled to the protection of s. 12 (1) (g), and, therefore, remaining in possession in virtue of the provisions of that section. If that is right, then, on the authorities to which I have referred, the defendants cannot claim the protection of that section. The appeal therefore fails.

TUCKER, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Douglas Wiseman & Co.*, Barking (for the defendants); *Hatten, Asplin, Jewers & Glenney*, Barking (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

HIDA v. NOLAN.

[COURT OF APPEAL (Lord Greene, M.R., Tucker and Somervell, L.JJ.), October 11, 12, 29, 1948.]

County Court—Payment into court—Tender—Plea filed after payment in—Applicability of County Court Rules, 1936, Ord. 47, r. 8 (2).

A By County Court Rules, 1936, Ord. 47, r. 8 (2), it is provided: "Where money is paid into court without a denial of liability and without a plea of tender, and the plaintiff does not accept it in satisfaction of his claim . . . the Scale applicable to the costs incurred after the date of the payment into court shall, unless the court otherwise orders, be determined as follows: (a) Where the plaintiff recovers an amount in excess of the amount paid into court, his costs shall be taxed on the Scale applicable to the excess. B (b) Where the plaintiff fails to recover an amount in excess of the amount paid into court, the defendant's costs shall be taxed on the Scale applicable to the amount remaining in dispute."

C The plaintiff, a builder, sued the defendant for the sum of £100 in respect of work done and materials supplied. On July 17, 1947, the defendant filed a defence denying the claim. On Aug. 7, 1947, the defendant paid into court the sum of £69 9s. 7d. with an admission of liability. On Sept. 17, 1947, the defendant paid into court a further sum of £4 9s. 7d., "to cover the costs on the said sum of £69 9s. 7d.," and raised the alternative plea of tender. On Nov. 11, 1947, he paid a further £2 into court. On Apr. 8, 1948, the county court judge gave judgment for the plaintiff for £70 0s. 6d. D with costs on Scale C on the ground that there was a plea of tender and r. 8 (2) of Ord. 47 did not apply.

E HELD: where payment into court was made with an admission of liability and later a plea of tender was raised, the position ought to be considered as it was during the interval, and the plea of tender subsequently raised could not prevent Ord. 47, r. 8 (2), from operating.

[AS TO PAYMENT INTO COURT, see HALSBURY, Hailsham Edn., Vol. 8, pp. 245-248, paras. 460-470.]

FOR THE COUNTY COURT RULES, 1936, Ord. 47, r. 8 (2), see THE COUNTY COURT PRACTICE, 1948, p. 514.]

F APPEAL by defendant from a decision of His Honour JUDGE RAWLINS at Wandsworth County Court, deciding that a certain payment into court was made with a plea of tender, the case thus being taken out of the provisions of the County Court Rules, 1936, Ord. 47, r. 8 (2). The Court of Appeal allowed the appeal. The facts appear in the headnote and the judgment of LORD GREENE, M.R.

G *Brundrit* for the plaintiff.
Silkin for the defendant.

Cur. adv. vult.

H Oct. 29. LORD GREENE, M.R., read the following judgment. This appeal raises a curious point. The plaintiff, who is a builder, sued the defendant for the sum of £100 in respect of work and labour and materials supplied. The plaintiff was entered on July 5, 1947, and after long and intermittent proceedings, in part before the judge and in part before the registrar, the plaintiff, on Apr. 8, 1948, recovered judgment for £70 0s. 6d. with costs on Scale C. These costs were taxed at £89 7s. 8d. and it is an unfortunate feature of the case that for the purpose of recovering so small a sum a larger sum of costs had to be incurred. That circumstance, moreover, has led to the present appeal which is against that part only of the judgment which orders the defendant to pay all the costs of the action.

The relevant facts are as follows. On July 17, 1947, the defendant put in a defence in which he disputed the claim on the ground that the work was unsatisfactory and had not been completed, and that the amount claimed was not reasonable having regard to the nature and extent of the work. On Aug. 7, 1947, the defendant paid into court a sum of £69 9s. 7d. As no indication was given as to the nature of this payment it fell to be treated as a payment on account with an admission of liability. On Aug. 11, 1947, the plaintiff's solicitor wrote to the defendant's solicitor inquiring whether the sum paid in was in full settlement or on account of the claim, and whether it was paid in with an admission or denial of liability. To this letter the defendant's solicitor replied on Aug. 14, 1947, that the sum paid into court was with an admission and in full settlement. The plaintiff could have taken the money out of court in satisfaction without leave within three days after receipt of notice of payment (County Court Rules, 1936, Ord. 11, r. 9), or with leave after the expiration of three days (Ord. 11, r. 11). He did neither, preferring to proceed with his action for £100. Had nothing else happened he would, under Ord. 11, r. 9 (d), have been entitled to his costs down to payment in, but on recovering judgment for £70 0s. 6d. he would have been entitled only to such subsequent costs as would have been carried by the sum of 10s. 11d. (the excess of the sum recovered over the sum paid in) unless the court had otherwise ordered (Ord. 47, r. 8 (2) (a)). On Sept. 17, the defendant paid into court a further sum of £4 9s. 3d., and on the same day he delivered "Further and better particulars of defence," a document the concluding paragraphs of which have given rise to the present controversy. They are as follows:

"And take notice that the defendant pleads that on or about February, 1947, before action brought, at Eton Cafe, Balham High Road, he tendered to the plaintiff the sum of £69 9s. 7d. in settlement of his claim and has now paid this sum into court. And take notice that in addition to the sum of £69 9s. 7d. already paid into court and alternative to the plea of tender the defendant has to-day paid into court the sum of £4 10s. 0d. to cover the costs on the said sum of £69 9s. 7d."

The intended effect of these paragraphs is clear. In the first place, they raise a new defence of tender inconsistent with the admission of liability contained in the letter of Aug. 14. In the second place, the first of the two paragraphs purports to relate the first payment in of £69 9s. 7d. to the defence of tender—which is entirely inconsistent with the purpose of the payment as defined in that letter. In the third place, the second of the two paragraphs gives an attribution of the £69 9s. 7d. to a purpose other than the defence of tender, *i.e.*, to the original purpose mentioned in the letter. This is clear from the fact that the sum of £4 9s. 3d. (described as £4 10s. 0d. in the particulars) is said to be paid in to cover the costs on the £69 9s. 7d. There could, of course, be no need to pay money into court for costs in connection with the plea of tender since, if that plea were to succeed, it would operate as a complete defence to the action and the defendant would not be liable for any costs. If, on the other hand, the plea of tender were to fail, the defendant claimed to be entitled to fall back on the alternative contained in the second paragraph, in which case the plaintiff would have been entitled to his costs down to the date of payment in, and it was to cover such costs that the additional sum of £4 9s. 3d. was paid in.

It is not surprising that the plaintiff complains of this pleading as embarrassing. On the other hand, he took no steps to compel the defendant to choose between the inconsistent alternatives which he was putting forward. That a party does not take such steps is, no doubt, more forgivable in a county court than it would be in the High Court, but the omission to do so left the plaintiff in this position. If the plea of tender were to be treated as having been properly raised and the attribution of the payment in to that plea were to be regarded as effective (and, if it were not, the plea of tender must fail: see Ord. 9, r. 4 (9)), then, if

the plaintiff were to take the money out (which he could only do with leave : see Ord. 11, r. 10 (b)), he would probably have been ordered to pay the defendant's costs on the basis that the plea of tender must be treated as a good plea. If, on the other hand, he were to claim to take the money out as having been paid in otherwise than with a plea of tender, he might be met by the defendant claiming that he could not do so as that would prevent the defendant from making use of the plea of tender. The plaintiff made no attempt to free himself from this embarrassment by applying to have the pleading struck out or (what would, no doubt, have secured that result by bringing matters to a head) by applying for leave to take the money out of court under Ord. 11, r. 11. Instead, he elected to go on with the action in the hopes, no doubt, of recovering more but with the knowledge (which must be attributed to him) that he was only entitled to recover £70 0s. 6d.

To complete the statement of the relevant facts it is only necessary to mention two matters. At the first hearing before His Honour JUDGE PRATT on Sept. 25, it was held that part of the claim (amounting to £14) failed, and on Nov. 11, a further £2 was paid into court by the defendant on account, thus bringing the amount paid in (other than the £4 9s. 3d. paid in for costs) to £71 9s. 7d., i.e., £1 9s. 1d. more than the amount which the plaintiff ultimately recovered. In these circumstances the argument both before the county court judge and before this court on the question of costs was a simple one. Counsel for the plaintiff asserted that the payment in of the £69 9s. 7d. was or ought in the circumstances to be treated as payment in with a plea of tender. Counsel for the defendant, on the other hand, contended that the payment in was not and could not on the facts be treated as a payment in with a plea of tender. The materiality of the difference between these two contentions was, of course, this, that, if the payment in was or ought to be treated as payment in with a plea of tender, Ord. 47, r. 8 (2), would not apply. That sub-rule (so far as relevant) provides that :

“Where money is paid into court without a denial of liability and without a plea of tender, and the plaintiff does not accept it in satisfaction of his claim . . . the Scale applicable to the costs incurred after the date of the payment into court shall, unless the court otherwise orders, be determined as follows : (a) Where the plaintiff recovers an amount in excess of the amount paid into court, his costs shall be taxed on the Scale applicable to the excess. (b) Where the plaintiff fails to recover an amount in excess of the amount paid into court, the defendant's costs shall be taxed on the Scale applicable to the amount remaining in dispute.”

The county court judge clearly stated the two contentions and decided that the contention put forward on behalf of the plaintiff was correct. His note of the reasons for his judgment is admittedly based on counsel's note of what he had said in delivering the oral judgment, and, if his judgment had been a considered one, he would no doubt have used rather clearer language, but I find myself in no doubt as to what he meant, which is that the matter must be treated as it stood after the plea of tender, and that after this plea had been raised there was nothing to “compel” the plaintiff to take the money out, by which I understand him to mean that if the plaintiff did not do so he would not expose himself to the drastic provisions of Ord. 47, r. 8 (2). He went on to say that it was impossible for the plaintiff to take the money out “in such a way as to make it abundantly clear that he was taking it out in satisfaction or on account,” by which I understand him to mean that on the pleadings as they stood the defendant could have objected to his doing so on the ground which I have mentioned, i.e., that the result would have been to deprive the defendant from making effective use of his plea of tender. This examination of the judge's reasons makes it quite clear to me that all that he was deciding was that Ord. 47, r. 8 (2), did not apply. It was argued that he must be treated as having

exercised in favour of the plaintiff the discretion which the sub-rule gives to the judge to depart from the provisions there laid down. Not only can I find no suggestion in the reasons that the judge conceived himself to be exercising a discretion, but the fact that he held that the payment in must be treated as a payment in with a plea of tender necessarily excluded the operation of the sub-rule and negatived the existence of the discretion which it gives.

The first question for decision is whether or not the judge was right in holding that the payment in ought to be treated as payment in with a plea of tender with the result that Ord. 47, r. 8 (2), did not apply. In my opinion, he was not. The plea of tender did not come into the case at all until Sept. 17, 1947, *i.e.*, a month and ten days after the £69 9s. 7d. was paid in. During the whole of this period the position was governed by Ord. 47, r. 8 (2). The plaintiff had ample opportunity to take the money out and so protect himself from the consequences of the rule. He chose not to do so, but he cannot, in my opinion, shield himself from the consequences of his inaction by pointing to something which happened subsequently, namely, on Sept. 17, particularly when that something was an irregularity which, if he had taken appropriate proceedings, could have been put right. He now seeks to take advantage of that irregularity on the ground that it embarrassed him and rendered abortive the elaborate and beneficial provisions of the rule relating to money paid into court, with the result that subsequently to the payment in there have been five hearings before the registrar and three before the judge and the amount recovered exceeds the sum originally paid in by 10s. 11d. For this the defendant is, it is said, to pay the whole costs of the action. The county court judge noted the fact of the interval of time to which I have referred, but he thought that the position ought to be considered as it was after the plea of tender was first raised. I, on the other hand, think that the position ought to be considered as it was during the interval, and that the plea of tender subsequently attempted to be raised could not prevent Ord. 47, r. 8, from operating. By failing to make use of his power to take the money out the plaintiff brought the rule upon himself. Counsel for the defendant argued that in law the payment in could not *ex post facto* be related to the plea of tender subsequently raised. I do not find it necessary to decide this. It is sufficient, to my mind, that the plaintiff failed to take the opportunity given him and thereby brought the rule into operation.

The only question that remains is whether we should exercise the discretion which the rule gives to make a different order from that laid down by the rule. Speaking for myself, I would not do so. It is true that the defendant, by his own irregularities, is partly responsible for the question having arisen, but, as I have said, a month and ten days elapsed before any irregularity was committed, and when it was committed the plaintiff could have set it right.

The result, in my opinion, will be as follows:—(1) The plaintiff will have the costs of the action down to Aug. 7, 1947, on Scale C; (2) as the excess recovered over £69 9s. 7d. is less than £2 he will have no subsequent costs; (3) as the amount recovered was in excess of the amount paid in down to Nov. 11, 1947, when the £2 was paid in, the defendant is not entitled to any costs in respect of the period before that date; (4) as the plaintiff failed to recover an amount in excess of the amount paid in by Nov. 11, *i.e.*, £71 9s. 7d., the defendant, under r. 8 (2) (b), is entitled to costs on the amount "remaining in dispute," *i.e.*, £100 less £71 9s. 7d. or £28 10s. 5d. on Scale B subsequently to Nov. 11; (5) these costs will be set off; (6) the £4 9s. 3d. paid in in respect of costs on Sept. 17 will be paid out to the party entitled thereto as a result of the set off; (7) the defendants will have the costs of the appeal.

I am authorised by **TUCKER, L.J.**, to say that he has read the judgment which I have delivered and agrees with it.

SOMERVELL, L.J. : I have had considerable doubt whether the learned county court judge proceeded to his conclusions on a decision that Ord. 47,

r. 8 (2), did not apply or whether he exercised his discretion on the facts as a whole without any error of law. On the basis of the judgment of the MASTER OF THE ROLLS that he did decide as a matter of law that Ord. 47, r. 8 (2), did not apply, I agree with my Lord's conclusion. I myself give less weight than he does to the plaintiff's inaction in the period from Aug. 7 to Sept. 17, and more to the fact that the plaintiff took no steps to have the matter cleared up after the particulars of defence, with the attempt to appropriate the money in court as a tender and in the alternative, had been delivered. I agree in the result that the appeal should be allowed and with the order as set out in the MASTER OF THE ROLLS' judgment.

Appeal allowed with costs. Order as to costs below varied accordingly.

Solicitors: *W. T. Donovan* (for the plaintiff); *Webster Butcher & Johnson* (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

REX v. BOARD OF CONTROL (SECRETARY). *Ex parte*
ABDUL KAYUM.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Byrne, JJ.).
October 19, 1948.]

Mental Deficiency—Person detained by order of a court—Order for transfer to institution for defectives—Date of expiration of order—Power of Board of Control to make a general order for extension—Mental Deficiency Act, 1913 (c. 28), s. 11.

The Mental Deficiency Act, 1913, s. 11 (1) provides: "An order made under this Act that a defective be sent to an institution or placed under guardianship shall expire at the end of one year from its date, unless continued in manner hereinafter provided: Provided that in the case of any institution the Board may by order direct that orders that persons be sent thereto shall, unless continued as hereinafter provided, expire on the quarter day next after the day on which the order would have expired under the above provision." By an order dated April, 1915, the Board directed that "the date of the expiration of the order or authority for detention of all persons detained in certified institutions and certified houses shall be extended to the quarter day next after the day on which the said order or authority for detention would otherwise have expired." In an application for a writ of *habeas corpus* it was argued that (i) the order of 1915 was invalid because there was no power in the Board to make an order of general application but only to deal with each institution individually, and (ii) that the proviso to s. 11 (1) applied only to persons detained at the time of the coming into force of the Act.

HELD: the order of 1915 was within the Board's powers under s. 11, and the application of the proviso to s. 11 (1) was not limited as contended.

[AS TO THE POWER OF THE HOME SECRETARY TO TRANSFER PERSONS TO AN INSTITUTION FOR DEFECTIVES, see HALSBURY, Hailsham Edn., Vol. 21, p. 472. FOR THE MENTAL DEFICIENCY ACT, 1913, ss. 9 and 11, see HALSBURY'S STATUTES, Vol. 11, pp. 167 and 168-169; and FOR THE MENTAL DEFICIENCY ACT, 1938, s. 1, see HALSBURY'S STATUTES, Vol. 31, pp. 421-422.]

APPEAL from a decision of SLADE, J., in chambers, refusing an application for a writ of *habeas corpus*.

On Nov. 5, 1946, the Minister of Health made an order transferring J.E.D. from detention under an order of a court to an institution for defectives, and on Jan. 6, 1948, made a further retrospective order continuing the former

order in force for one year from Dec. 25, 1947. The appellant contended that the second order was invalid on the ground that it was not made within one month of the date of expiration of the first order as required by the Mental Deficiency Act, 1938, s. 1 (1). Under the Mental Deficiency Act, 1913, s. 11 (1), an order sending a person to an institution expired a year after its date unless continued in the case of any institution by order of the Board of Control until the ensuing quarter day. The Board had made an order in April, 1915, continuing all such orders until the quarter day following the date of expiration under the Act. The appellant contended that this order of the Board was invalid because it applied to all institutions whereas a separate order should have been made in respect of each institution; and that the Minister's order, therefore, expired on Nov. 5, 1947, more than a month before Jan. 6, 1948. It was also contended that the power of continuing orders could only be exercised in relation to persons detained in institutions at the date of the coming into force of the Mental Deficiency Act, 1913. The court rejected these contentions and dismissed the appeal.

Heathcote-Williams and H. I. Spence for the appellant.

The Solicitor-General (Sir Frank Soskice, K.C.), H. L. Parker and J. H. L. Royle for the respondents.

LORD GODDARD, C.J.: I think SLADE, J., was right. Under the Mental Deficiency Act, 1913, s. 9, it is provided:

"Where the Secretary of State is satisfied from the certificate of two duly qualified medical practitioners that any person who is undergoing . . . detention in a place of detention by order of a court . . . is a defective, the Secretary of State may order that he be transferred therefrom and sent to an institution for defectives . . ."

The subject of the application, Miss D., was detained under an order of the court and by an order of the Minister of Health, dated Nov. 5, 1946, she was sent to an institution for defectives, the Devon and Exeter Girls' School at Exeter. Section 11 of the Act provides:

"(1) An order made under this Act that a defective be sent to an institution or placed under guardianship shall expire at the end of one year from its date, unless continued in manner hereinafter provided: Provided that in the case of any institution the Board [of Control] may by order direct that orders that persons be sent thereto shall, unless continued as hereinafter provided, expire on the quarter day next after the day on which the orders would have expired under the above provision."

By sub-s. (2) provision is made for the extension of orders from time to time. The proviso to s. 11 (1) seems to me to be framed with a view to distinguishing the cases of persons detained in institutions and the cases of persons placed under guardianship. The proviso has no application to persons placed under guardianship, and orders placing persons under guardianship will expire unless continued as provided by sub-s. (2) at the end of one year. It is clear that Parliament considered it desirable—I should think for the convenience of administration—that these orders relating to persons in institutions should be capable of extension by order of the Board of Control, so that all such orders will expire on one or other of the four quarter days.

This Act having come into force on Apr. 1, 1914, in April, 1915, the Board of Control made an order directing that "the date of the expiration of the order or authority for detention of all persons detained in certified institutions and certified houses shall be extended to the quarter day next after the day on which the said order or authority for detention would otherwise have expired." By the Mental Deficiency Act, 1938, s. 1, it was provided that an order having retrospective effect could be made continuing a detention order "within one

month after the date on which, but for the provisions of this sub-section, the detention order would be limited to expire." The effect of that is that, if the general order of Apr. 10, 1915, is valid, the order for detention of this young woman would be extended by that order to Christmas Day, 1947; and by virtue of the Mental Deficiency Act, 1938, there was one month, that is to say, till Jan. 25, 1948, for the extension of that order. If the order of 1915 is valid, it must be conceded that the young woman is in lawful custody at this mental home.

It is argued by counsel for the appellant that the order of 1915 is not valid—first, because it applies to all institutions, and, he says, the Board is bound to exercise its discretion in respect of each separate one, and must consider each institution separately. Authorities have been cited to us in which it has been decided that when a person applies for a licence he is entitled to have his case considered individually, and that if magistrates or other authorities lay down some general rule as to conditions which must be fulfilled that is a bad exercise of discretion. In my judgment, these authorities have no application to a case of this sort. If the Board of Control can make an order, as they are given power to do, in respect of any institution, it seems to me to follow that they can make an order in respect of every institution. If they can make an order in respect of every institution it would be surely a matter of supererogation to say that they have to issue an order in respect of each institution, naming it. What they have done, and what they, in my opinion, were entitled to do, was to say: "We are going to apply this proviso which Parliament has allowed us to apply to all these institutions." I think the Board of Control have power to make an order which applies to all institutions. They have power to make it in one document, and it was not necessary for them to make it in several documents.

The other point which counsel for the appellant raises is that the proviso only applies to persons who were detained in institutions at the date when the Act came into force. That would be, as I said, on Apr. 1, 1914. In my opinion, that is not the true construction of this proviso. It would, indeed, be somewhat odd if that were the true construction, because obviously the effect of the proviso would very soon wear off. If it only applied to the people who were detained on a particular day of the year 1914, in 10 or 15 years it would apply to very few, and shortly it would apply to nobody. It is in the case of institutions that the order is to be made and not in the case of an individual, and, if the Board say: "All institutions are to be affected by this order," all institutions are affected by the order and the persons in those institutions are subject to the order being continued until the particular quarter day which follows the date on which it would otherwise expire.

In my opinion, there is nothing in either of these two points. I think the matter is clear and that SLADE, J., was right in refusing this writ. The appeal fails, and must be dismissed with costs.

HUMPHREYS, J. : I agree.

BYRNE, J. : I agree.

Appeal dismissed with costs.

Solicitors: *Cassavetti, Coustas & Co.* (for the appellant); *Solicitor, Ministry of Health* (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

BARBER v. BARBER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), October 18, 1948.]

Adultery—Evidence—Cross-examination—“Have you ever committed adultery?”—General charge of adultery pleaded—Particulars of specific acts—Denial in evidence of specific acts—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 198.

By s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925 :
 “The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.”

A husband in his petition for divorce on the ground of adultery stated that on divers dates and in places unknown the wife had committed adultery with a man or men unknown to the husband. In his particulars of the adultery alleged he stated that the wife had constantly spent her evenings away from home in the company of other men, had boasted of her adultery with various men, and had attributed her pregnancy to adultery, and he also gave particulars of some of the specific allegations of adultery. At the hearing of the petition the wife in evidence denied that she had committed adultery on the specific occasions alleged. Counsel for the husband then sought to ask her the question : “Have you ever committed adultery ?”

HELD : the wife, having given evidence in chief in rebuttal of the specific charges of adultery, could properly be asked in cross-examination whether or not she had been guilty of any other acts of adultery.

[AS TO LIABILITY TO ANSWER QUESTIONS TENDING TO SHOW ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 735, 736, para. 1138 ; and FOR CASES, see DIGEST, Vol. 27, pp. 430-432, Nos. 4383-4403.]

PETITION by husband for divorce on the ground of adultery.

The petition alleged that the respondent wife “on divers dates unknown and in a place or places unknown to the petitioner has committed adultery with a man or men unknown to the petitioner”, and, later, particulars were given of certain specific charges. At the hearing of the petition the wife denied that she had committed adultery on the occasions specified in the particulars and in cross-examination counsel for the husband put to her the question : “Have you ever committed adultery ?” This question was objected to on the grounds that, in view of the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 198, it was not permissible to put a question as to adultery which was not specifically charged unless the question went to credit. WILLMER, J., held that the question was admissible.

Salmon, K.C., and *Baskerville* for the husband.

Karminski, K.C., and *Trevor Reeve* for the wife.

WILLMER, J. : The question which it is proposed to ask is a proper question, but, in view of the importance of the matter, I will state my reasons for coming to that conclusion.

By para. 7 of his petition the husband alleges :

“ . . . that the respondent on divers dates unknown and in a place or places unknown to the petitioner has committed adultery with a man or men unknown to the petitioner.”

That allegation was put on the file over six years ago, and, not unnaturally, it invited a request for particulars, the answers to which, in due course, prompted an inquiry for further particulars. In answer to the first request for particulars

A the husband stated that the wife had constantly spent her evenings away from home in the company of other men and had boasted to the husband of her adultery with divers men and attributed her pregnancy to adultery. The husband was asked to give further particulars of the occasions on which she boasted of adultery. The husband gave particulars enumerating the number of occasions when the wife was alleged to have boasted. Certain later particulars gave details of one or two specific allegations of adultery which the wife was alleged to have committed, but the general position under para. 7 remained as it was stated in the petition. The wife has given evidence in chief denying the specific charges of adultery and the allegation that she boasted of adultery. In cross-examination counsel for the husband seeks to ask the question: "Have you ever committed adultery?", and to that question objection is taken by counsel for the wife, who contends that, having regard to the terms of s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925, it is not an admissible question.

B It seems to me that the question depends on what is meant by the words "the alleged adultery" which are used in s. 198 of the Judicature Act. In my judgment, "the alleged adultery" must mean the adultery alleged in the petition and that adultery in the present case is adultery which amounts to a course of conduct pursued over a number of years, that is to say, the husband charges the wife generally with being a promiscuous woman and with committing adultery with various men at various times in various places. The fact that he has been required to give particulars of certain specified occasions does not seem to me to detract from the generality of the allegation made in the petition. It is contended by counsel for the wife that the effect of the particulars delivered is to tie the husband down to the occasions mentioned in the particulars. In my judgment, that is not so. The general allegation remains and if the wife feels embarrassed by a general allegation, not fully satisfied by particulars, it is always open to her to come to the court and obtain an order either striking out the general words of the allegation or limiting the husband in his evidence to the acts complained of in the particulars. No such step has been taken in this case, and no attempt has been made by the wife to get rid of the first allegation in the petition. From what I have seen of the case so far I think it is plain that had such an application been made it would not have succeeded and that is the reason why it was not made. The fact is that this is a very exceptional case where the husband, instead of alleging particular acts of adultery about which he has specific evidence, is forced to rely on what he contends is a long course of conduct. In this case it seems to me that that is "the alleged adultery," and, in my judgment, the wife, having given evidence in chief in rebuttal of various specific acts of adultery suggested against her, can properly be asked in cross-examination whether or not she has been guilty of any other acts of adultery, and I rule that the question is admissible.

E F Solicitors: *James & Charles Dodd* (for the husband); *J. H. Bueno de Mesquita* (for the wife).

G [Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

MACKRELL v. MACKRELL.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Harman, J.), October 21, 22, 1948.]

Condonation—Cruelty—Wife remaining in the home after filing of her petition.

The parties were married in 1925. After 1939 there was no marital intercourse, and in 1941 they ceased to share the same bedroom, there being trouble between the husband and wife due to the husband's attentions to another woman. In 1943, the husband attacked his wife putting his hands round her neck and swearing at her. In 1945, the husband again lost his temper and put his hands round her neck with such violence as to leave marks on her neck. The parties continued to live in the same house, but the wife consulted her solicitors with a view to the execution of a deed of separation. This proposal was abandoned after a further act of cruelty had occurred on Oct. 20, 1946, when the husband struck the wife a violent blow in the eye. The wife again consulted her solicitors and on Nov. 12, 1946, a petition for judicial separation on the grounds of cruelty was filed. The wife continued to live in the house. In February, 1947, the husband filed an answer denying the cruelty. On May 3, 1948, the petition was dismissed on the ground that the wife had condoned the husband's offence.

HELD: the fact that the wife continued to stay in the house after she had filed her petition was not necessarily proof of forgiveness and there was, therefore, no condonation.

Per DENNING, L.J.: Reconciliation does not take place unless and until mutual trust and confidence are restored. It is not to be expected that the parties can ever recapture the mutual devotion which existed when they were first married, but their relationship must be restored, by mutual consent, to a settled rhythm in which the past offences, if not forgotten, at least no longer rankle and embitter their daily lives. Then, and not until then, are the offences condoned.

Reconciliation being the test of condonation, nothing short of it will suffice. The fact that the parties continue to live in the same house or the fact that the guilty party is reinstated in his or her former position is, indeed, evidence from which reconciliation may be inferred, but it is by no means conclusive. Attempts to effect a reconciliation do not amount to condonation.

Dictum of VISCOUNT SIMON in *Henderson v. Henderson & Crellin* ([1944] 1 All E.R. 44, 45; [1944] A.C. 49, 53; 170 L.T. 84, 85), *applied*.

Wilmot v. Wilmot and Martin ([1948] 2 All E.R. 123), *considered and distinguished*.

[AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-682, paras 1004-1009; and FOR CASES, see DIGEST, Vol. 27, pp. 336-342, Nos. 3161-3223.]

Cases referred to:

- (1) *Wilmot v. Wilmot and Martin*, [1948] 2 All E.R. 123; [1948] L.J.R. 1336.
- (2) *Keats v. Keats and Montezuma*, (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 27 Digest 336, 3166.
- (3) *Fearn v. Fearn*, [1948] 1 All E.R. 459; [1948] P. 241; [1948] L.J.R. 1043.
- (4) *Henderson v. Henderson and Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 2nd Digest Supp.
- (5) *Snow v. Snow*, (1842), 2 Notes of Cases, Supp. i; 27 Digest 342, 3231.

APPEAL by a wife, Amy Eleanor Mackrell, from an order of HODSON, J., dismissing her petition for a judicial separation in which she alleged cruelty by her husband, Frank Albert Mackrell, on the ground that she had condoned

the offence. The Court of Appeal allowed the appeal. The facts appear in the headnote.

Norman Parkes for the wife.

Travers for the husband.

BUCKNILL, L.J.: This is an appeal by a wife, Amy Eleanor Mackrell, from an order of HODSON, J., dismissing her petition for a judicial separation on the ground of the cruelty of her husband, Frank Albert Mackrell. [His LORDSHIP reviewed the facts and continued:] The judge dismissed the petition on the ground of condonation, and his judgment on that part of the case is as follows:

"I ought perhaps to deal with the last incident [on Oct. 20, 1946] in this connection, because when the husband smacked her face her eye was hurt. She says he was sorry, and I asked her if she accepted his apology and she said: 'Yes.' But when she explained the matter further she said: 'Well, I said I cannot go on like this much longer.' Afterwards he apologised, and she went down and carried on with the preparation of a meal for him. So, it does not necessarily follow that anything which she did immediately after was tantamount to a condonation or even an expression of forgiveness of her husband for this past particular incident. But her conduct afterwards, from October, 1946, until today is a matter which this court has to consider very carefully, to see whether she can possibly be held not to have condoned the acts of cruelty of which she now complains. She has deliberately remained in this house ever since, preparing her husband's meals, doing washing, mending, sitting down to meals with him and living with him in the ordinary sense of the word, except that they have been occupying separate rooms and that the situation between them has been abnormal, in that these proceedings, which were taken by the wife in November, 1946, have been in suspense, both parties knowing that in due course, presumably, if nothing happened to prevent it, the case would come to trial. No doubt, there was no conversation beyond that which has been suggested between them during that time, but I find it impossible in the circumstances of this case (I am not saying there might not be circumstances where a different conclusion might not be arrived at) to say that she has not condoned the conduct of her husband by remaining with him in the house as she has for all this length of time . . . The wife said, when she was asked why she stayed on: 'I stayed on because my home was a partnership'—meaning by that that she was not going to give up her interest either in the furniture or the occupation of the house in which she has lived and to which she has a claim, because, as she says, she provided some of the principal out of her own income. But I do not think she can be heard to say: 'I stayed on for eighteen months after the last act of which I complained. Although the petition was launched, I carried on and did not do anything to alter the situation, but I have not condoned.' I think her conduct speaks volumes. She cannot avoid the natural consequences of her own action by saying that she would not forgive her husband, or that she never intended to forgive him."

With great respect to the learned judge, I think that the error in his judgment is that he has not drawn sufficient distinction between the three weeks which elapsed between the last act of cruelty and the filing of the petition and the eighteen months thereafter before the case came on for hearing. There is a fundamental distinction between those two periods, because once the wife filed her petition for judicial separation it seems to me very unlikely that after that time she has forgiven her husband or been reconciled to him or that the offence of cruelty has been blotted out merely because she continued to live in the same house as before although her husband also lived there. To establish condonation

in this case, I think one must find condonation during the three weeks between the last act of cruelty and the filing of the petition. The learned judge himself indicated that, if that were the only point, he would not be prepared to find condonation, and I certainly would not. The mere fact that she stayed on in the house does not seem to me to show forgiveness. She, no doubt, could have found some other place to which to go. On the other hand, she was entitled to stay in the house to protect her property in it until the lawyers had come to some agreement as to what was to be done with the house. She may well have expected that her husband, after the last assault and apology, would, at any rate for a time, behave reasonably to her. I cannot see any evidence of condonation before or after the filing of the petition.

A decision of WILLMER, J., in *Wilmot v. Wilmot and Martin* (1) was cited to us. The facts were that in November, 1945, the husband suspected that his wife had been guilty of adultery. On Dec. 9, while away from home, the husband wrote to the wife asking her to make it up with him and to give up the co-respondent. When the husband returned home on Dec. 11, the wife confessed that she had committed adultery with the co-respondent, and she said that she still loved the co-respondent and refused the husband's attempt at reconciliation. On learning this, the husband took no action of any kind and he and his wife continued to live together in the same way as they had been doing hitherto, *i.e.*, without sexual intercourse, until July, 1946, when the husband left the wife. There was an interval in that case of seven months between the confession of adultery and the husband's departure. That seems to me to be a substantially different case from that with which we are dealing where the interval between the last act of cruelty—an act which revived all the previous cruelty—and the filing of the petition is only three weeks.

For these reasons in my judgment there is no evidence on which the court could properly find that the wife condoned the cruelty of her husband, and she, therefore, is entitled to a decree of separation.

DENNING, L.J. : I agree. It is not impossible for a woman to complain of cruelty while still residing in the same house as her husband. The legislature recognised that with regard to proceedings in the magistrates' courts, when they enacted in the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (1) that :

"An application by a married woman for an order . . . on the ground of cruelty . . . by her husband, may be made notwithstanding that the cruelty . . . complained of has not caused her to leave and live separately and apart from him . . ."

The reason is, that the wife may have nowhere else to go, or may not have the means to leave her husband until she gets the benefit of an order against him. The same is the position in the High Court. A wife may petition for a divorce or a judicial separation although she is still residing in the same house as her husband, but the question always arises in such a case whether she has condoned the offence. Of all the tests of condonation the one which I find most helpful is that stated by LORD CHELMSFORD, L.C., in *Keats v. Keats and Montezuma* (2), where he said (1859), 1 Sw. & Tr. 357) :

" . . the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation. . . "

Reconciliation does not take place unless and until mutual trust and confidence are restored. It is not to be expected that the parties can ever recapture the mutual devotion which existed when they were first married, but their relationship must be restored, by mutual consent, to a settled rhythm in which the past offences, if not forgotten, at least no longer rankle and embitter their daily lives. Then, and not till then, are the offences condoned.

Reconciliation being the test of condonation, nothing short of it will suffice. The fact that the parties continue to live in the same house or the fact that the guilty party is reinstated in his or her former position is, indeed, evidence from which reconciliation may be inferred, but it is by no means conclusive. The longer the parties continue together and the closer their relationship, the stronger, of course, is the evidence of reconciliation; but cases often arise where the parties continue to live in the same house by force of circumstances. The wife may have nowhere else to go, or the innocent party may continue or reinstate the guilty one in his or her former position in an attempt at reconciliation. If in such cases the continuance or reinstatement were held to amount to condonation, it would mean that innocent parties would be deterred from attempting reconciliation: for, if an innocent party should feel that any attempt to mend the marriage would involve condoning the offence—and the consequent cancellation of his grounds for divorce—he would be reluctant to try it. He could not be sure that the attempt would be successful, and, rather than commit himself forever to an unhappy marriage, he would not embark on the attempt. Moreover, in those cases in which an innocent party was not deterred, but made a genuine attempt at reconciliation which failed, it would enable the guilty party to insist on keeping the marriage in existence when it would probably be better dissolved—a marriage which had been rendered unhappy by his or her wrongdoing. In my opinion, therefore, attempts to effect a reconciliation do not amount to condonation unless and until a reconciliation is actually achieved. The only exception to this is the positive rule that one act of sexual intercourse by a husband, with full knowledge of his wife's guilt, is conclusive evidence of condonation, but as BUCKNILL, L.J., said in *Fearn v. Fearn* (3), that is because of the serious prejudice to the wife that may thereby be occasioned. She may have a child in consequence of it.

I wish to say a word about *Wilmot v. Wilmot* (1). Both parties were there seeking a divorce and it may well have been right that the wife should have been granted the decree because the first act of adultery perpetrated by the husband seems to have been the cause of all the trouble, but, if and in so far as the judge held that the continuance of strained relations, without reconciliation, amounted to condonation, I cannot agree with him. However, that case is very different from the present case. Here the wife did not stay on in the house doing nothing. She issued a petition for judicial separation. As she said, she hoped that her home would “brighten up,” that is, she hoped for a reconciliation, but it never came. There was, therefore, no condonation. I agree that the appeal should be allowed.

HARMAN, J. : I agree that the appeal should be allowed. I am content to accept the judge's finding that there was cruelty justifying a decree. That leaves the issue of condonation. Condonation implies a reinstatement of the husband, and we are told that this occurred within the 24 hours following the last offence in October, 1946, but the offended party must be allowed more time for reflexion than that, and the wife here put her petition on the file within 3 weeks or so and so acted with reasonable expedition, and, by waiting in the home for that time, she did not condone the offence. That a continuance in the matrimonial home is not necessarily condonation is shown by the speech of VISCOUNT SIMON in *Henderson v. Henderson and Crellin* (4), where he says ([1944] 1 All E.R. 45):

“In *Snow v. Snow* (5), DR. LUSHINGTON discusses at length whether, where a husband has been guilty of cruelty, a wife can ever maintain a suit where cohabitation was continued after the last act, and he concludes that subsequent cohabitation is not universally a bar to the wife's suit for the reason above stated.”

The “reason above stated” was the difficulty of the wife's situation. That being so, it seems to me, as, indeed, I think it seemed to the learned judge, that

there was no condonation in the sense of reinstatement down to the date when the petition was put on the file. After that date, for the reasons given by BUCKNILL, L.J., I cannot see that it can possibly count against the wife that the court takes some time to bring the matter to fruition. Unless one regards the petition as a sham, of which there is no evidence here, one must take it to have been a final declaration on her part that there was no reconciliation and no reinstatement. In that attitude she has persisted, although she remained in the house as long as was necessary to bring this case to trial.

Appeal allowed with costs.

Solicitors: *Baylis, Pearce & Co.*, agents for *Stevens & Stevens*, Farnham (for the wife); *Johnson, Weatherall & Co.*, agents for *Potter, Crundwell & Bridge*, Farnham (for the husband).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

WINNAN v. WINNAN.

[COURT OF APPEAL (Lord Morton of Henryton, Bucknill and Lord THOLOMEW v. BARTHOLOMEW. [1948] 2 All E.R. 1035.)] *Explained and Distinguished.*

Desertion—Res judicata—Order obtained by wife for wilful neglect to maintain—Allegation of desertion by husband—Subsequent petition for divorce by husband on ground of desertion based on same facts.

On May 29, 1945, a wife took out a summons in a court of summary jurisdiction complaining that her husband had wilfully neglected to maintain her and their infant child, and asking that an order be made that she be no longer bound to cohabit with the husband. She also claimed custody of the child and reasonable maintenance. The husband defended the proceedings in person, alleging constructive desertion by the wife, but an order was made against him as claimed by the wife. By a petition dated Apr. 17, 1947, the husband sought a decree of divorce on the grounds of cruelty and desertion by the wife, the charge of desertion being based on the same facts as those relied on by the husband before the justices. In her defence, the wife argued that (1) the husband had condoned the cruelty; (2) the facts proved did not amount to desertion; (3) the allegations as to desertion were *res judicata*. The Court of Appeal found that the cruelty had been condoned, but that constructive desertion of which the wife was guilty revived the cruelty, and as to the third defence:

HELD: as constructive desertion would be a defence to a charge of wilful neglect to maintain, the justices must have applied their minds to that question and their order proved that they decided that the wife was not guilty of the constructive desertion, but the allegations in the petition for divorce did not thereby become *res judicata* for otherwise the jurisdiction of the Divorce Court would be impaired.

Finney v. Finney (1868) (L.R. 1 P. & D. 483; 18 L.T. 489), *Harriman v. Harriman* ([1909] P. 123; 100 L.T. 557), *Kara v. Kara* ([1948] 2 All E.R. 16; [1948] P. 287), *James v. James* ([1948] 1 All E.R. 214) and *Pratt v. Pratt* (1927) (137 L.T. 491), considered.

Observations of LORD SHAW in Hoystead v. Commr. of Taxation ([1926] A.C. 170; 134 L.T. 359), and rule laid down by WIGRAM, V.-C., in *Henderson v. Henderson* (1843) (3 Hare 100, 114; 1 L.T.O.S. 410), applied.

[AS TO RES JUDICATA, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-414, paras. 465-469; and FOR CASES, see DIGEST, Vol. 21, pp. 159-226, Nos. 213-593.]

Cases referred to :

- (1) *Richardson v. Richardson*, (1942), 167 L.T. 260 ; 2nd Digest Supp.
- (2) *Papadopoulos v. Papadopoulos*, [1930] P. 55 ; 99 L.J.P. 1 ; 142 L.T. 237 ; 94 J.P. 39 ; Digest Supp.
- (3) *Hoystead v. Taxation Commissioner*, [1926] A.C. 155 ; 94 L.J.P.C. 79 ; 134 L.T. 354 ; Digest Supp.
- A (4) *Henderson v. Henderson*, (1843), 3 Hare 100 ; 1 L.T.O.S. 410 ; 21 Digest 174, 276.
- (5) *Finney v. Finney*, (1868), L.R. 1 P. & D. 483 ; 37 L.J.P. & M. 43 ; 18 L.T. 489 ; 27 Digest 324, 3030.
- (6) *Harriman v. Harriman*, [1909] P. 123 ; 78 L.J.P. 62 ; 100 L.T. 557 ; 73 J.P. 193 ; 27 Digest 321, 2995.
- B (7) *Kara v. Kara*, [1948] 2 All E.R. 16 ; [1948] P. 287 ; [1948] L.J.R. 1741.
- (8) *James v. James*, [1948] 1 All E.R. 214.
- (9) *Gooch v. Gooch*, [1893] P. 99 ; 62 L.J.P. 73 ; 68 L.T. 462 ; 27 Digest 368, 3548.
- (10) *Hudson v. Hudson*, [1948] 1 All E.R. 773 ; [1948] P. 292 ; [1948] L.J.R. 907.
- C (11) *Pratt v. Pratt*, (1927), 96 L.J.P. 123 ; 137 L.T. 491 ; Digest Supp.

APPEAL by a wife from an order of CASSELS, J., dated Dec. 12, 1947, granting a decree *nisi* of divorce to the husband on the grounds of cruelty and constructive desertion. The Court of Appeal dismissed the appeal. The facts appear in the judgment of BUCKNILL, L.J.

M. P. Picard for the wife.

D *E. A. Jessel* for the husband.

Cur. adv. vult.

Oct. 28. BUCKNILL, L.J., read the following judgment. The petition is dated Apr. 17, 1947, and the desertion is alleged to have started on Apr. 10, 1944. The wife by her answer denied the cruelty, and, alternatively, alleged condonation of it. She also denied the desertion. Counsel for the wife did not dispute the finding of cruelty. His points were that : (1) the husband had condoned the cruelty ; (2) the facts proved by the husband did not amount to desertion by the wife ; (3) the allegations as to desertion were *res judicata*, and the husband was estopped from relying on them in support of his petition.

The parties were married in 1920, and lived together for some 22 years. There were three children of the marriage, Gordon, born in 1923, Brian, born in 1928, and Betty, born in 1930. The marriage was made unhappy through frequent quarrels owing to the wife's habit of unjustly accusing the husband of committing adultery or behaving indecently with various women whom he met from time to time. I need not detail these incidents. They were so frequent and so grievous that they gradually affected the husband's health. It is clear that the evidence of the husband on this part of the case, evidence which the judge accepted, proved cruelty by the wife. In October, 1942, the husband was in bad health owing to this conduct of the wife, and he applied to the National Service Officer for work away from Twickenham, where he and his wife were living, and was directed to work at Hove. At that time the wife had recently taken to keeping cats, and according to the husband she had at that time six or seven. This number greatly increased after the husband went to Hove. When he was at his home at Twickenham for a short visit at Easter, 1944, there were 25 to 30 cats there. His last visit ended about Apr. 10, 1944. According to his evidence, which the judge accepted, the cats were allowed to roam all over the house, a small building with two bedrooms upstairs and a lounge, bathroom, dining room and kitchenette downstairs. The house smelt very badly from the excretions of the cats. When the husband asked the wife to get rid of the cats, and set up home together again and make a fresh start, the wife replied that she loved her cats and preferred them to her husband. The learned judge sums up the position at Easter, 1944, in these words :

"I am satisfied that the husband is right when he says that the presence of these cats, coupled with her conduct, made life utterly intolerable for him in that house, and so he left, and since that day he has never been back to the matrimonial home."

He continued to pay his wife an allowance until October, 1944, and to pay the rent of the house until May, 1945.

The cruelty of the wife in making false accusations against her husband came to an end in October, 1942, when the husband left the home for Hove and only made occasional visits thereafter to his wife. During these visits he and his wife had marital intercourse, so that he thereby condoned those acts of cruelty. The last act of intercourse was in March, 1944. If, however, the keeping of the cats and the wife's refusal in 1944 to abate the nuisance amounted to a matrimonial offence, then such offences would, in my opinion, revive the acts of cruelty which ended in October, 1942. Counsel for the wife argued that the presence of the cats did not justify the husband leaving his wife and suggested that it was a mere pretext to get away from her, but on this point I think there was abundant evidence that the refusal of the wife to get rid of the cats was conduct which drove the husband finally from the matrimonial home. In these circumstances, the judge held that, although there was condonation of the previous acts of cruelty by reason of the sexual intercourse up to March, 1944, her later conduct in preferring her cats to him and insisting on their intolerable presence in the house was a matrimonial offence amounting to constructive desertion. I agree with the decision of CASSELS, J., on this point. In my opinion, such constructive desertion has also revived the condoned cruelty just as much as active desertion would have done.

Subject, therefore, to the point as to *res judicata*, I think that the husband is entitled to a decree of divorce both on the grounds of cruelty and of desertion. Counsel for the wife argued that the issue whether the wife had been guilty of desertion was *res judicata* for the following reasons. He said, in the first place, that the question whether the wife had deserted the husband was directly raised in certain proceedings by the wife against the husband in a court of summary jurisdiction. Those proceedings started with a summons taken out by the wife on May 29, 1945, in the petty sessional division of Brentford. The material part of the summons is as follows:

"Complaint has been made by your wife, Edith Amelia Winnan, of 20, Waverly Avenue, Twickenham, Middlesex, for that you have wilfully neglected to provide reasonable maintenance for her your said wife and her infant child whom you are legally liable to maintain, Summary Jurisdiction (Married Women) Act, 1895, Summary Jurisdiction (Separation and Maintenance) Act, 1925. Wherefore your wife, pursuant to the statute in that case made and provided, applies that an order may be made That she be no longer bound to cohabit with you. That the legal custody of the child of the marriage between your wife and you, namely Betty Wilfreds born on Aug. 7, 1930, while under the age of sixteen years be committed to her. That you shall pay to her such weekly sum not exceeding £2 as the court shall consider reasonable."

It appears from the evidence of the husband before CASSELS, J., that he defended those proceedings, but had no legal assistance, so his counsel informed this court. Before CASSELS, J., the husband gave the following answers in cross-examination as to what took place before the justices:

"Q.—As soon as you gave up sending her any money she took out a police court summons against you?

A.—Yes.

Q.—You defended it, did you not?

A.—Yes. I was called to the court.

Q.—Did you not try to put very much the same facts as you are putting to the court today?

A.—I did.

Q.—And the court then decided against you?

A.—10s. per week."

A The summons was heard on July 11, 1945, when the justices made an order for the husband to pay the wife 10s. a week for the maintenance of the wife and 5s. a week for the maintenance of her daughter.

B Counsel for the wife, in his careful and able argument before this court, argued that the justices could not properly have held the husband guilty of wilful neglect to maintain if the wife had deserted him at the time when such neglect was alleged, and that they must be presumed to have considered the question of such desertion and to have decided the point in the wife's favour, because they made the order of 10s. a week. Counsel argued that, therefore, the justices had adjudicated on the issue of the wife's desertion, that the matter was *res judicata*, and that the husband could not allege desertion on the same facts in subsequent divorce proceedings. He further argued that there could be no revival of the earlier condoned cruelty by reason of the subsequent alleged desertion of the wife because the issue of that desertion had already been decided C adversely to the husband by the justices and was *res judicata*.

D Counsel for the husband took the following points. (1) The plea of *res judicata* was not pleaded. (2) The question whether the wife was guilty of constructive desertion was irrelevant on a summons by her for maintenance on the ground of wilful neglect. (3) Even if the justices had decided that the wife had not been guilty of desertion, nevertheless such a finding would not be a bar to the husband subsequently filing a petition for divorce and alleging such desertion. As regards the first point, counsel for the wife relied on the fact that the petition of the husband referred to these proceedings before the justices. This had to be done in accordance with the Matrimonial Causes Rules, 1947, r. 4 (1) (f). In my opinion, this reference in the petition of the husband does not raise by necessary inference the question of *res judicata*, and the wife should have raised it expressly in her answer. The result of its absence from the pleadings was that E neither side put before CASSELS, J., any note of the evidence before the justices, or of the reasons, if any, for their decision, or any proof that they had in their minds, when arriving at their decision, the issue whether the wife had been guilty of desertion. Under these circumstances, counsel for the husband might properly have asked for an adjournment before CASSELS, J., to deal with the plea F of *res judicata* on the ground that he was taken by surprise. He did not do so, but was content to leave the matter to the decision of the judge. CASSELS, J., in his judgment on this point, said: "It was said on behalf of the wife that this was *res judicata*. The first thing that one has to point out is that that is not pleaded." I do not think that in all the circumstances this failure in pleading is an effective bar to the point being taken at the trial, and do not think that the G wife should be debarred from arguing the point of *res judicata* before this court.

H The second point for our decision is whether the defence of constructive desertion by the wife would have been a good defence to the wife's claim for maintenance on the ground of wilful neglect to maintain. There is authority for saying that active desertion by the wife without cause would be a good defence: see *Richardson v. Richardson* (1), a decision of the Divisional Court composed of HENN COLLINS, J., and myself, in which the court followed the dicta of HILL, J., in *Papadopoulos v. Papadopoulos* (2). In my opinion, a husband is not guilty of wilful neglect to maintain a wife who has without cause deserted him and is in a state of desertion at the material time, and I think the same rule applies to the case where a wife has without cause driven her husband out of the house. I, therefore, feel bound to hold that, if the justices tried the case properly, as I presume they did, they must have applied their minds to the question whether the wife had been guilty of constructive desertion and its legal effect

on her claim for maintenance, and that their order of 10s. a week proves that they decided that the wife had not been guilty of constructive desertion.

I now turn to the third point, namely, whether such a decision by the justices estops the husband from subsequently petitioning for a divorce on the ground of such desertion. The scope of the rule of *res judicata* is stated in *Hoystead v. Taxation Commissioner* (3), in the judgment of the Judicial Committee, delivered by LORD SHAW ([1926] A.C. 170):

"It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the *ratio* of and fundamental to the decision. The rule on this subject was set forth in the leading case of *Henderson v. Henderson* (4), by WIGRAM, V.-C., as follows (3 Hare 114): 'I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' This authority has been frequently referred to and followed, and is settled law."

It will be seen that no distinction is drawn here between decisions of acquittal and decisions of conviction.

In *Finney v. Finney* (5), a wife petitioned for divorce on the ground of her husband's cruelty and adultery. About a year before, the wife had filed a petition for judicial separation on the ground of cruelty and the allegations of cruelty in that petition were the same as those set out in the petition for divorce. The petition for judicial separation had been heard, the evidence of cruelty given, and the judge ultimately found that the husband had not been guilty of cruelty, and dismissed the petition. The husband demurred to the allegations of cruelty being raised again in the second petition, and his objection was upheld. The Judge Ordinary, LORD PENZANCE, in the course of his judgment said (L.R. 1 P. & D. 484):

"In all the cases cited the question raised was, either to what extent one court is to be bound by the judgment of another court, or how far a court is to give effect to a decision on certain facts pronounced in some other suit of a wholly different nature. But the questions of fact raised in this case are precisely the same as those which were inquired into and determined in a previous suit in this very court. In both suits the husband is charged with the same matrimonial offence, that of cruelty. That issue having been tried, and found in the husband's favour in the former suit, the wife now seeks to have it tried over again, and it is argued that she is entitled to reiterate those identical charges, because she has tacked on them a charge of adultery. I think that cannot be allowed. According to the practice of every court, after a matter has once been put in issue and tried, and there has been a finding or a verdict on that issue, and thereupon a judgment, such finding and judgment is conclusive between the same parties on that issue. In all courts it would be treated as an estoppel."

If the principle applied in *Finney's* case (5) is to be strictly applied to proceedings before a court of summary jurisdiction, followed by proceedings in the Divorce Court, a previous finding of guilt should also act as an estoppel and prevent the guilty spouse from denying his guilt in answer to a divorce petition, but the Divorce Court cannot be estopped, as was pointed out in *Harriman v. Harriman* (6), and in the recent case of *Kara v. Kara* (7) in the Court of Appeal. In *Kara v. Kara* (7) the husband petitioned for a divorce on the ground of his wife's adultery. The wife by her answer denied the adultery and petitioned for a divorce on the ground of the husband's cruelty. Before the divorce proceedings started the wife had taken out a summons against the husband on a charge of cruelty and had obtained an order in her favour. The facts as to the cruelty then charged were substantially the same as those on which the charge of cruelty was based in the wife's petition. Mr. COMMISSIONER TYNDALE held that the wife had not committed adultery and that the husband had been guilty of cruelty, but the Court of Appeal (LORD GREENE, M.R., myself and HODSON, J.) reversed this decision and held that the wife had been guilty of cruelty. The Court of Appeal did not consider that the finding of cruelty by the stipendiary magistrate estopped the divorce court from finding that there had been no cruelty. LORD GREENE, M.R., in the course of his judgment said ([1948] 2 All E.R. 17):

"A finding of a court of summary jurisdiction against one of the parties to a divorce suit who is accused of a matrimonial offence may be admitted as evidence that he or she has committed the offence charged, but, in our opinion, this does not absolve the court from examining the evidence given at the trial on the issues there raised. In the result, notwithstanding the decision of the stipendiary magistrate, the charge of cruelty is not proved to our satisfaction, and the findings of the learned commissioner on this issue must also be reversed."

Counsel for the wife argued that, although no estoppel of the parties binds the divorce court, this principle only applies where a spouse has been found guilty of a matrimonial offence, and does not apply where he or she has been acquitted of such offence. There is no direct authority for this proposition. LORD MERRIMAN, P., in *James v. James* (8), pointed out ([1948] 1 All E.R. 217) that:

"... there may be a marked distinction in this respect between a judgment (whether it be a judgment of a court of summary jurisdiction or of the High Court) which finds a particular offence proved and where it becomes necessary to investigate the truth of that finding in some subsequent proceedings, on the one hand, and, on the other hand, a case where the High Court has dismissed the charge."

After referring to the decisions in *Harriman v. Harriman* (6) and *Gooch v. Gooch* (9), LORD MERRIMAN, P., continued:

"When it is a question of seeking to oblige a court to decide something contrary to its own belief on the facts because some other court has decided in the affirmative, there is the consideration that so to oblige the court would be running contrary to the statutory duties imposed on the court, whereas where a party who has already been defeated in bringing a claim for relief is trying to do exactly the same thing again, the same consideration does not apply to prevent him from being estopped from bringing that evidence before the court at all."

LORD MERRIMAN, P., mentioned the point again in *Hudson v. Hudson* (10). In that case a Divisional Court had affirmed a decision of the court of summary jurisdiction that the husband had been guilty of cruelty. The wife subsequently petitioned for a divorce in respect of the same cruelty, the husband in his answer to the petition denied the cruelty, and the wife in her reply pleaded that the husband was estopped from denying the cruelty by virtue of the previous

decision. LORD MERRIMAN, P., held that there was no estoppel in accordance with the principle laid down in *Harriman v. Harriman* (6), but again expressed a doubt "whether there is or is not a distinction to be drawn between a judgment dismissing a cause of complaint and a judgment finding that the cause of complaint is proved," and indicated two reasons for such a distinction ([1948] 1 All E.R. 775):

"The first is that in *Harriman v. Harriman* (6) no doubt was expressed about the correctness of the decision in *Finney v. Finney* (5) . . . Secondly, it may well be that, if a party is estopped by the earlier decision, the estoppel may operate to prevent that party from bringing the same charge at all before any other court, whereas the doctrine of estoppel will not operate so as to abrogate the statutory duty of the court to inquire into the truth of a petition which is properly brought before it. I need only add that the decision of the Divisional Court in *Pratt v. Pratt* (11) supports the view that an earlier dismissal of a charge may be conclusive."

In *Pratt v. Pratt* (11) a judge of assize dismissed a petition by the husband for a divorce on the ground of the wife's alleged adultery although a court of summary jurisdiction had found that the wife had been guilty of adultery and had, accordingly, revoked a separation order which they had previously made in the wife's favour. The wife, after succeeding in her defence in the divorce proceedings, then made an application to the justices to restore the order which they had formerly made in her favour, and the justices did so. That case seems to show that the finding of the judge of the High Court that the wife had not committed adultery is *res judicata* and conclusive in subsequent proceedings before a court of summary jurisdiction. It does not decide that, if there had been a previous finding by the court of summary jurisdiction that the wife had not committed adultery, such finding would have estopped the husband from petitioning for a divorce on the ground of the same adultery.

When the Matrimonial Causes Act, 1857, created the divorce court with its original and unique jurisdiction of granting a decree of divorce on proof of certain matrimonial offences there was no court of summary jurisdiction in existence with jurisdiction to grant relief to a wife from her husband for wilful neglect to maintain her. Mere desertion as a ground for divorce was first established by the Matrimonial Causes Act, 1937, which enacted that a petition for divorce may be presented to the High Court either by the husband or the wife on the ground that the respondent has deserted the petitioner without cause for a period of at least three years preceding the presentation of the petition. Other sections of that Act enact that on a petition for desertion the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if the petitioner has during the marriage been guilty of adultery or has been guilty of such wilful neglect or misconduct as has conduced to the desertion. The Act does not confer any jurisdiction on the court to make any decree or order against a husband on the ground of wilful neglect to maintain his wife. When the Act of 1937 was passed, the wife had a statutory right under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, exercisable before a court of summary jurisdiction, to claim an order for maintenance on the ground of the husband's wilful neglect to maintain her. Section 6 of the Act of 1895 also enacts that :

"No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery ; Provided that the husband has not condoned or connived at, or by his wilful neglect or misconduct conduced to such act of adultery."

The statute does not state that the court shall not make an order in the wife's favour if she has herself without cause deserted the husband, neither does the statute give any remedy to the husband against his wife on the ground of her desertion. Now, if the argument of *res judicata* put forward by the wife in

the present case is to prevail the right given by the statute of 1937 to the husband for a decree of divorce on the ground of his wife's desertion will be of no value to him because the order of the justices against the husband incidentally and by inference also decided that his wife was not in desertion at the time when the order was made. Can it be said in these circumstances that the issue of the wife's desertion, assumed to have been considered by the justices, and the right of the husband to petition for a divorce on the ground of her desertion is the "same subject of litigation" within the definition of *res judicata* by WIGRAM, V.-C., to which I have referred. So to hold would, in my opinion, lead to a very undesirable limitation on the jurisdiction of the Divorce Court. Many questions, such as adultery by the wife, condonation, connivance, or neglect or misconduct conducing to such adultery, may be raised before the justices, and if it is to be held that in every case where the justices have decided such a question the matter is *res judicata*, and that, therefore, the parties cannot raise it in proceedings in the Divorce Court (unless, indeed, the point is one governed by the rule in *Harriman v. Harriman* (6)), then I think that the jurisdiction of the Divorce Court would be grievously impaired. Take, for instance, the question of condonation of the wife's adultery. The justices, in proceedings by the wife for maintenance on the ground of her husband's wilful neglect to maintain, might hold that the wife had committed adultery but that the husband had condoned it, and accordingly might make an order. The husband then proceeds to file a petition for divorce on the ground of the wife's adultery and the wife in her answer alleges condonation. Is the matter of condonation *res judicata*, and may not the husband in his reply allege that he did not condone it? If *res judicata* applies, then it seems to me that this is a serious impairment of the jurisdiction of the Divorce Court which under s. 4 of the Act of 1937 has the specific duty on a petition for divorce to inquire into the facts alleged and whether there has been any condonation by the petitioner.

The point is bare of authority and I do not find it easy to give any clear cut reason why the rule of *res judicata* should not apply here, but I am satisfied that those who first formulated the rule never intended it to apply in such a case as this. In my opinion, the appeal should be dismissed. **LORD MORTON OF HENRYTON** has authorised me to say that he has read this judgment and that he agrees with it.

ASQUITH, L.J.: I agree.

Appeal dismissed. No order with regard to costs.

Solicitors: *L. H. Whitlamsmith*, Law Society Divorce Department (for the wife); *B. Bunker & Son*, Hove (for the husband).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

Not followed. PERRING v. PERRING.
[1949] 2 All E.R. 334.

MAYO v. MAYO.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Blanco White, K.C.), October 11, 1948.]

Adultery—Admission—Failure by wife to state name of father when registering birth of child—Births and Deaths Registration Act, 1874 (c. 88), ss. 1, 7.

A wife gave birth to a child, and, on registering the birth, omitted to give information of the name and surname and rank or profession of the father.

HELD: the entry in the register of births omitting these particulars constituted an admissible admission of adultery.

Frampton v. Frampton and Bushell ([1941] 1 All E.R. 305; [1941] P. 24; 165 L.T. 48), *applied*.

[AS TO EVIDENCE OF ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 660-664, paras. 973-976; and FOR CASES, see DIGEST, Vol. 27, pp. 294-299, Nos. 2708-2755.]

Cases referred to :

- (1) *Frampton v. Frampton and Bushell*, [1941] 1 All E.R. 305 ; [1941] P. 24 ; 110 L.J.P. 20 ; 165 L.T. 48 ; 2nd Digest Supp.
- (2) *Russell v. Russell*, [1924] A.C. 687 ; 93 L.J.P. 97 ; 131 L.T. 482 ; 27 Digest, 297, 2743.

UNDEFENDED PETITION by husband for divorce on the grounds of his wife's adultery.

MR. COMMISSIONER BLANCO WHITE decided that the wife's failure to supply the names of the father of a child, born during the marriage, for the purpose of the registration of the birth, amounted to an admission of adultery by her, and he granted the husband a decree *nisi*.

Quintin Hogg for the husband.

The wife was not represented.

MR. COMMISSIONER BLANCO WHITE, K.C. : This case raises a question which is important in practice and on which the diligence of counsel and my own inquiries have been unable to find any authority.

The question is this : If, on the registration of the birth of a child by a married woman, col. 4, of the form of register, which should contain the name and surname of the father, and col. 6, which should contain a statement of his rank or profession, are left blank, is that an admission by her of adultery ? At first sight one would say, "No," because all that has happened is that the mother has failed to give any information with regard to those matters, and from nothing, nothing can be deduced, but, when one looks at the provisions of the Births and Deaths Registration Acts, 1836 and 1874, and the regulations which deal with the registration of births, the position appears to be different.

Section 20 of the Act of 1836 provided that :

"The father or mother of every child born in England . . . shall, within 42 days next after the . . . birth, give information, upon being requested so to do, . . . of the several particulars hereby required to be known and registered touching the birth of such child."

To that Act there was annexed a schedule which showed the form in which, by s. 17 of the Act, the register books were to be printed, and that form contained, as does the form in use today, a column for the name and surname of the father and a column for his rank or profession. In the Births and Deaths Registration Act, 1874, s. 1, it is provided that :

"In the case of every child born alive after the commencement of the Act, it shall be the duty of the father and mother of the child . . . to give to the registrar, within 42 days next after such birth, information of the particulars required to be registered concerning such birth, and in the presence of the registrar to sign the register."

By s. 7 it is provided :

"In the case of an illegitimate child no person shall, as father of such child, be required to give information under this Act concerning the birth of such child, and the registrar shall not enter in the register the name of any person as father of such child, unless at the joint request of the mother and of the person acknowledging himself to be the father of such child, and such person shall in such case sign the register, together with the mother."

I have seen the register in this case and am satisfied that all the requirements of the Act have been carefully observed by the registrar of births. The position, therefore, was that the wife attended to register the birth of the child and it was her duty, unless the child was illegitimate, to enter the name of the father and his rank or profession. It is not to be assumed that she would fail to comply with her duty. She did not enter the name and surname of the father, and that must mean, if one assumes she is doing her duty, either that she did not

know who the father was, and, therefore, was unable to give the necessary particulars, or she was admitting that the child was illegitimate. Whichever view one takes following the decision in *Frampton v. Frampton and Bushell* (1), that is an admissible admission of adultery, and in so far as it is an expression of her opinion that the child is illegitimate the evidence is admissible under the rule in *Russell v. Russell* (2).

- A In the present case, when the wife was pregnant she was seen by her husband and a conversation took place from which the husband deduced that she admitted that she had committed adultery and, indeed, admitted that the child was illegitimate. On that conversation alone I should not have felt justified in acting, but, for the reasons I have given, I regard the entry in the register of births, which does not include the name of the father, as an admission of adultery, and with that evidence I am satisfied that adultery on her part is proved.
- B There will be a decree *nisi*.

Decree nisi.

Solicitors : *Herbert Baron & Co.* (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

C

SHARP v. COATES.

[COURT OF APPEAL (Lord Goddard, C.J., Asquith and Singleton, L.JJ.), October 25, 26, 27, 1948.]

- D *Land Charges—Registration—Estate contract—Yearly tenancy under written agreement—Undertaking to grant 10 years' lease—Landlord himself holding under yearly tenancy at time of agreement—Fee simple later vested in landlord—Validity of undertaking against purchaser of land—Land Charges Act, 1925 (c. 22), ss. 10 (1), Class C (iv), 13 (2).*

- E By an agreement in writing, dated Apr. 13, 1944, R., the tenant from year to year of certain land of which his mother was the freeholder, sublet the land to the defendant on a yearly tenancy. The agreement contained the following provision : " In the event at any time during the continuance of this agreement of the reversion expectant upon this agreement becoming absolutely vested in " R., R. " will grant to " the defendant " a lease for a term of 10 years as from Oct. 11, 1943." This provision was not registered.
- F as a land charge under the Land Charges Act, 1925. In April, 1945, after the death of his mother, R. became the freeholder of the land, and in December, 1945, he sold it to the plaintiff. In September, 1946, the plaintiff gave the defendant notice to quit, but the defendant claimed that under his tenancy agreement he was entitled to demand a lease for 10 years :—

- G HELD : in 1944 R., as a tenant from year to year, was an " estate owner " within the meaning of the Land Charges Act, 1925, s. 10 (1), Class C (iv), and, therefore, the undertaking by R. to grant a lease to the defendant was capable of registration as a land charge ; as it had not been registered under s. 13 (2) of the Act it was void against a purchaser ; and, therefore, the plaintiff was entitled to give the defendant notice to quit.

- H *Decision of HUMPHREYS, J. ([1948] 1 All E.R. 136), affirmed.*

[AS TO ESTATE CONTRACTS REGISTRABLE AS LAND CHARGES, see HALSBURY, Hailsham Edn., Vol. 19, p. 358, paras. 753, 754.

FOR THE LAND CHARGES ACT, 1925, ss. 10, 13 (2) and 20 (4), and THE LAW OF PROPERTY ACT, 1925, ss. 1 (1) and 205 (1) (v) and (xxvii), see HALSBURY'S STATUTES, Vol. 15, pp. 531-537, and 543, and pp. 177, 385 and 389.]

APPEAL by the defendant from a judgment of HUMPHREYS, J., dated Dec. 19, 1947, and reported [1948] 1 All E.R. 136.

Under a written agreement for a yearly tenancy, the tenant (the defendant) was entitled to the grant of a lease for 10 years in the event of the freehold of the property becoming vested, during the currency of the agreement, in the landlord, who himself held under a yearly tenancy agreement from his mother. The mother died, and the landlord, on becoming the freeholder, sold the land to the plaintiff, who brought this action to recover possession from the tenant. The tenant set up the term of his tenancy agreement. HUMPHREYS, J., held that, as the term was not registered as a land charge, it was void as against the plaintiff, who was, therefore, entitled to possession. The tenant appealed, but the Court of Appeal now dismissed his appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Jopling for the defendant.

Sir Andrew Clark, K.C., and *Hanbury Aggs* for the plaintiff.

LORD GODDARD, C.J. : This is an appeal from a judgment of HUMPHREYS, J., in an action brought by the plaintiff for recovery of land, and it raises what is said to be a short point under the Land Charges Act, 1925. It is one that has taken considerable time to argue, and it certainly is not easy.

On Apr. 13, 1944, one Walter Henry Racey granted a tenancy from year to year to Mr. Coates, the defendant in the action. It was a tenancy of something over 3 acres of land, which formed part of a larger holding, and we know now that at the time of the letting Racey's mother was the owner in fee of the whole property. The agreement contained a covenant—if I may use that expression with regard to a document which is not under seal—to this effect :

"In the event at any time during the continuance of this agreement of the reversion expectant upon this agreement becoming absolutely vested in the landlord the landlord will grant to the tenant a lease for a term of 10 years as from Oct. 11, 1943, upon the terms of this agreement so far as the same are applicable to a lease."

Mrs. Racey died in December, 1944, and on Apr. 29, 1945, the property was conveyed by her executors to Walter Henry Racey, who thereupon became the owner of the fee. After that time, Coates was entitled, if he was so minded at that time, to demand a lease for 10 years, but he did not do so. The property was then put up for auction by Racey. It did not sell by auction, but on Nov. 13, 1945, the plaintiff contracted to buy the property from Racey, and the purchase was completed on Dec. 11, 1945. Coates, meanwhile, had remained as a tenant from year to year. On Sept. 13, 1946, the plaintiff served a notice to quit on Coates, and Coates then set up that he was entitled under the terms of the written agreement under which he was holding from year to year to demand a lease for 10 years. The answer that the plaintiff makes to that claim is that the proviso in the written agreement was a contract which was caught by the provisions of the Land Charges Act, 1925, and, as it was not registered as a charge, it is void as against him, and that, whatever right Coates may have against Racey, that does not prevent the plaintiff, as the owner in fee of the property, from giving Coates notice to quit.

It is necessary, therefore, to refer, briefly as may be, to the provisions of the Land Charges Act, 1925. Section 10 (1) provides :

"The following classes of charges on, or obligations affecting, land may be registered as land charges in the register of land charges, namely . . ."

Then come various classes, and the class which is in question in this case is Class C (iv) :

"Any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate . . ."

That is, any contract by an estate owner to create a legal estate. A term of

years is a legal estate under the Law of Property Act, 1925, s. 1 (1). By s. 13 (2) of the Land Charges Act, 1925, it is provided :

“A land charge of Class B, Class C or Class D, created or arising after the commencement of this Act, shall (except as hereinafter provided) be void as against a purchaser of the land charged therewith . . .”

A So, if the right under the proviso in the tenancy agreement is a land charge, it ought to have been registered, and, if it is not registered, it is void as against the purchaser whether he had notice or not. Then by s. 20 (4) of the Land Charges Act, 1925, it is provided that the expressions “estate owner,” “legal estate,” and so forth, have the same meaning as in the Law of Property Act, 1925. The Law of Property Act, 1925, s. 205 (1) (v), contains the following definition :
B “‘Estate owner’ means the owner of a legal estate . . .” and by s. 1 (1) of the Act :

“The only estates in land which are capable of subsisting or of being conveyed or created at law are—(a) An estate in fee simple absolute in possession ; (b) A term of years absolute.”

C By s. 205 (1) (xxvii) of the Law of Property Act, 1925, the expression “Term of years absolute” is defined, and :

“ . . . in this definition the expression ‘term of years’ includes a term for less than a year, or for a year or years and a fraction of a year or from year to year.”

D A tenant from year to year can be, and is, an estate owner, because he has an estate for a term of years as defined by the Act.

The argument for the plaintiff put forward below, which HUMPHREYS, J., accepted, was that Racey, in the first instance, was an estate owner because he had a term of years, *viz.*, a yearly tenancy from his mother. He purported to act as landlord in creating a yearly tenancy between himself and Coates. It may be true, as counsel for the plaintiff has argued, that, as between Racey and Coates, Coates, being the tenant, could not dispute the title of the landlord, *i.e.*, the person who purported to act as landlord. That estoppel would not, I think, operate as between the plaintiff and Racey in this case, but, however that may be, it would seem that in the court below the case proceeded on the footing that there was this interest, at least, in Racey, *viz.*, the yearly tenancy from his mother. No application was made to the court to adjourn, when this
E matter was brought up for the first time, that the matter might be further investigated. It could have been done, but the case proceeded on those lines, and, accordingly, we think that we must accept the position, a position that was very largely, no doubt, due to the fact that, for some reason on which the court has already commented, the plaintiff brought this action as an action under R.S.C., Ord. 14, and there were no full pleadings. The case was treated as a
G short cause, which it certainly was not. The court feels, however, that it is too late now to say that this matter should be further investigated. If Walter Racey was tenant from year to year from his mother, he was, as I have already shown by reference to the sections, an estate owner, and as an estate owner he made this contract to give Coates a 10-years lease if and when he became the owner of the fee. In other words, it is a case in which a man who has a
H limited interest in land contracts that, when he enlarges his interest and becomes the owner in fee, he will grant a term of years.

Counsel for the defendant contended that s. 10 (1), Class C (iv), of the Land Charges Act, 1925, must be read as meaning that the estate owner must at the time of his contract have an estate out of which the charge could operate, and in support of that argument he referred to s. 10 (2), which says :

“A land charge shall be registered in the name of the estate owner whose estate is intended to be affected . . .”

I think one comment that can be made on that contention is that s. 10 (2) merely directs in whose name the land charge shall be registered, but, further than that, it seems to me that, if a limited owner—using the words “limited” owner in the sense in which I have just indicated—does contract that if, during the continuance of the agreement which he has made with the other party to grant him a yearly tenancy, his interest becomes enlarged, he will grant him a larger interest, he is making an agreement which affects his interest as an estate owner. If that is so, it follows that the conclusion to which HUMPHREYS, J., came was right, because no requirement which ought to have been satisfied had been satisfied in this case, and, therefore, the charge was void, *i.e.*, the contract which had been made by Racey with Coates could not be effectual as against the plaintiff, who was a purchaser for value.

Another point raised by counsel for the defendant was that the estate owner must be an estate owner at the time the contract was made. Counsel for the plaintiff said that the words in s. 10 (1), Class C (iv) :

“Any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him . . .”

show that there is a contrast between the estate owner and the person who is merely entitled to have the legal estate conveyed to him. As I understand the argument of counsel for the plaintiff, it is that, if a man is an estate owner, it does not matter whether he was an estate owner at the time the contract was made or not. In view of the conclusions to which I have come, and which I have just expressed, that Racey was an estate owner at the time the agreement was made, and his estate was affected, it is not necessary to give a decision on this second point. I merely say that I think there is a great deal to be said for the argument of counsel for the defendant on this point.

For the reasons I have endeavoured to express on a not very easy point, I have come to the conclusion that the judgment of HUMPHREYS, J., was right, and that, therefore, the appeal must be dismissed.

ASQUITH, L.J. : I agree. The sole question on this appeal is whether the tenancy agreement of Apr. 13, 1944, was capable of registration. If it was, it is common ground that the appeal fails. It would be capable of registration, if at all, as an estate contract within s. 10 (1), Class C (iv), of the Land Charges Act, 1925. It will be an estate contract within that provision if it is a contract within the opening words of para. (iv), *viz.* :

“Any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate . . .”

Mr. Racey certainly contracted to convey or create a legal estate, *viz.*, a term of 10 years. Was he then “an estate owner” within this provision? He was a tenant from year to year, and an estate owner, as defined by reference to the provisions of the Law of Property Act, 1925, includes in that designation a tenant from year to year. Therefore, if s. 10 (1), Class C (iv), is read literally, he is an estate owner within it, and the agreement is an estate contract and is capable of being registered. Should any limitation be engrafted on the literal meaning of the terms of s. 10 (1), Class C (iv)? One limitation, I apprehend, must be read in. The estate owner must have an estate of some sort in the same land in respect of which he contracts to convey or creates an estate in favour of someone else. Hence, an owner of an estate in Whiteacre who contracts to convey or creates an estate in Blackacre would presumably not be an estate owner within the provision. But it is argued by counsel for the defendant that a further limitation should be implied, *viz.*, that an owner of an estate in Whiteacre, contracting to convey an estate also in Whiteacre which is larger than that which he himself possesses, is also not an estate owner. I do not see the necessity for this implication. There is no absurdity in a contract by X, the owner of

(say) a 5 years' term, contracting to convey a 10 years' term to Y, provided that the obligation does not fall to be performed until X acquires the fee simple or some other estate large enough for 10 years to be carved out of it. I do not see why a person who owns an estate, *viz.*, a term from year to year, should be any the less an estate owner because he enters into such a contract. For these reasons, I agree with my Lord that the contract of Apr. 13, 1944, was capable of registration, and, I think, capable of registration *ab initio*, and, therefore, the appeal fails.

SINGLETON, L.J. : I agree that the appeal should be dismissed, and I also agree that this was not a case for procedure under R.S.C., Ord. 14, nor a case proper to be put into the Short Cause List. It seems to me that time would have been saved had there been pleadings in the ordinary way.

Appeal dismissed with costs.

Solicitors: *Metcalf, Copeman & Pettefar* (for the defendant); *Merrimans*, agents for *Fraser, Woodgate & Beall*, Wisbech (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ARTILLERY MANSIONS, LTD. v. MACARTNEY.

[COURT OF APPEAL (Tucker, Asquith and Singleton, L.JJ.), October 20, 21, 22, 1948.]

Rent Restriction—Possession—Lease of flat with “attendance”—Separate charge stipulated for attendance—Whether charge for attendance “substantial part of whole rent”—“Value to the tenant”—“Tenant”—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2)—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 10 (1).

By an agreement, dated June 16, 1944, the landlords let a flat to A. for one year from June 24, 1944, and thereafter on a quarterly tenancy, at a clear yearly rent of £170. By cl. 3 of the agreement the tenant agreed “to pay to the company by way of further or additional rent £15 per annum for service charges all such charges to be paid on the said days for payment of rent. The service to be provided . . . shall include keeping the rooms and furniture clean sweeping chimneys cleaning windows lighting fires valeting and general attendance but shall not include the cooking or service of meals where the tenant provides his or her own food.” The landlords also agreed to keep the stairway clean and provide a hall porter. On Oct. 22, 1944, A. assigned the benefit of the tenancy agreement to M. The landlords sought possession from M., claiming that, by reason of the provision of services, the Rent Restrictions Acts did not apply. It was common ground that, if the proportion of the rent fairly attributable to the attendance was only £15, that would not be a substantial proportion of the total rent of £185. The landlords contended, however, that £15 did not represent a proportion fairly attributable to the attendance having regard to their value to M.

HELD : the word “tenant” in the Rent and Mortgage Interest Restrictions Act, 1923, s. 10, referred to the original tenant A., and, in arriving at the proportion of the rent fairly attributable to attendance, regard must be had to the requirements only of A. and not to those of M. or of a hypothetical “average” or “normal” tenant of the class of property in question. In the circumstances, and particularly in view of A.’s requirements, £15 was a *bona fide* estimate made by the parties to the agreement of the proportion of the rent attributable to attendance, and there was no reason why the court should otherwise construe it. The amount of rent fairly attributable to the attendance was, therefore, not a substantial portion of the whole rent, and the Rent Restrictions Acts applied.

Dicta of VISCOUNT SIMON ([1948] 1 All E.R. 1, 9; [1948] A.C. 291, 314), and MORTON, L.J., ([1946] 2 All E.R. 287, 290; [1946] K.B. 631, 638; 175 L.T. 204, 207) in *Palser v. Grinling*, *applied*.

Decision of DENNING, J., ([1947] 1 All E.R. 686; [1947] K.B. 594), *affirmed*.

[AS TO DWELLING-HOUSES LET AT A RENT INCLUDING ATTENDANCE, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370; and FOR CASES, see A DIGEST, Vol. 31, pp. 559, 560, Nos. 7068-7077.]

Cases referred to:

(1) *Palser v. Grinling. Property Holding Co., Ltd. v. Mischeff*, [1948] 1 All E.R. 1; [1948] A.C. 291; [1948] L.J.R. 600; *affg.*, [1946] 2 All E.R. 287, 294; [1946] K.B. 631, 645; [1947] L.J.R. 97; 115 L.J.K.B. 484; 175 L.T. 204, 192; 2nd Digest Supp.

(2) *Engvall v. Ideal Flats, Ltd.*, [1945] 1 All E.R. 230; [1945] K.B. 205; 114 L.J.K.B. 249; 172 L.T. 134; 2nd Digest Supp.

APPEAL by the landlords from a judgment of DENNING, J., without a jury, dated Mar. 26, 1947, ([1947] 1 All E.R. 686), refusing an order for possession. The Court of Appeal now dismissed the appeal. The facts appear in the judgment of TUCKER, L.J.

Diplock, K.C., and *Quintin Hogg* for the landlords.

Collard for the tenant.

TUCKER, L.J. : This is an appeal from a decision of DENNING, J., whereby he gave judgment for the tenant in an action in which the landlords, Artillery Mansions, Ltd., were claiming possession of a flat. Mrs. Macartney, the tenant, was the assignee of the original tenant, Mr. Anderson. Mrs. Macartney's tenancy had been duly determined, and she claimed the protection of the Rent Restrictions Act. The sole question was whether or not this flat was protected having regard to the provisions of the Acts with regard to apportioning the rent of premises where attendance is provided by the landlord.

The sections in question are these. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (f), which provides:

"The expressions 'landlord,' 'tenant,' 'mortgagee,' and 'mortgagor' include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor."

Section 12 (2) of the same Act, which provides:

"This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed—[certain specified amounts]. Provided that—(i) this Act shall not, save as otherwise expressly provided, apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance, or use of furniture."

And the Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (1), which provides:

"For the purposes of proviso (i) to s. 12 (2) of the principal Act (which relates to the exclusion of dwelling-houses from the principal Act in certain circumstances), a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent."

The flat in this case was let by the landlords to Mr. Anderson by an agreement in writing dated June 16, 1944. It was a flat on the fifth floor of the south quadrangle and the term was:

" . . . from June 24, 1944, for one year and thereafter on a quarterly tenancy terminable by either party subject as hereinafter mentioned at the clear yearly rent of £170."

By cl. 3, which is the all-important clause in the present case, the tenant agrees :

A " . . . to pay to the company by way of further or additional rent £15 per annum for service charges all such charges to be paid on the said days for payment of rent. The service to be provided by the company shall include keeping the rooms and furniture clean sweeping chimneys cleaning windows lighting fires valeting and general attendance but shall not include the cooking or service of meals where the tenant provides his or her own food."

B Clause 11 contains a covenant on the part of the tenant :

C " . . . not to assign underlet lend or part with the possession of the said premises or any part thereof without first obtaining the consent in writing of the company for that purpose but such consent shall not be unreasonably withheld in the case of a respectable and responsible intending assignee or under-tenant but provided that the company shall not be required to sanction the assignment or underletting by an under-tenant to any assignee or under-tenant."

Clause 20, one of the landlords' covenants, is :

" . . . to arrange for the staircase to be kept clean and to provide a hall porter to attend to the hall door and to take in messages and parcels."

D It is not necessary to read the rest of that clause. On Oct. 22, 1944, Mr. Anderson assigned the benefit of that tenancy agreement to the present tenant, Mrs. Macartney, by a document of that date, having previously obtained the consent of the landlords.

E The question which arises in the present appeal is whether or not the sum of £15—which by the agreement is to be paid by way of additional rent for the services described in cl. 3—represents the proportion of the total rent fairly attributable to the attendance, regard being had to the value of the same to the tenant, and whether it is a substantial portion of the whole rent. It is common ground, I think, that, if the proportion fairly attributable to the attendance, regard being had to the value of the same to the tenant, is only £15, that would not be a substantial proportion of the total rent of £185. The
F tenant contends that this is the sum fairly attributable to the value of the attendance, and she says that, as that is not a substantial proportion of the whole, she is entitled to the protection of the Act. The landlords, on the other hand, say that the sum of £15 arranged between them and Mr. Anderson does not represent a proportion fairly attributable to the value of the attendance, regard being had to the value to Mrs. Macartney, who, they say, is the tenant
G for the purposes of s. 10 of the Act of 1923. They further say that, in any event, £15 does not represent the contractual value of the services which the landlords undertook to provide under cl. 3.

H DENNING, J., decided this case when *Palser v. Grinling* (1) had not reached the House of Lords, but had been decided by this court. Having referred to the judgment of MORTON, L.J., in that case, DENNING, J., said ([1947] 1 All E.R. 688) :

"In my opinion, they also apply in a case such as the present where there is not an inclusive rent, but the parties have specifically agreed on one figure, £170, for the rent and another figure, £15, for the services. In a case of this kind, however, where the parties themselves have made the severance, I think that in the ordinary way it is reasonable to assume that the amounts allocated are a genuine estimate of the value of the services mentioned. I am supported in this view by the analysis which has been put

before me . . . When one has such a difficult matter to assess and estimate, it seems to me that when the parties have in their agreement set down their own figure, it is *prima facie* to be taken as correct. I see nothing in all these calculations to satisfy me that this £15 is not a perfectly proper figure to put on the value of the services which the landlords contract to provide for that sum."

The first question to be solved is whether or not the "tenant" referred to in s. 10 of the Act of 1923 is Mr. Anderson or Mrs. Macartney. With regard to that, I refer to a passage in LORD SIMON's speech in *Palser v. Grinling* (1), where he said ([1948] 1 All E.R. 9) :

"Now comes the question how to arrive at 'the amount of rent which is fairly attributable to attendance or the use of furniture, regard being had to the value of the same to the tenant.' It is convenient, first, to observe that the 'amount of rent' is equivalent to 'the portion of the whole rent.' 'Of the same' refers to the attendance or to the use of furniture or to both together when both are provided. A question of some difficulty arises as to the meaning of 'the tenant.' Does the expression refer to the particular individual whose lease is in question, or does it refer to the average or normal tenant of that class of property? I think the phrase refers to the actual tenant whose lease is under examination. It is the analysis of the particular transaction to which he is a party that is the subject-matter of the inquiry. It is the value to him (and included in that value is the fact that he may assign or sub-let) which must be taken into account, but, in taking this view, it is of the utmost importance to observe that the section directs that 'regard shall be had' to the value to the tenant and not that the value to such tenant is to govern the calculation absolutely."

It is clear that *Palser v. Grinling* (1) did not concern an assignment—the court there was dealing with the original tenant—but, none the less, an argument had been advanced in *Property Holding Co., Ltd. v. Mischeff* (1) (which was decided at the same time) which did involve a consideration of the position if there had been an assignment, and that was dealt with by LORD SIMON (*ibid.*, 5). In that case the original lease was dated 1937, and in 1942 there has been what was held to be a sub-lease which, it had been contended, amounted to an assignment. LORD SIMON said (*ibid.*) :

"If the respondent was right in this, the year as at which the furniture should be valued would be 1937 and not 1942. But there is no substance in this contention."

He was there, at any rate, indicating the view that the material date was the date of the original lease and not the date at which the assignment had taken place, if there had been an assignment.

In my view, the "tenant" referred to in s. 10 of the Act of 1923 means the original tenant, the tenant who was a party to the formation of the contract made with the landlord, who, of course, often will be the tenant in occupation of the premises at the date of the expiration of the notice to quit and when the case comes before the court. I think that meaning is implicit in LORD SIMON's speech, and I think, furthermore, that it is the natural meaning to be given to the word. The other construction contended for by counsel for the landlords would have the curious result that, although the total rent for premises might remain constant, and although the amount apportioned between the parties and attributed to the attendance might remain constant, none the less the premises would go in and out of the Rent Restrictions Acts according to the requirements or needs of the particular assignee at a particular time. That would, I think, be a very undesirable and confusing consequence, and unless I were driven to that view I should be disposed to decide that the word "tenant" means the original contractual tenant.

A That passage from the speech of LORD SIMON also, in my view, makes it clear that in arriving at the proportion fairly attributable to attendance you have to have regard to the requirements of the particular individual whose lease is in question. That rules out regard being had to the average tenant or the normal tenant in Artillery Mansions or anywhere else. It shows that this matter cannot be decided objectively by assessing the value of the covenant standing by itself and assuming that every tenant will require the landlord to implement it to the full. The needs and requirements of a particular tenant, namely, the original contractual tenant—in this case Mr. Anderson—have to be taken into consideration. That view, I think, is indicated by MORTON, L.J., in his judgment in this court in *Palser v. Grinling* (1). He says ([1946] 2 All E.R. 290):

B “I think the judge must next consider whether there are any special circumstances providing grounds for attributing to the tenant of the particular flat in question either more or less than his proportion of the cost of providing attendance, arrived at in the above manner. For instance, suppose that part of the attendance provided is the carrying of coals to the flats by a man employed by the landlord; is it right that a portion of the cost of this labour should be attributed to a tenant who chooses to instal electric fires in all his rooms? This is a matter which was much argued before us. My own view is that if the carrying of coals is a service which the landlord undertakes to provide for a tenant, then *prima facie* that service is of the same value to that tenant as it would be to any other tenant, and the burden is upon the tenant to satisfy the court that less than his arithmetical proportion of the cost should be attributed to him. For instance, the tenant might prove that when the terms of the lease were being arranged, he told the landlord that he did not require this service, and that the landlord could make the appropriate alteration in the lease. If, in these circumstances, the landlord insisted on keeping to his common form of lease, which included this provision, the judge might well think that the amount of rent which was fairly attributable to that particular attendance was little or nothing. In *Engvall's* case (2) LORD GREENE, M.R., said ([1945] 1 All E.R. 234): ‘With regard to No. 19—the provision of personal services of a caretaker for the purpose of carrying up wood, coals and so forth—the fact is that the tenant used electric fires and did not make use of those services, and had no need for them. The judge, accordingly, held (and I think he was fairly entitled to hold) that no value to the tenant must be attributed to that particular undertaking by the landlord.’ I am sure LORD GREENE, M.R., did not intend to lay down any general rule that, if a tenant in fact makes no use of a particular ‘attendance’ which the landlord has contracted to give, no part of the rent must be attributed to that attendance. I think the important point is: What did the parties contemplate at the time when the lease was granted?”

As I read his judgment, that is a clear expression of opinion by MORTON, L.J., that the real crux of the matter is what was contemplated by the parties at the time when the lease was granted. If the House of Lords had thought that was an erroneous view, I think LORD SIMON, in his speech, would have said so in terms. It is argued by counsel for the landlords that when carefully examined the reasoning of LORD SIMON in his speech is inconsistent with that view expressed by MORTON, L.J. I do not think it is.

H The passage which I have quoted from LORD SIMON's speech ([1948] 1 All E.R. 9) must be borne in mind and considered closely in connection with the passage to which I am about to refer, and which is most relied on by the landlords. LORD SIMON said (*ibid.*, 12);

“The LORD CHIEF JUSTICE recognised that the services of the porter

were not solely for the tenants' advantage, but he put this on the limited ground that the removal of refuse is also to the advantage of the landlord. A broader view is fully justified, *viz.*, that the greater part of the services of the porter were services rendered to the landlord which did not involve any attendance on the tenants at all. On the other hand, the LORD CHIEF JUSTICE, following *Engvall v. Ideal Flats, Ltd.* (2), held that, inasmuch as the respondent did not require the services of the porter for carrying up coals because she was not using coal fires, the portion of the whole rent which was fairly attributable to the porter's attendance for this purpose would be reduced. This does not seem to be the case, for the tenant who has contracted to pay rent for attendance which the landlord covenants to supply cannot reduce the proportion of the rent fairly attributable to such attendance by saying that though he is entitled to have it he does not want it. The result in *Palser's* case (1) is that the attendance provided by the appellant and paid for in the total rent was not such as to make the figure which may be fairly attributable to it a substantial portion of the whole rent."

Counsel for the landlords argues that LORD SIMON is there saying, in effect, that all you have to look at is what is the attendance to which the tenant is contractually entitled. He says that that conflicts with MORTON, L.J.'s expression of opinion, and he furthermore says that MORTON, L.J.'s opinion must be considered in relation to the particular circumstances with which he was dealing and that he was only dealing with a case (which he had given as an example) where the tenant had not, in fact, availed himself of the attendance which the landlord had contracted to supply. I think that LORD SIMON is confining himself entirely to the case where the tenant has, in fact, not availed himself of the services, and I think he is accepting MORTON, L.J.'s view with regard to that. MORTON, L.J., had clearly indicated that he did not think that LORD GREENE, M.R., ever intended to suggest that the mere circumstance of non-user would affect the matter. I cannot find anything in that passage, or in the rest of LORD SIMON's speech, to indicate that he is dissenting from the proposition of MORTON, L.J. ([1946] 2 All E.R. 291), that the important point is: "What did the parties contemplate at the time when the lease was granted." Incidentally, if that is right, it further strengthens my view that Mr. Anderson and not Mrs. Macartney is the tenant envisaged, because no question arises of anything ever being in the contemplation of Mrs. Macartney. The only parties who could contemplate anything on the subject were the landlords and Mr. Anderson.

If that is the right view, how does the matter stand? The covenant in cl. 3 of the lease is not like a covenant by the landlord to repair. It is not even like a covenant by a landlord to supply certain specified articles of furniture, such as a piano or the articles of furniture which may appear in the schedule to a lease. Covenants of that nature are absolute. The repairs have got to be carried out and the furniture has got to be supplied if it is part of the contract. But this is a provision which entitled the tenant, at his option, to call for certain services to be rendered to him by way of attendance. A substantial proportion of the services envisaged in cl. 3 are by their nature such that they depend on the requirements of a particular tenant at a particular time:

"The service to be provided by the company shall include keeping the rooms and furniture clean, sweeping chimneys, cleaning windows, lighting fires, valeting and general attendance."

If the tenant is not there he may not require his fire to be lighted, or his bed to be made, or any valeting. It depends on the extent to which he occupies the flat and how often he rings the bell, if there is one, to summon an attendant to render him some of these services. I think, in considering a clause of this

kind, the parties, when entering into an agreement like this, may very well and very properly take into consideration the probable extent to which the tenant is going to call on the landlord to implement his obligation under such a clause. Similarly, it may become very relevant for the landlord to consider the extent to which he is going to be called on to implement this obligation. In this case there was evidence (and there is no dispute about this) that the sum of £15 arrived at between the landlords and Mr. Anderson was on the basis that Mr. Anderson (who was, I think, a journalist concerned particularly with agricultural matters) was not likely to avail himself to any considerable extent of the services which the landlords undertook by cl. 3 to provide if required, and, therefore, the landlords and Mr. Anderson agreed to allocate to those services, in the particular circumstances of this case, a sum which, according to the evidence of the landlords, was one considerably below the sum which would properly be attributable to services supplied to a tenant who required 100 per cent. performance of the obligations under that covenant. That being so, I find myself in agreement with DENNING, J., in saying that I see no reason to interfere with the *bona fide* pre-estimate made by the parties to the proportion of the rent fairly attributable to the value to the tenant of this attendance.

I have not lost sight of the fact that LORD SIMON stated that one of the elements to be taken into consideration in apportioning the amount of the rent attributable to the attendance is the fact that he may assign or sub-let. That, in some cases and in the case of a lease of long duration, may be a valuable asset and it may increase the sum attributable to the attendance, but in this particular case the lease was of very short duration. It was only for one year and thereafter at a quarter's notice. I have no doubt that this matter did not enter into the actual calculations of Mr. Anderson or the landlords any more than it had occurred to any of the counsel or judges until *Palser v. Grinling* (1) reached the House of Lords. In the present case I think, having regard to the short duration of the tenancy and the fact that there was nothing to indicate that Mr. Anderson at that time contemplated that he would be likely to wish to avail himself of the right to assign, that that element is not sufficient to compel us to interfere with the pre-estimate of £15 at which the parties arrived. For these reasons I think that this appeal fails.

ASQUITH, L.J. : I agree. It is true that what has to be valued here is the contractual right to attendance and not the quantum of attendance actually utilised by the tenant, but in valuing the contractual right the Act of 1923, by s. 10, provides that regard must be had to its value to the tenant. The House of Lords, in *Palser v. Grinling* (1), has held that the "tenant" in this context means, not a hypothetical or average tenant, but, to use the words of LORD SIMON ([1948] 1 All E.R. 10), "the actual tenant whose lease is under examination"—who, for the reasons given by my Lord and which I will not repeat, I agree is Mr. Anderson and not Mrs. Macartney. Such a valuation can only be made by taking into account the special needs and requirements of that individual tenant. Those are the factors which measure the value of the contractual right to the particular tenant as distinct from its market value to persons generally. Notwithstanding the very persuasive argument of counsel for the landlords, I do not think, on reflection, that these conclusions are inconsistent with what is said by LORD SIMON ([1948] 1 All E.R. 12) in *Palser v. Grinling* (1), or that in that passage LORD SIMON is disapproving of what MORTON, L.J., had said ([1946] 2 All E.R. 290). Where the special needs of the tenant are disclosed before the contract to the landlord, and, therefore, before a value is set in the contract on the contractual right to the satisfaction of those needs, there is a very strong presumption that the contractual value is the true value of the right to the tenant. LORD SIMON, in the passage so often cited during the argument, is simply saying, to my mind, that the value of the contractual right to the tenant

crystallises at the time of the contract and cannot be varied afterwards according as the tenant in the event makes use of his contractual rights to an extent greater or less than was originally anticipated. For these reasons, in addition to those given by my Lord, I agree that the appeal should be dismissed.

SINGLETON, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Wainwright & Pollock, O'Bryen-Taylor & Co.* (for the landlords) ;
William Foux & Co. (for the tenant).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re WOHLGEMUTH'S WILL TRUSTS. THE PUBLIC TRUSTEE v. WOHLGEMUTH.

[CHANCERY DIVISION (Jenkins, J.), October 21, 22, 1948.]

Will—Construction—Bequest to "children"—Inclusion of illegitimate children—Effect of surrounding circumstances.

By his will, dated May 13, 1936, a testator left certain property "in trust to pay the income thereof to [my wife] during her life and after her decease in trust for such children or remoter issue of myself and [my wife] in such shares . . . and in such manner as she shall by deed or will appoint."

The testator was first married in 1907, but he separated from his wife in the same year and there were no children of the marriage. Shortly after the marriage he started living with the first defendant by whom he had two children (the second and third defendants) in 1921 and 1929 respectively. The first wife died in 1935 and in 1936 the testator married the first defendant, but the children, having been born during the subsistence of the former marriage, were not thereby legitimated. At the date of the will the testator was incapable of begetting a child and believed that this wife was also unable to bear children.

HELD : since it was impossible to the knowledge of the testator that, in view of his condition, any legitimate children could take under the bequest, the case was brought within the first exception to the general rule stated by LORD CAIRNS in *Hill v. Crook*, (1873) (L.R. 6 H.L. 265, 282) and applied by SWINFEN EADY, J., in *Re Eve* ([1909] 1 Ch. 796 ; 100 L.T. 874), and the will must be construed as making provision for the two children of the testator and his wife notwithstanding that they were not legitimate.

Ward v. Van der Loeff, Burnyeat v. Van der Loeff ([1924] A.C. 653 ; 131 L.T. 292), distinguished.

[AS TO ADMISSIBILITY OF EVIDENCE OF TESTATOR'S INTENTION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 165-183, paras. 217-234 ; and FOR CASES, see DIGEST, Vol. 44, pp. 614-644, Nos. 4409-4847.]

Cases referred to :

- (1) *Hill v. Crook*, (1873), L.R. 6 H.L. 265 ; 42 L.J.Ch. 702 ; *affg.* S.C. *sub nom. Crook v. Hill*, (1871), 6 Ch. App. 311 ; 44 Digest 808, 6614.
- (2) *Dorin v. Dorin*, (1875), L.R. 7 H.L. 568 ; 45 L.J.Ch. 652 ; 33 L.T. 281 ; 39 J.P. 790 ; 44 Digest 809, 6616.
- (3) *Re Eve, Edwards v. Burns*, [1909] 1 Ch. 796 ; 78 L.J.Ch. 388 ; 100 L.T. 874 ; 44 Digest 812, 6646.
- (4) *Re Pearce, Alliance Assurance Co., Ltd. v. Francis*, [1914] 1 Ch. 254 ; 83 L.J.Ch. 266 ; 110 L.T. 168 ; 44 Digest 810, 6627.
- (5) *Ward v. Van der Loeff, Burnyeat v. Van der Loeff*, [1924] A.C. 653 ; 93 L.J.Ch. 397 ; 131 L.T. 292 ; *revsg.* S.C. *sub nom. Re Burnyeat, Burnyeat v. Ward*, [1923] 2 Ch. 52 ; 44 Digest 336, 1662.
- (6) *Jee v. Audley*, (1787), 1 Cox, Eq. Cas. 324 ; 29 E.R. 1186 ; 37 Digest 57, 15.

ADJOURNED SUMMONS to determine whether a provision made by the testator in his will for the "children" of himself and his second wife operated in favour of two illegitimate children born to him by his second wife during the subsistence of his first marriage. JENKINS, J., held that there was nothing in the will to show that the *prima facie* meaning of the word "children" could be extended to include illegitimate children, but, in view of the surrounding circumstances, it appeared impossible that there should be any legitimate children of the testator by his second wife, and, therefore, the illegitimate children were entitled to take.

Hubert Rose for the plaintiff, the Public Trustee, an executor of the will.

Wilfrid Hunt for the first defendant (the testator's widow and an executor of the will) and the second and third defendants (the testator's children).

T. A. C. Burgess for parties interested in default of the children.

JENKINS, J. : The question which I have to decide is in substance whether the provision made by the testator in his will for his children by his wife, the first defendant, operates in favour of two illegitimate children he had had by that lady before his marriage to her and during the subsistence of his marriage to a former wife. The testator was married to his first wife some time before 1907. In that year they separated. There were never any children of the marriage. In September, 1913, the testator began to cohabit with the lady who afterwards became his second wife, and is the first defendant in these proceedings. There was a formal deed of separation from his first wife in June, 1921. In October of that year the first defendant, who was formerly Nellie Carey, changed her name by deed poll to her present name of Nellie Wohlgemuth. The first of the two children, that is the defendant, Joan Louise, was born on Dec. 25, 1921, and the second child, the infant defendant, Bryan, was born on Feb. 13, 1929. The first wife died on Dec. 31, 1935, and the testator married the first defendant on Jan. 9, 1936. There was no question of the two children being legitimated by that marriage inasmuch they had been born during the subsistence of the testator's marriage to his first wife.

The testator's will was dated May 13, 1936, and he died on Mar. 2, 1942. By his will, after revoking all former wills, he appointed his wife, Nellie Wohlgemuth, formerly Nellie Carey, and the Public Trustee to be executors and trustees of his will, and he went on : "I appoint the said Nellie Wohlgemuth to be the guardian of my infant children." From there, I can pass to the residuary trust fund. These trusts are declared :

"In trust to pay the income thereof to the said Nellie Wohlgemuth during her life and after her decease In trust for such children or remoter issue of myself and the said Nellie Wohlgemuth in such shares (if more than one) and in such manner as she shall by deed or will appoint but I declare that any such will or appointment shall not be operative until any such child or children attain the age of twenty-eight years and until the attainment of that age any such child or children shall only receive after attaining the age of twenty-one years the income and whilst minors such income shall be applied towards their maintenance and education and in default of any such appointment and so far as any such appointment shall not extend In trust for all the children of myself and my said wife on their attaining the age of twenty-eight years in equal shares and if there shall be only one such child the whole to be in trust for that one child and in the event of any such child or children dying leaving a child or children such last mentioned child or children shall take the share which his/her or their parent would have taken in my residuary trust funds upon their respectively attaining the age of twenty-one years and in case there shall be no issue of myself and the said Nellie Wohlgemuth who shall attain the age of twenty-eight years or remoter issue who shall attain the age of twenty-one years In trust as to one-fourth thereof for any child or

children of my brother Ludwig Maximilian Wohlgemuth one-fourth to the University College London one-fourth to the London University and the remaining one-fourth to the Berlin University."

The interests under that ultimate trust are represented for the purpose of this application by the University of London. Then there are certain declarations.

"I further declare that in the event of there being no such child or children of my said brother entitled to that one-fourth share the same shall go to the said Berlin University. And I declare that my trustees may with the consent in writing of the said Nellie Wohlgemuth during her life and after her decease at their own discretion raise any part or parts not exceeding together one moiety of the vested or presumptive share of any child or grandchild of mine and the said Nellie Wohlgemuth under this my will and apply the same for his or her advancement preferment or benefit as my trustees shall think fit."

The immediate reason for the summons is a desire to exercise that power in the event of the defendant's children being held contingently entitled under the trusts of residue. Then there is an administrative direction enabling the trustees to postpone sale, conversion and so forth, and all unconverted property is treated as income, and there is an extension of the appointing powers of investment to trustees. This direction follows:

"I direct and desire that my child or children shall be brought up without any religious instruction whatsoever"

and, finally, there is a desire that the testator should be cremated. The question I have to decide is whether the trusts for his children by his wife, the first defendant, operate in favour of the defendants, Joan and Bryan, notwithstanding that they were not legitimate children of the testator and his said wife.

The principles to be applied in deciding this question are well settled. They were thus laid down by LORD CAIRNS in particular in *Hill v. Crook* (1) (1873) (L.R. 6 H.L. 282):

"And what appears to me to be the principle which may fairly be extracted from the cases upon this subject is this—the term 'children' in a will *prima facie* means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *prima facie* interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way:—Suppose there is a bequest 'to the children of my daughter Jane,' Jane being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether the courts will hold that those illegitimate children are intended, and they will take under the term 'children.' Having referred to that class of cases, I may put them altogether aside; for your Lordships will observe that that class of cases can have no bearing upon the present case, because here, as was truly said, there was no reason why legitimate children might not take under the bequest in this will. The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which

will include, illegitimate children. I might give again a familiar illustration of that class of cases by the supposition of a bequest upon which, I presume, there would be no argument. Suppose that a testator were to say in his will 'being aware that my daughter, who is now married to her husband, had before her marriage children by the same person, who in law are illegitimate children, and it being my intention to provide for all the children of my daughter, I give funds to trustees upon trust for her for life, and after her death to divide the funds among the children of my said daughter.' I apprehend that no person reading a bequest of that kind could hesitate to say that the testator had shown upon the face of his will, by the words which he had used, his intention, in a way that could not be mistaken, to use the generic term 'children' so as to include illegitimate children along with legitimate children."

- A That statement of the general law that "children" in a will *prima facie* means legitimate children, and of the two exceptions from it, has been approved and followed in many other cases. I was referred to *Dorin v. Dorin* (2) which proceeded upon those same principles. I was also referred to *Re Eve, Edwards v. Burns* (3), where SWINFEN EADY, J., applying the principle stated by LORD CAIRNS in *Hill v. Crook* (1), held that a gift to the children of a woman aged 68 at the date of the testator's will, she having illegitimate children but no legitimate children, operated as a gift to the illegitimate children under the first of the exceptions of LORD CAIRNS on the ground that in the surrounding circumstances it was impossible that there should be any legitimate children of the woman in question to take. That decision was referred to with approval by the Court of Appeal in *Re Pearce* (4). Therefore, I can regard it as settled that the circumstance that a woman to whose children a gift is made and who has had no legitimate children and is past childbearing is a circumstance which can be looked at for the purpose of ascertaining whether the testator by referring to her children in his will meant illegitimate children, and is also a sufficient ground for holding that he did mean illegitimate children. Those are the only authorities bearing directly on the question to which I need refer.
- E I was referred by counsel in his argument on behalf of the University of London as representing the parties interested in default of children of the testator's to take to *Ward v. Van der Loeff* (5), where extrinsic evidence was held to be inadmissible to exclude the rule against perpetuities. In my judgment, the application of the rule against perpetuities is one to which special considerations apply, and I do not think any assistance for the present purpose is to be derived from *Ward v. Van der Loeff* (5). The decision in relation to the rule against perpetuities could not have been intended by their Lordships to apply to cases where the meaning of the word "children" is in question, which would, so far as I can see, have been quite inconsistent with the law as laid down in *Hill v. Crook* (1) and *Dorin v. Dorin* (2), the correctness of which certainly was not questioned in *Ward v. Van der Loeff* (5). I think their Lordships regarded those cases as of a different class, and, in my judgment, they are of a different class from cases like *Ward v. Van der Loeff* (5), and the old case of *Jee v. Audley* (6) mentioned in it.
- G

H Applying those principles to the present case, first, is there anything on the face of the will which enables me to say, not looking beyond the four corners of the will itself, that the testator when he spoke of his children by his wife, the first defendant, meant illegitimate children—in other words, that he used the word "children" not in its strict *prima facie* meaning but in the sense of illegitimate children? In my judgment, there is nothing in this will which could lead me to that conclusion. The only passage which at all suggests any such result is the passage where the testator appoints "my said wife to be the guardian of my infant children." That passage was strongly relied on by counsel for the defendants as imparting a reference to existing children. He said if the testator, on the true construction of his will, referred to existing children of his by his wife,

then, inasmuch as the only children by his wife existing at the date of the will were the children Joan and Bryan, that in itself would show that by "children" the testator must have meant illegitimate children. I agree that, if one could find here a clear reference to existing children, the consequences suggested by counsel for the defendants could follow, but I can say no more of the appointment of the testator's wife to be "the guardian of my infant children" than that it is, on the whole, perhaps more appropriate to children existing at the date of the will than to possible future children. I cannot say that it is wholly inappropriate to the latter. Looking at the will as a whole, it seems to me that it is as a matter of language perfectly appropriate as a will made wholly in favour of after-born children. I, therefore, hold that the meaning of the word "children" cannot here properly be extended on the strength of any context found in the will itself.

It remains to consider whether, when the surrounding circumstances are looked at, it appears impossible that there should be any legitimate children of the testator by his wife, the first defendant, to take under the will. On that there is evidence which, in my judgment, must clearly be admissible, of the testator's wife and of two doctors who attended the testator. It appears that in or about 1918 the testator's first wife, from whom he was separated, paid him a visit and shot him in the back, the bullet, I understand, lodging in his spine. That injury had the effect of causing a gradual but progressive deterioration of the testator's use of the lower part of his body. The medical evidence clearly establishes the fact that at the date of the will and for some years before that date the testator was incapable of begetting a child and was fully aware of such incapacity. He was at the date of the will aged 67 or thereabouts, but obviously there was nothing in his age itself to make it impossible that he should beget a child. The wife was in her 50th year at the date of the will, and, if that had been the only evidence about her, it might have been that the case could have been regarded as on all fours with *Re Eve* (3), which proceeded on the ground that the woman whose children were mentioned in the will was past the age of childbearing, but the matter, so far as the wife is concerned, does not rest solely on the question of age, because the wife's evidence was that at the date of the will it would still have been possible for her to have a child. In view of that I am unable to found myself on the age of the wife. I think it is, however, material to add this about the wife's evidence. The wife refers in her evidence to the testator's incapacity and says this was a worry to him and that she, notwithstanding her own view as to her capacity, gave him to understand, and he accepted the position, that after an operation she underwent in or about 1933, she was no longer capable of intercourse with him. So, according to her evidence, they both accepted and were convinced of the fact that it was out of the question that they should have any further children.

On that evidence am I justified in holding that it was impossible at the date of the will that there should be any legitimate children of the testator and the wife, the first defendant, to take under the will? It has been pointed out that there is a distinction between this case and *Re Eve* (3) in that here the impossibility, if I hold it proved, turns on the incapacity of a man and not, as in *Re Eve* (3) on the incapacity of a woman. In my judgment, the material fact which has to be proved is the impossibility, and for that purpose I see no distinction in principle between the incapacity of a man and that of a woman. No doubt, the cases in which a man can be proved to be incapable of begetting children must be few in number, and the onus of proof must be heavy. In the majority of cases I should say it would be a matter which was incapable of proof, but in principle I see no reason why the incapacity of a man, if capable of proof, should not be proved and relied on just as much as the incapacity of a woman to establish the impossibility of there being legitimate children to take under a disposition. In the unusual circumstances of this case and on the evidence I find that it is proved that at the date of his will the testator was permanently incapable of

having any further children by his wife, and that he was well aware at that date that he was so incapable. One may add also that, rightly or wrongly, he believed that in any case there was no longer any possibility of his wife having a child, irrespective of his own capacity. That being so, in my judgment, the case is brought within the first of the two exceptions to the general rule stated by LORD CAIRNS and applied by SWINFEN EADY, J., in *Re Eve* (3), and, accordingly, the material parts of this will must be construed as making provision for the two children of the testator and the first defendant notwithstanding that they were not legitimate children.

Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors: *Matthew J. Jarvis* (for the plaintiff); *Hamkins, Grammer & Hamlin* (for first, second and third defendants); *Field, Roscoe & Co.* (for parties interested in default).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

SELIGMAN v. DOCKER.

C [CHANCERY DIVISION (Romer, J.), July 20, 21, 22, 26, 27, 28, October 22, 1948.]

Game—Reservation by landlord of exclusive right of sporting and preserving game—Abnormal increase in number of pheasants owing to weather conditions—Damage to tenant's crops—Liability of landlord.

The plaintiff was tenant of certain farms of which the defendant was landlord, and by the tenancy agreements the exclusive rights of sporting and preserving game was reserved to the landlord. It was also agreed that the landlord might retain possession of an area of grassland for game rearing purposes at an agreed rental and on payment of compensation for loss of crops and damage and tenant right at valuation in the usual way. In the autumn of 1947 there was an abnormal increase in the number of pheasants in the landlord's coverts, due entirely to exceptional weather conditions and not to an increase in the breeding stock left on the landlord's shoot at the beginning of the season. In the 1947-48 season, over double the number of pheasants were shot as compared with the number shot in the 1946-47 season. In an action brought by the tenant claiming damages for injury done to his crops by the excessive number of pheasants in and after the autumn of 1947, it was alleged that the landlord had permitted or encouraged the birds to collect in unreasonable numbers on his land:—

HELD: (i) since the tenant took his tenancy agreements subject to the reservation by the landlord of the sporting rights and with a full knowledge of the possibility of some damage occurring, he had no right, even though he was not entitled to kill the pheasants himself, to complain at common law because damage was occasioned to him by the pheasants in the landlord's coverts, unless there had been some unreasonable action by the landlord.

Dictum of SCRUTTON, L.J., in Peech v. Best ([1931] 1 K.B. 1, 14; 143 L.T. 266, 269), *applied*.

(ii) on the facts of the case, the presence in the landlord's coverts or on the tenant's farms of an unprecedentedly large number of pheasants in the autumn of 1947 was not due to any unreasonable conduct or action on the part of the landlord on which an action could be founded.

Farrer v. Nelson (1885) (15 Q.B.D. 258; 52 L.T. 766), *distinguished*.

(iii) since the birds were *ferae naturae*, the landlord was under no legal obligation to the tenant to reduce them (observations of ERLE, C.J., in *Hilton v. Green* (1862) (2 F. & F. 821, 826), and *Giles v. Walker* (1890) (24 Q.B.D. 656; 62 L.T. 933), *applied*), and the fact that the tenant had

no right to shoot them did not impose any duty in law on the landlord to shoot them himself.

(iv) the only material inquiry was whether the landlord acted reasonably in regard to the tenant, and the question whether he acted reasonably to the public, or to the War Agricultural Executive Committee, did not arise in proceedings brought by a private property owner in respect of his property, but, assuming that the landlord was under a duty to reduce the birds, the duty was to shoot intensively, but in a reasonable way and according to generally accepted methods, and there was no evidence that he had failed to do so.

[AS TO EXERCISE OF SPORTING RIGHTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 117, para. 129; and FOR CASES, see DIGEST, Vol. 25, pp. 358, 359, Nos. 93-98.]

Cases referred to :

- (1) *Hilton v. Green*, (1862), 2 F. & F. 821; 25 Digest 358, 93.
- (2) *Farrer v. Nelson*, (1885), 15 Q.B.D. 258; 54 L.J.Q.B. 385; 52 L.T. 766; 49 J.P. 725; 25 Digest 359, 98.
- (3) *Birkbeck v. Paget*, (1862), 31 Beav. 403; 25 Digest 359, 96.
- (4) *Giles v. Walker*, (1890), 24 Q.B.D. 656; 59 L.J.Q.B. 416; 62 L.T. 933; 54 J.P. 599; 2 Digest 117, 979.
- (5) *Stearn v. Prentice Brothers, Ltd.*, [1919] 1 K.B. 394; 88 L.J.K.B. 422; 120 L.T. 445; 36 Digest 195, 358.
- (6) *Boulston's Case*, (1597), 5 Co. Rep. 104b; 2 Digest 215, 107.
- (7) *Brady v. Warren*, [1900] 2 I.R. 632; 2 Digest 206, c.
- (8) *R. v. Moore*, (1832), 3 B. & Ad. 184; 1 L.J.M.C. 30; 36 Digest 240, 787.
- (9) *Bland v. Yates*, (1914), 58 Sol. Jo. 612; 36 Digest 174, 199.
- (10) *Peech v. Best*, [1931] 1 K.B. 1; 99 L.J.K.B. 537; 143 L.T. 266; Digest Supp.
- (11) *Sturges v. Bridgman*, (1879), 11 Ch.D. 852; 48 L.J.Ch. 785; 41 L.T. 219; 43 J.P. 716; 36 Digest 160, 30.

ACTION for damages and an injunction in respect of injury done to the plaintiff's property by pheasants which the defendant was alleged to have encouraged or permitted to collect in unreasonable numbers on the defendant's land. ROMER, J., held that the defendant had not been guilty of any act on which the plaintiff was entitled to found a claim, either for damages or an injunction, and dismissed the action. The facts appear in the judgment.

Pascoe Hayward, K.C., and *G. H. Newsom* for the plaintiff.

Sir Andrew Clark, K.C., and *J. F. Bowyer* for the defendant.

Cur. adv. vult.

Oct. 22. ROMER, J., read the following judgment. By this action, the plaintiff, a gentleman engaged in farming, sues for damages and an injunction in respect of injury done to his property in and after the autumn of 1947 by pheasants, which, he says, the defendant encouraged or permitted to collect in unreasonable numbers on his, the defendant's, land. The lands which the plaintiff farms are in or near the parish of Crawley, in the county of Southampton. He first came to this neighbourhood in 1933, when he bought a farm called New Barn Farm. He subsequently became tenant of other adjoining farms and in September, 1941, he became tenant from year to year from a Mr. Bassett, the defendant's predecessor in title, of Sandy Down Farm, which is the farm principally in question in these proceedings.

Two tenancy agreements were entered into, both dated Aug. 6, 1942. Under each of such agreements there was excepted and reserved to the landlord all mines, minerals, etc., with liberty for the landlord, his agents and servants and all other authorised persons to enter and be on the premises for the purposes therein specified :

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In a further passage, ERLE, C.J., said (*ibid.*):

"Then again, you can only in this action find against the defendants for damage done by rabbits turned on to the *farm*, not as to rabbits turned into Buckney Woods, which was no part of the plaintiff's holding. For if rabbits were put into the wood, and thence strayed into the farm, the defendants would not be liable for the injury they caused. But as regards rabbits turned on to the *farm* by the direction of the defendants, they would be liable, because the leave to *shoot* on the farm implied no right to put rabbits into the farm. That hundreds of rabbits *were* turned on to the farm there can be no doubt. The question is, whether they were so turned on with the sanction and authority of the defendants."

It is to be observed that the defendants' rights over the plaintiff's farm were apparently limited to shooting and did not extend to preserving.

In *Farrer v. Nelson* (2) the facts were as follows. In 1881 the plaintiff became tenant from one Strickland of a certain farm, but the shooting rights were reserved to the landlord. Strickland subsequently let to the defendants the shooting and sporting rights over his estate, of which the farm leased to the plaintiff formed part. During the spring, summer and autumn of 1884, the defendants, by their gamekeepers, reared in coops elsewhere than on the plaintiff's land but on another part of Strickland's estate about 1,500 pheasants and had carried in the coops about 450 of these pheasants into a coppice wood, which was situate on the plaintiff's farm but was reserved to the landlord in the plaintiff's lease. This coppice wood covered an area of approximately 80 acres, and about an acre of it had been cut down for the purpose of rearing pheasants, into which the 450 pheasants were brought; and the part of the coppice wood so cut down adjoined to within about 5 yards of the fence dividing the coppice wood from a field of the plaintiff, which was about 27 acres in area. The plaintiff sued for damage done by the pheasants to his crops in this field. It was admitted by the defendants that 300 to 400 pheasants had been placed as before mentioned and that some of these pheasants had from time to time come out of the wood and alighted on the plaintiff's farm and, by feeding on his crops, had done damage to the amount claimed in the action. The county court judge held that the plaintiff was entitled to recover the amount of the damage so occasioned and gave judgment for the plaintiff for the amount claimed by him. The defendants appealed to the Divisional Court, and it was argued on their behalf that they had the right of shooting over the land and it was necessary for the reasonable enjoyment of that right that they should be at liberty to stock the land with pheasants. POLLOCK, B., in delivering the leading judgment of the court, observed that the case was new and interesting, but he entertained no doubt that the decision of the county court judge was, in law, correct. He then proceeded as follows (15 Q.B.D. 260):

"I will first deal with the question whether an action can be brought by a neighbour against any person who collects animals upon his land so as to injure the crops of the neighbour, and I should say that beyond doubt such an action would lie, and that the rule upon which it would be founded would be not so much negligence as upon an infraction of the rule, *sic utere tuo ut alienum non laedas*. I agree, however, that this does not solve the question before us. It is not merely the case of a man collecting noxious animals upon his land so as to injure his neighbour, but the case of a man entitled to keep game upon the land, and the tenant complaining of injury to his crops from this game being unduly multiplied. As I understand the law each person in this country is entitled to bring on his land any quantity of game which can reasonably and properly be kept on it, and so that nothing extraordinary and non-natural is done. The case of *Birkbeck v. Paget* (3), which was cited by the counsel for the defendants to show that there is a difference between introducing fresh game and shifting game from one part of the land to another, is at any rate an authority that the lessee is not

warranted in introducing into the land game not bred in the ordinary way. So here, so long as the lessee of the right of shooting was exercising the ordinary rights which the landlord who had reserved the right might have exercised, he was acting within his rights, but the moment he brings on game to an unreasonable amount or causes it to increase to an unreasonable extent, he is doing that which is unlawful, and an action may be maintained by his neighbour for the damage which he has sustained."

A DAY, J., concurred. It appears to me that the essence of that case lies in the fact that the pheasants which caused damage for which the defendants were held liable were not birds which were on the defendants' land in the ordinary course of nature, but birds which had been artificially introduced on to the land by the action of the defendants themselves.

B In *Giles v. Walker* (4) the defendant, a farmer, occupied land which had originally been forest land, but which had, some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles, but immediately on its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding

C and in 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities on to the adjoining land of the plaintiff, where they took root and did damage. The plaintiff sued the defendant for such damage in the county court and, on the jury finding that the defendant was negligent in not cutting the thistles, judgment was entered for the plaintiff. On appeal to the Divisional

D Court, the plaintiff sought to uphold the judgment by arguing that, if the defendant's predecessor had left the land in its original condition as forest land, the thistles would never have grown; that, by bringing it into cultivation and so disturbing the natural condition of things, he caused the thistles to grow, thereby creating a nuisance on the land just as much as if he had intentionally grown them; and the defendant, by entering into occupation of the land with the nuisance

E on it, was under a duty to prevent damage from thereby accruing to his neighbour. This argument, however, was rejected by the court and the appeal was allowed. LORD COLERIDGE, C.J., said (24 Q.B.D. 657) :

"I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil."

F LORD ESHER, M.R., was of the same opinion.

In *Stearn v. Prentice Brothers, Ltd.* (5) the defendants, who were bone manure manufacturers, were sued for damages on the ground that their factory caused rats to collect, which damaged the crops on the plaintiff's adjoining land. The action was dismissed in the county court and the plaintiff appealed. The

G Divisional Court dismissed the appeal on the ground that there was no evidence of anything unusual or excessive done by the defendants, who carried on an ordinary business in an ordinary way. BRAY, J., in the course of his judgment (with which AVORY, J., agreed), referred to certain authorities. He said ([1919] 1 K.B. 396) :

H "The earliest is *Boulston's Case* (6). It was there held that 'if a man makes coney-boroughs in his own land, which increase in so great number that they destroy his neighbours' land next adjoining, his neighbours cannot have an action on the case against him who makes the said coney-boroughs; for so soon as the coneys come on his neighbours' land he may kill them, for they are *ferae naturae*, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coneys do in which he has no property, and which the other may lawfully kill.' That was an action on the case as here, and seems to be directly in point. I

am not aware that this decision has ever been overruled or questioned. It was approved and followed in *Brady v. Warren* (7). It was cited in *Farrer v. Nelson* (2), a case relied on by the plaintiff. There, the plaintiff was tenant to the defendant of a farm, the defendant reserving the right to kill game. The defendant had reared large quantities of pheasants and had turned them down in a wood adjoining the plaintiff's land, whence they had strayed on to the plaintiff's land and damaged his crops. This of course was clearly distinguishable from *Boulston's Case* (6), as the defendant had deprived the plaintiff of his right to kill or destroy the pheasants . . . That case does not, in my opinion, support the plaintiff's proposition. *R. v. Moore* (8) and the cases which followed it, all cases of nuisance, were cited to us. They lay down that if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance. These cases are clearly distinguishable in my opinion. The plaintiff could not kill the crowd or stop them. The crowd are not *ferae naturae*."

The learned judge then referred to and distinguished *Bland v. Yates* (9), which was a case where an unusual and excessive collection of manure was held to be an actionable nuisance.

The judgment to which I have just referred clearly points the distinction between cases in which the person injured by *ferae naturae* has the right to kill them himself and cases in which he has not. In the case before me, the plaintiff had not the right to shoot the pheasants which came on to his land, but it is scarcely true to say, in the language of BRAY, J., that the defendant had deprived him of the right. A man cannot be deprived of a right which he has never had. So far as the plaintiff's farms are concerned, the plaintiff never had the shooting rights over them, for they were reserved out of the grant to him of the farms. It cannot, therefore, strictly be said that he was "deprived" of those rights by the defendant or anyone else. It is, however, true to say that, inasmuch as he was not entitled, and therefore not lawfully able, to kill the pheasants himself, the principle of *Boulston's Case* (6) does not apply.

In *Peech v. Best* (10) SCRUTTON, L.J., made the following observations ([1931] 1 K.B. 14) on *Farrer v. Nelson* (2):

"In *Farrer v. Nelson* (2) a sporting tenant who brought an unreasonable number of pheasants on the land which injured the crops was held liable in damages. This apparently shows that both landlord and sporting tenant must use their land reasonably having regard to the interest of the other, and will be liable for damage caused to the other by extraordinary, non-natural, or unreasonable action."

On the above cases, counsel for the plaintiff submitted the following propositions. (i) If a man does something on his land which causes wild animals or birds to collect on it, his neighbour generally has no remedy if the animals or birds come out on to his land and do damage; but this is subject to the proviso that the user of the land is a natural user and it is conceded in the argument that the preserving of game for shooting purposes is such a user. (ii) The rule is based on the fact that the person whose land is injured may lawfully kill the wild animals or birds which are doing the injury. (iii) The principle has no application in cases like the present where, under an agreement or grant, the right to shoot game over particular land is vested in some person other than the occupier. In such a case the occupier is "disarmed" by the contract, *i.e.*, he is debarred from shooting the invading animals or birds himself. (iv) Consequently, in such a case the law imposes on the person who enjoys the shooting rights the duty not to bring on to the land in question or adjoining land of his own game to an unreasonable extent and not to cause the game to increase to an unreasonable extent. (v) The question of what is reasonable or unreasonable is a question of law, and the interests of the public and the general economy of the nation are amongst the considerations which

are relevant to its decision. (vi) There is some authority (e.g., *Hilton v. Green* (1)) for the view that a shooting tenant does not cause game to increase merely by omitting to shoot it. It was submitted that this view is wrong, but, even assuming its accuracy, it was contended that, if a man preserves game, he is under an obligation to shoot sufficiently intensively to keep the game down to reasonable numbers. It is, of course, quite clear that, when the plaintiff took his tenancy agreements of Sandy Down Farm in August, 1942, he knew that the coverts on his landlord's estate (some of them lying within his, the plaintiff's farms) were intended to be used for the preserving and shooting of pheasants; and it was, indeed, for the furtherance of that very purpose that the sporting rights were reserved from the grants to the plaintiff. Such a purpose was calculated to injure the plaintiff's crops in some degree, especially as the artificial feeding of pheasants was, when the agreements were entered into, prohibited. As against the possibility of such damage occurring, however, the plaintiff had the advantage of a somewhat reduced rent and the protection afforded by the Agricultural Holdings Act, 1923, s. 11. In the light of these circumstances, it is, in my opinion, clear that the plaintiff, although "disarmed," could have no right to complain at common law merely because some damage (slight but definite) was occasioned to him by the pheasants in the defendant's coverts.

At what point then, or in what circumstances, does such a right arise, assuming that it is capable of arising at all? I think the answer is to be found in the passage already quoted from the judgment of SCRUTTON, L.J., in *Peech v. Best* (10): the defendant would be liable to the plaintiff for damage caused by "extraordinary, non-natural or unreasonable action." SCRUTTON, L.J., in this passage, was expressing his views of the effect of *Farrer v. Nelson* (2), but he indicated no disapproval of such effect and was, as I think, expressing also his own view of the law. If I may respectfully say so, such view seems quite consistent with the other cases to which I have referred, and I propose to apply it to the circumstances of the present case. It is not suggested that any action by the defendant was "extraordinary" or "non-natural," and the question, therefore, narrows down to this: Was the damage of which the plaintiff complains caused by any unreasonable action by the defendant? I am quite unable, on the evidence, to hold that the presence of what was admittedly a large number of pheasants in the defendant's coverts, or on and around Sandy Down Farm, last autumn was due to any unreasonable action on the part of the defendant. He said in evidence that he had not, at any time since 1944, bought or put down any eggs or young birds or any artificial stock on his shoot, and in this he was confirmed by his head-keeper, Nicholson. I accept this evidence as true. The only thing of this kind at all that happened was when, as occurred occasionally during haymaking, hen birds were killed on their nests and the chicks, which would have otherwise perished, were saved by the defendant's keepers and put under hens. Nicholson said that, in the spring of 1947, some 35 to 40 birds were saved in this way. Apart from this (of which clearly no complaint could be made by the plaintiff), the whole of the pheasants on the defendant's shoot were wild, a fact which, in my judgment, very materially distinguishes this case from *Farrer v. Nelson* (2).

What, then, was responsible for the presence in the autumn of 1947 of wild pheasants so much in excess of those which had been found in any previous year? I am satisfied that it was not due to an unreasonably large stock having been left after the close of the shooting season 1946-47. As to this, the defendant estimated that the breeding stock after that season was much the same as what had been left at the end of the previous shooting season. Nicholson corroborated this and expressed the view that the stock was about 600 birds in the spring of 1946 and a similar number in the spring of 1947. There was no evidence that the proportion of cocks to hens in the breeding stock was higher in 1946 than it was in 1947. No complaint was made that there were too many pheasants on the defendant's shoot in the autumn of 1946, and I find, accordingly, that the

increase which occurred in the following autumn was not due to an increase in the breeding stock left at the beginning of the season and far less was it due to an unreasonable increase in such stock.

The question then arises why the breeding stock in the spring of 1947 resulted in so many more birds reaching maturity than was the case with the approximately equivalent stock the previous year. The evidence which was given on this point leads to one conclusion and one conclusion only, and that is that it was due to the exceptional weather conditions which prevailed in Hampshire, as elsewhere, in the summer of 1947 and particularly during the very important months of May and June. On this question, all the witnesses who gave evidence about it were practically unanimous, including the plaintiff himself, who gave his evidence in every way very fairly indeed. Mr. Bray, the secretary of the Hampshire War Agricultural Executive Committee, who gave evidence before me, said that 1947 was a quite exceptional year all over Hampshire for the number of pheasants and that he had never seen anything like it in his experience and that many people much older than he would have said the same thing. He also said that May and June are the important months for pheasant breeding, and that those months in 1947 were wonderful. Mr. Bray then gave the following evidence :

“(Q.)—Now, anyone who left a stock of birds which would have been a reasonable stock to leave in a normal year would suddenly find in 1947 that they had double the number of birds in their coverts, or very nearly that, which they expected to have ? (A.)—I think that was the experience of a number of estates.

(Q.)—That is, no doubt, what happened in the case of [the defendant] ?

(A.)—That is how it appears to me.”

Then, with regard to the large number of birds on the defendant's estate, he said that he did not suggest that that was due to anything unusual that the defendant did, that the trouble was the concentration of the birds in three or four areas and that the birds could not have been prevented from nesting and hatching in those areas. He then added that he thought that, if the defendant or his keepers had wished to disperse them over a wider area, they could have done so, but that is a point with which I am not for the moment concerned.

The defendant described 1947 as a “double” year, by which he meant that the number of pheasants seemed to him to be about double the normal number found in previous years. Nicholson agreed with him and said that the only other year that he knew in which pheasants did any better was 1921. Mr. Walter Arnold, whose firm has acted as agents for the Heath House Estate since 1941, and who has for many years been actively engaged in the management of large agricultural and sporting estates in Hampshire, said that, from a general climatic and farming point of view, 1947 was a very exceptional year, and he had never, in his experience in Hampshire, seen anything like it for the number of pheasants. He referred to the absence of thunderstorms in the important months of the year when the pheasants were breeding. Mr. Ingram, a chartered surveyor called by the plaintiff, who has considerable personal experience of shooting, agreed that 1947 was a much better year than ordinarily, but not that it was a “double” year. He estimated the increase of pheasants resulting from the climatic conditions of 1947 as not more than 10 to 20 per cent. On this, as on every other question upon which he gave evidence, Mr. Bray impressed me very favourably as a man whose honesty, and desire to assist the court, were beyond doubt. His work gave him ample opportunity for observing the conditions which prevailed in Hampshire, and I accept his views as to the increase in wild pheasants which occurred throughout his area owing to the exceptional weather conditions of 1947 and especially during the breeding months.

As, therefore, I hold, first, that there was not an excessive breeding stock left on the defendant's shoot in the spring of 1947, and, secondly, that the

phenomenal number of mature birds which resulted from this stock was due to the wholly exceptional climatic conditions of that year, it would be impossible, in my judgment, if no other point were taken, to find any unreasonable action by the defendant, so far as the number of birds is concerned, on which an action could be founded. It was, however, argued on behalf of the plaintiff that a substantial contributory cause of the increase in mature birds in 1947 lay in the fact that the defendant employed keepers. The argument, as I understand it, was that, assuming that the defendant could not be held liable if he had employed no keepers at all, nevertheless the employment of any whole-time keepers (even one) is sufficient in itself to fix him with liability, for the reason that, but for the keeper or keepers, some of the birds would have fallen victims to stoats and other vermin and the ultimate numbers which damaged the crops in the autumn would thereby have been reduced. I find this a difficult argument

A it, was that, assuming that the defendant could not be held liable if he had employed no keepers at all, nevertheless the employment of any whole-time keepers (even one) is sufficient in itself to fix him with liability, for the reason that, but for the keeper or keepers, some of the birds would have fallen victims to stoats and other vermin and the ultimate numbers which damaged the crops in the autumn would thereby have been reduced. I find this a difficult argument
B to accept. It is impossible to suppose that there is anything unreasonable in the owner of a shooting estate keeping one or more gamekeepers for the purpose of preserving the game, and I should imagine that the plaintiff is the last person who would be likely to express any such view. He did not in fact do so, but thought that the defendant employed too many. Apparently in 1945 there were two keepers and the number increased as the shoot increased
C and as men returned from the services, until in the summer of 1947 there were five keepers, in addition to the head-keeper, one of whom left in September. I have no reason to suppose that these numbers were in any way unreasonable or excessive for a shoot of this size, and it certainly was in no way proved to my satisfaction that this was so. I am, accordingly, unable to accept the argument which was addressed to me on behalf of the plaintiff on this aspect of the matter.

D I would add at this point that Mr. Bray, in his evidence, was emphatic that the trouble was due not so much to the number of the pheasants in the defendant's shoot, but to the fact that they concentrated in three or four particular places. Mr. Ingram also drew attention to these concentrations. It is reasonably plain, in my opinion, that the congregation of the birds in a few favoured localities was due to topographical conditions; and I accept the view which
E Nicholson advanced in his evidence that birds always seem to flock to a sunny part of the beat. He said (and I believe him) that he never did anything to induce them to concentrate in any particular way. It, accordingly, follows that the effective cause of the damage, as the matter presented itself to Mr. Bray, was not one for which the defendant's keepers were responsible. The result of what I have so far said is that, in my judgment, the presence in the
F defendant's coverts or the plaintiff's farms in the autumn of 1947 of an unprecedentedly large number of pheasants, and their concentration in particular areas, was not due to any unreasonable conduct or action on the part of the defendant.

The next subject for inquiry is whether the defendant owed a duty to the plaintiff to reduce or disperse the pheasants when it became known that their
G numbers were so considerable and, if so, whether or not he failed in that duty so as to give the plaintiff a legal right of complaint. I approach this inquiry on the hypothesis, as already indicated, that the presence of these pheasants in such large numbers on the defendant's land had not been brought about by any unreasonable conduct or action on his part. In these circumstances, was he under a legal obligation to the plaintiff to reduce them and, if so, how
H quickly and to what extent? In the absence of authority, I am not prepared to hold that he was under any such obligation. The birds were *ferae naturae* and I am unable to see that the fact that the plaintiff had no right to shoot them imposed any duty in law upon the defendant to shoot them himself. It may be that the number of pheasants would have been less in some degree had the defendant employed no keepers and that, by employing them (though lawfully and reasonably), the defendant had to some extent interfered with the ordinary course and processes of nature. The employment of a reasonable number of

keepers was not, however, in my judgment, equivalent to the bringing by the defendant of birds on to his land or unreasonably causing them to increase so as to attract the liability and obligations which such action would, on the authorities, have entailed. In my view, the observations of ERLE, C.J., in *Hilton v. Green* (1) and the decision in the "thistle" case (*Giles v. Walker* (4)) alike show that the defendant was under no legal liability to destroy the pheasants which were present on his land.

Having regard to this conclusion, it becomes unnecessary for me to deal with the contention of the plaintiff that the defendant did not shoot, in the 1947-48 season, as intensively as he ought to have done, for the contention postulates a duty on the defendant from which I have held that he was free. I will, however, shortly express my views on it. It was argued that any reasonable man would, in the circumstances which prevailed, have conducted frequent and intensive shoots until the number of the birds was reduced to reasonable, but unspecified, proportions. I am quite unable to accept the submission that the public interest is in some way relevant to the question in this action whether the defendant did or did not conform to the standard of the hypothetical reasonable man. In my judgment, the only material inquiry is whether the defendant acted reasonably in relation to the plaintiff; and the question whether he acted reasonably in relation to the public, or to the War Agricultural Executive Committee as representing the public, does not arise in proceedings which have been brought by a private property owner in respect to his property. That the War Agricultural Executive Committee for Hampshire did, in fact, intervene in the matter is admitted, and much reliance was placed by the plaintiff on their intervention. On Nov. 16, 1947, the committee, in pursuance of powers conferred on them by an order made under the Defence (General) Regulations, 1939, served a notice on the defendant requiring him to reduce the pheasants on his land by Nov. 17 to the satisfaction of the committee. On Dec. 9 they wrote to him saying that they were not satisfied that the above direction had been complied with, insisting on further destruction of the pheasants without delay, requiring him to continue progressively with the destruction of the pheasants forthwith and giving him until Dec. 27 to comply with the direction. A further direction was issued on Jan. 20, 1948, requiring him to reduce the pheasants to the satisfaction of the committee by Jan. 31, and, on Feb. 4, this date was extended to Feb. 14.

This activity on the part of the War Agricultural Executive Committee was, no doubt, due in some measure to the promptings of the plaintiff, but it is clear that the committee were anxious about the position and felt that the defendant was not dealing with it as energetically as he might have done. This, indeed, was the view expressed by Mr. Bray in his evidence. He said:

"We felt that he was not shooting them fast enough . . . I think he did the best he could, but we thought he ought to have been a bit quicker and we still feel that . . . I have found him entirely reasonable, excepting that I do think he could, in the interests of the food crops, have shot the birds rather more vigorously."

When asked whether he gave the defendant any idea as to what the maximum number was to which the birds should be reduced, Mr. Bray very fairly said that he did not and that it was a very difficult thing to do. He said further in evidence that, in his view, it should have been quite possible to shoot 2,000 pheasants during November and December. This answer was of some interest, inasmuch as, of the 2,441 pheasants which were shot during the 1947-48 season, 2,197 had been killed by the end of December and the number shot in November and December was 1,851. For the plaintiff, it was argued that the defendant could and should have shot more, and Mr. Ingram said in evidence that it would have been possible to organise three shoots a week, and he described how he thought it could have been done. The defendant's evidence was that

it could not have been done. Nicholson's evidence also was that it could not be done, and he gave his reasons for thinking so. It is not necessary for me to decide which view is right, though I would be slow to reject the evidence of Nicholson on such a point, for he struck me as being a truthful witness and has an unrivalled experience of the defendant's coverts.

A I will assume that, by some means or other—*e.g.*, by shooting the birds on the ground—the defendant could have done more to satisfy the requirements of the War Agricultural Executive Committee. If the defendant was under an absolute duty to the plaintiff to reduce, say, by half, the number of pheasants which were on his land in the autumn of 1947, and to reduce them by all means at his disposal and at once, then it could not be said that the duty was performed. I have already said that, in my view, he was under no legal obligation to the plaintiff to reduce them at all. If, however, I am wrong in this and he was B under a duty to shoot, I can only contemplate that the duty was to shoot intensively, but in a reasonable way, and according to generally accepted methods. I have not been satisfied by the evidence that he failed in the performance of an obligation so defined. Over double the number of pheasants C were shot during the season as compared with birds shot during the season of 1946-47. The defendant in evidence told me that he did not believe they could reasonably have shot many more and any attempt to do so would merely have dispersed the birds without securing any benefit to the plaintiff. In this he was confirmed by Nicholson. Apart from dispersing the birds, there were the difficulties of finding guns and beaters, and also the fall of the leaf was late D that year. I do not propose to go into these matters in detail, as, on my view of the legal position, they do not really arise. I need only repeat that it has not been proved to my satisfaction that the defendant failed to discharge the hypothetical duty which I am now considering.

It follows from what I have said that, in my judgment, the defendant has not been guilty of any act on which the plaintiff is entitled to found a claim, either for damages or for an injunction. Some reliance was placed on the kind of case of which *Sturges v. Bridgman* (11) is an example, but, as, in my opinion, E no actionable nuisance has been established, the principle of those decisions has no application. I am not without sympathy for the plaintiff, who unquestionably suffered damage last season and underwent serious trouble and inconvenience as well. There was considerable divergence of opinion amongst the witnesses who were called before me as to the *quantum* of damage that the plaintiff sustained. Some of it may well be recoverable under the application F which the plaintiff has made—and which was suspended by reason of these proceedings—under the Agricultural Holdings Act, 1923. Section 11 of that Act is specifically directed to circumstances such as those of the present case, and presumably reflects the legislature's views as to what compensation is properly payable to persons in the position of the plaintiff. Be that as it may, G I must apply to this case what I conceive to be the law and, so applying it, I have no alternative but to dismiss this action, with the usual consequences.

Action dismissed with costs.

Solicitors: *Cunliffe & Airy*, agents for *White, Nash & Brooks*, Winchester (for the plaintiff); *Preston, Lane-Claypon & O'Kelly*, agents for *Evershed & Tomkinson*, Birmingham (for the defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

**SHELLEY v. LONDON COUNTY COUNCIL.
HARCOURT AND OTHERS v. LONDON COUNTY COUNCIL.**

[HOUSE OF LORDS (Lord Porter, Lord Wright, Lord Uthwatt, Lord du Parc, Lord Morton of Henryton), June 22, 23, 24, November 9, 1948.]

Housing—Accommodation of working classes—Recovery of possession—Right of local authority—Exclusion of Rent Restrictions Acts—Small Tenements Recovery Act, 1838 (c. 74), s. 1—Housing Act, 1936 (c. 51), ss. 83 (1), 156 (1) (a). A

S. and H. were tenants of dwellings erected by a local authority for the housing of the working class under the provisions of the Housing of the Working Classes Act, 1890. The local authority gave notice to quit to S. and H., both of whom were members of the working class, with a view to the housing of other persons of that class. In proceedings by the local authority to recover possession under the Small Tenements Recovery Act, 1838 :— B

HELD : (i) (LORD DU PARC *dissentiente*) : the power to terminate a tenancy by notice was within " the general management, regulation, and control of houses " expressly vested in the local authority by the Housing Act, 1936, s. 83, and it was, therefore, a power under an " enactment relating to the housing of the working classes " within the meaning of s. 156 (1) (a) of the Act, so as to exclude the operation of the Rent Restrictions Acts where the authority was seeking to recover possession at the termination of a tenancy. C

(ii) section 1 of the Act of 1838 did not bestow on the magistrate a discretion as to the granting of a warrant, based on the personal position of and hardship to the individual tenant, and " reasonable cause " in that section meant some cause which gives a right in law for the tenant to remain, nor was there any power in the magistrate to postpone the execution of the warrant at his pleasure, for the Act in terms stipulates that the warrant shall command the constables to enter not more than 30 days after the issue of the warrant. D

Decisions of the Court of Appeal ([1947] 2 All E.R. 720; 177 L.T. 662), *affirmed*. E

[AS TO RECOVERY OF POSSESSION OF CONTROLLED HOUSES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 581, 582, para. 1233; and FOR CASES, see DIGEST, Vol. 38, p. 216, No. 505, and Supplement, Vol. 38, Public Health, No. 509 (e).]

APPEALS by the tenants, Shelley and Harcourt and others, from orders of the Court of Appeal ([1947] 2 All E.R. 720), affirming decisions of the Divisional Court of the King's Bench Division (*ibid.*, 320). F

In *Shelley v. London County Council* a complaint was preferred before the Tower Bridge magistrate by the landlords, the London County Council, under the Small Tenements Recovery Act, 1838, s. 1, against the tenant, Shelley, for neglecting to deliver up possession of a tenement, notwithstanding the determination of her tenancy by notice to quit and service on her by the council of a notice in writing under s. 1 of their intention to apply for the issue of a warrant to recover possession. The magistrate issued a warrant for possession of the premises, but directed that it should remain in force for 3 months (as provided by s. 5 (4) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920), and should not be executed until the last day of the period, and the magistrate further informed Shelley that she could apply before the expiration of that time for an extension of the period. The council appealed against the direction and the granting of the liberty to apply, and the appeal was allowed by the Divisional Court. G

In *Harcourt v. London County Council* a similar complaint under s. 1 of the Act of 1838 was preferred by the landlords before the Clerkenwell magistrate. In this case the magistrate issued a warrant for delivery of possession within 30 days, the limit prescribed by s. 1. The tenant appealed to the Divisional H

Court, and the appeal was dismissed. Appeals by the tenants to the Court of Appeal were dismissed.

The House of Lords (LORD DU PARCQ dissenting) now dismissed appeals by the tenants. The facts appear in the opinion of LORD PORTER.

Ackner for the appellants.

H. V. Lloyd-Jones and *R. J. Harvey* for the respondents.

A

The House took time for consideration.

Nov. 9. **LORD PORTER** : My Lords, it is not, in my opinion, necessary to set out in detail the exact circumstances in which these appeals are brought. It is enough to state that Mrs. Shelley, the appellant in the first case, occupied a flat, 8, Barnaby Buildings, of which the respondents are landlords. This flat is rated at £11 a year and she pays a rent of 14s. 5d. a week, or £37 9s. 8d., *i.e.*, more than £20, a year. Notice to quit was served on her expiring on Dec. 9, 1946. She failed to go out, and, accordingly, the London County Council took proceedings to obtain possession under the Small Tenements Recovery Act, 1838, after taking the necessary preliminary steps. Mrs. Harcourt is the occupier of other premises belonging to the respondents, also of a value exceeding £20 per annum, and, like Mrs. Shelley, was given due notice to quit, and, as she refused to do so, had similar proceedings taken against her by the respondents. Both tenants are members of the working classes, and the tenements occupied by them were erected by the respondents under the provisions of the Housing of the Working Classes Act, 1890, for the housing of the working class. Mrs. Harcourt had been guilty of a breach of a condition of her tenancy and refused to abate it, but, save for her contumacy, it was not of serious consequence and no stress was laid on it in argument before your Lordships. In the other case, there was no complaint of any breach of the terms of occupation, and, therefore, in both cases the main question for the decision of your Lordships' House is whether the Rent and Mortgage Restrictions Acts, 1920-39, apply to an action by a local authority to recover possession of a dwelling-house from a tenant who has been provided with accommodation by the local authority under its statutory powers for the housing of the working class in a case where the action of the local authority has been taken with a view to the housing of another member of that class. Two subsidiary questions were also raised, the first being whether the provisions of the Small Tenements Recovery Act, 1838, give a right of recovery of possession in such a case, and the second whether, if they do, the justices in an action under s. 1 have a discretion to refuse or to postpone the issue of a warrant for possession. In Mrs. Shelley's case the learned magistrate sitting at Tower Bridge, to whom application had been made, issued a warrant for possession, and directed that it should remain in force, but should not be executed for three months and that the appellant should have liberty to apply before the expiration of that time for a further period of extension. In Mrs. Harcourt's case a similar application was made to the learned magistrate sitting at Clerkenwell who held that he had no discretion either to refuse or to postpone possession, and, accordingly, issued a warrant for possession in 30 days from the date of issue. Each of the learned magistrates stated a Case for the opinion of the High Court and the two matters were considered together both by the Divisional Court and by the Court of Appeal. Both courts agreed with the latter decision, but in the first case remitted the matter to the learned magistrate with an intimation that the warrant could be suspended for not more than 30 days and in the second case affirmed the order of the learned magistrate. From these orders the appellants appeal to your Lordships' House.

My Lords, each of the appellants is, undoubtedly, protected by the provisions of the Rent and Mortgage Restrictions Acts unless that protection is taken away by the terms of the Housing Act, 1936. Section 156 (1) of that Act so far as is material is in the following terms :—

"Nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, as amended by any subsequent enactment shall be deemed . . . to prevent possession being obtained (a) of any house possession of which is required for the purpose of enabling a local authority to exercise their powers under any enactment relating to the housing of the working classes."

Section 83 (1) of the same Act provides :—

"The general management, regulation, and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority, and the authority may make such reasonable charges for the tenancy or occupation of the houses as they may determine."

And the Act itself stipulates that certain classes of houses (among which these are included) provided under earlier statutes shall be treated as if they were provided under the statute of 1936. If, then, the general management, regulation and control of houses includes the right to oust the tenant, the local authority, in giving notice to quit, were exercising their powers under an enactment relating to the housing of the working classes, and the protection afforded to tenants of private owners does not apply. For the appellants it was argued that management, regulation and control could be fully exercised even though the tenants had a right to retain their holdings by reason of the provisions of the Rent Acts, and urged that, as the respondents were prepared to accept the position that they were subject to the obligation not to exceed the statutory rent, so they were similarly obliged to retain their tenants as statutory tenants.

My Lords, I do not know whether the concession in question is necessarily made or not, but, whether the Rent Acts apply to the extent of fixing a statutory rent or not, "management" must, in my view, include a right to terminate the tenancy so far as the general law allows, *i.e.*, after due notice. It is, to my mind, one of the important duties of management that the local body should be able to pick and choose their tenants at their will. It is true that an ordinary private landlord cannot do so, but local authorities who have wider duties laid on them may well be expected to exercise their powers with discretion, and, in any case, the wording of the Act seems to me to necessitate such a construction.

As to the other two points :—

(1) Under the Act of 1838, the jurisdiction of the magistrate was limited to premises of an annual value of less than £20, but this limitation of jurisdiction has been expressly widened by s. 156 (2) of the Housing Act, 1936, which ordains that :

"Where a local authority, for the purpose of exercising their powers under any enactment relating to the housing of the working classes, require possession of any building or any part of a building of which they are the owners, then, whatever may be the value or rent of the building or part of a building, they may obtain possession thereof under the Small Tenements Recovery Act, 1838, as in the cases therein provided for, at any time after the tenancy of the occupier has expired, or has been determined."

It follows that the jurisdiction given by the Act is not now limited to houses not exceeding £20 in annual value.

(2) As to the jurisdiction of the justices to refuse a warrant for possession or postpone its execution the matter stands thus. The Small Tenements Recovery Act, 1838, s. 1, provided that after due notice, if the tenant or occupier should not appear at the time and place appointed and show to the satisfaction of the justices reasonable cause why possession should not be given, it should be lawful for the justices to issue a warrant to the appropriate constables commanding them within a period to be therein named not less than 21 nor more than 30 clear days from the date of the warrant to enter into the premises and give possession of the same to the landlord. On this wording it was argued on behalf of the tenants that there was no ground for terminating the tenancy except the

desire of the local authority to substitute another tenant of their own choosing, that the hardship caused to the tenants by their eviction constituted reasonable cause for refusing to issue the warrant, and in any case it was lawful for, but not compulsory on, the justices to order the warrant to be executed within 30 days. My Lords, I agree with LORD GODDARD, C.J., in thinking that, on its true construction, the Act does not leave it to the discretion of the magistrate to oust or not to oust according as he or she may consider the personal position of and hardship caused to an individual tenant. Such a construction, to my mind, leaves the landlord's right much too vague. "Reasonable cause" means, I think, some cause which gives a right in law for the tenant to remain. As to the use of the words "it shall be lawful," I cannot accept the view that that expression means that it is left to the magistrate to issue or not to issue the warrant at his discretion or to postpone its execution. Again I agree with the LORD CHIEF JUSTICE that the phrase "it shall be lawful" was inserted because up to the passing of the Act magistrates had no such power, and s. 1 thereupon gave them power and made it lawful for them to act. Furthermore, I see no reason for coming to the conclusion that the justices could postpone the execution of the warrant at their pleasure. The Act in terms stipulates that the warrant shall command the constables to enter not more than 30 days after the issue of the warrant. This wording, in my opinion, limits in plain terms, the length of time afforded to the tenant before the warrant is to be executed and allows no further extension. For these reasons I find myself in agreement with the judgment of the Court of Appeal and would dismiss both appeals to your Lordships' House.

LORD WRIGHT: My Lords, notwithstanding the able argument of counsel for the appellants, which loses no merit by not being successful, I think that the appeal should be dismissed for the reasons contained in the opinions of my noble and learned friends, LORD PORTER, LORD UTHWATT and LORD MORTON, which I have read in print.

LORD UTHWATT (read by LORD PORTER): My Lords, counsel for the appellants, in his able argument, very properly brought under review the course of legislation under the Rent Restrictions Acts and the Housing Acts relating to the position of local authorities as respects houses to which in general the Rent Restrictions Acts apply. I do not propose to refer to that legislation, for a close consideration of it has not revealed to me anything which is germane to the proper construction of head (a) of s. 156 (1) of the Housing Act, 1936. I would only mention that the complete exemption from the Rent and Mortgage Interest Restrictions Act, 1939, (see s. 3 (2) (c) of that Act) of dwelling-houses to which s. 128 of the Housing Act, 1936, applies, is irrelevant in construing s. 156 (1) of the Housing Act, 1936. Nor, in my opinion, is any help in construing head (a) of s. 156 (1) derived from the other heads included in that sub-section, for those heads deal with subject-matters entirely different from the subject-matter which is comprehended within the head (a).

The point at issue, therefore, lies within a narrow compass. The respondents contend that, in requiring possession of the houses for the purpose of putting themselves in a position to let the houses to some members of the working classes to be elected by them, they required possession "for the purpose of enabling them to exercise their powers under an enactment relating to the housing of the working classes." The enactment relied on is the Housing Act, 1936, and s. 83 (1) of that Act is rested on as containing the power. Section 83 (1) provides:

"The general management, regulation, and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority. . ."

The houses in question were, in fact, provided under the Housing of the Working Classes Act, 1890, but the effect of the Housing Act, 1936, s. 189 (2), is that the houses so provided fall within the application of the phrase "houses provided

by a local authority under this Part of this Act." The appellants contended that, in seeking to secure possession, the respondents were not exercising a power, but were merely taking a step referable to their ownership of the properties, and that s. 83 (1) did not confer a power in the sense in which that word was used in s. 156 ; and that an adequate content could be given to head (a) of s. 156 (1) by reason of its applicability to the case where it was sought to obtain possession of a house which had been compulsorily acquired under the Housing Acts. The last point may, I think, be summarily disposed of. I am content to assume—I do not express an opinion one way or another—that the appellants are right in their submission that, even if the tenancy interest as well as the reversion had been compulsorily acquired under the Housing Act, the Rent Restrictions Acts would, apart from s. 156, preclude the acquiring local authority from recovering possession from the tenant, but the fact that the provision is necessary to meet one set of circumstances is no bar to a construction which admits its application to other cases.

My Lords, the local authority, having acquired the houses for the purposes of housing the working classes, are bound to see that the houses are used for that and for no other purpose. That, I think, remains their statutory duty unless and until the houses are sold under an exercise of statutory powers. The selection of tenants qualified to occupy the houses is unquestionably an act of management and the exercise of a power, but, in light of the limitation as to the area of selection, the exercise of the power cannot be referable merely to the ownership of the local authority. It is also referable to their duty. It may not, indeed, have been necessary by express words to vest management in the local authority, but the Act has in terms stated that the management shall be vested in and exercised by the local authority. Clearer words could not be used to state and give a power, and, in my opinion, a power, related to the duty to select, was thereby given.

Two other points were preferred by the appellants. First, it was said that s. 83 does not appear in the fasciculus of sections in Part V headed "General Powers and Duties of Local Authorities." That is true, but, in my opinion, of no weight. A heading to one group of sections cannot alter the meaning of a section outside the group. Further, the reference in s. 186 (1) is not to powers under the Housing Act, 1936, but to powers under any enactment relating to the housing of the working classes. It cannot be said that this was a reference to a particular group of sections labelled "Powers" contained in the Housing Act, 1936. Secondly, it is said that the result of acceding to the respondents' contention is that the rents chargeable as respects houses not excepted under the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (2) (c), are controlled by the Rent and Mortgage Restrictions Acts while the right to possession is not, and that an anomalous position is created. That is not, I think, in any event an argument of great weight, but it may be pointed out that the legislature, while making provision in the Housing Act, 1936, s. 85 (5), as to the rents chargeable as respects (*inter alia*) the excepted houses by reference to local conditions, has made no provision as to the rents chargeable as respects houses not excepted. It may be that the view taken was that as regards the houses not excepted the Rent Restrictions Acts did what was necessary. I am, therefore, of the opinion that both houses were houses possession of which was required for the purpose of enabling the respondents to exercise a power under an enactment relating to the housing of the working classes.

The remaining question arises from the fact that pursuant to the Housing Act, 1936, s. 156 (2), the respondents sought an order for the recovery of possession under the Small Tenements Recovery Act, 1838. It was argued by the appellants that the Act of 1838, on its true construction, gave to the court, though satisfied that the applicant before them had duly proved his case, a discretion to refuse to issue a warrant for possession. The appellants' argument was based on the language of s. 1 which so far as relevant provides as follows :

"and if the tenant or occupier shall not thereupon appear... and

show to the satisfaction of the justices hereinafter mentioned, reasonable cause why possession should not be given under the provisions of this Act . . . it shall be lawful for the justices . . . to issue a warrant [for possession.]”

A In construing this provision due weight must be given to the phrase “under the provisions of this Act.” In my opinion, the only discretion given by this provision when properly construed is a discretion to decline to exercise jurisdiction under the Act when, for good reason, it is satisfied that the case ought not to be heard under the Act at all. In that event, the complainant must resort to the jurisdiction which in 1838 existed, and still exists, in other courts. The clear purpose of this Act in conferring jurisdiction on the justices sitting in petty sessions was to set up a summary procedure available when possession of properties of small value was sought, but complicated questions can as readily arise B in the case of properties of little value as in the case of properties of large value, and justices might well take the view that they were ill-equipped for decision of such questions. That, I think, gives an intelligible reason for the provision. I would only add that an Act creating a new jurisdiction to hear a certain type of case should not lightly be construed as authorising the withholding of a remedy in a case properly brought before it, when in other courts, to which resort might C equally well be had, the remedy would follow as of course. I would dismiss the appeals.

LORD DU PARCQ : My Lords, I regret that I am unable to concur in the decision at which the majority of the Appellate Committee have arrived. In my opinion, these appeals should be allowed.

D The question on which I find myself in disagreement with my noble and learned friends is purely one of construction, and it is desirable to approach it, I think, without any preconceived view as to the policy of the legislature. LORD GREENE, M.R., in his judgment, truly observed that considerations “of that kind”—that is to say, what may be called, I think, political considerations—“do not afford an answer by themselves to the question which we have to determine.” He was, if I may say so respectfully, on less firm ground when E he added that “they merely affect the approach to the problem.” I would agree, of course, that a court is often entitled to reject a possible construction of ambiguous words if it would result in absurdity or manifest injustice, and the learned MASTER OF THE ROLLS was fully entitled to say that the construction which he approved was not unreasonable. This fact by itself does not help us, however, unless the competing construction can be said to be unreasonable. F Now, I am very willing to concede that Parliament may have intended to give great and almost unique powers as landlords to local authorities performing their statutory duties under the Housing Acts, on the ground (I quote the words of the MASTER OF THE ROLLS) that “they may be trusted . . . to exercise their powers in a public-spirited and fair way in the general public interest.” It is, however, I think, no less possible that Parliament may have thought that all G tenants, even those who, being members of what is called the “working class,” are given the privilege of occupying their houses as tenants of a local authority, should have the same security of tenure. The London County Council claims to be entitled to give notice to tenants who enjoy the benefits of a Housing Act without assigning any reason for doing so, and to eject them as of right if they refuse to give up possession of their dwellings. That Parliament should have H intended to arm local authorities with this power is not impossible, but neither is it so manifestly probable that a court, if doubt as to the true construction exists, should favour an interpretation which assumes such an intention. If the question is approached, as I think it ought to be, without any preconception as to the probable intention of the legislature, the weight of the argument seems to me to be in favour of the construction for which the appellants contend.

It is not in doubt that the Acts to which it is convenient, if inaccurate, to refer as the Rent Acts are of general application in the sense that they apply to all

houses within the limit specified in them except in so far as the Rent Acts themselves, or other legislation, create exceptions. One relevant exception is contained in s. 3 (2) of the Act of 1939, the effect of which is that the principal Acts apply to some of the houses provided under the Housing Act, 1936, but not to all of them. The houses with which your Lordships are here concerned are not within this exception, and the respondents do not claim to be entitled to increase the rents payable by the tenants beyond the standard rent. I pause to point out that it is common ground that, although (under the Housing Act, 1936, s. 83 (1)), local authorities are empowered to "make such reasonable charges for the tenancy or occupation of the houses as they may determine," they must exercise this power with due regard to the Rent Acts when the houses in question are not excepted from the provisions of those Acts. The crucial question can be shortly stated. "The general management, regulation and control of houses provided under the Housing Acts is vested in" and to be "exercised by" the authority. It is later provided that the Rent Acts are not to apply, so far as the recovery of possession is concerned, where possession "is required for the purpose of enabling a local authority to exercise their powers under any enactment relating to the housing of the working classes." Does it follow that the Rent Acts have no application when the local authority seeks to determine the tenancy of a house provided under the Housing Acts? It is said that the answer to this question must be "Yes" because the local authority cannot be said to be exercising the "power" of "general management, regulation and control" of a house if it is fettered by the Rent Acts so far as concerns recovery of possession. The last qualifying words of the sentence are necessary, because, as appears from what I have said already, Parliament has accepted the view that "general management, regulation, and control," may be exercised by a landlord even though he cannot himself fix the rent which he considers a fair or economic one. My Lords, I think it reasonable to say that, notwithstanding the Rent Acts, the ordinary unprivileged landlord does still exercise the "general management, regulation and control" of the house which he lets. Both Acts of Parliament and the common law restrict in more ways than one a landlord's right to recover possession, but it cannot be said, in my opinion, that no landlord exercises these general "powers," as in deference to the argument I will call them, unless he is liberated from all legal, or, at least, all statutory, control. The learned MASTER OF THE ROLLS said ([1947] 2 All E.R. 724) that the argument which appeals to me would result in this: "that the management of these properties . . . would be shared, in effect, between the county council and the county court judge." Many a landlord may have made a similar comment in a moment of bitterness, but it cannot be said, I think, as a matter of law, or as a guiding rule of construction, that the Rent Acts have taken away from landlords the right, or the power, of general management of their property. If I may take by way of illustration a case familiar to some of your Lordships, I believe that most people would say that the Inns of Court exercise the general management, regulation and control of the whole of their property, even though as to much of it their control is, I believe, subject to the Rent Acts. If the material part of the section, as the respondents construe it, is written out in full it will read: "Nothing in the Rent Acts shall be deemed to prevent possession being obtained of any house possession of which is required for the purpose of enabling a local authority to exercise the power of exercising the general management, etc." of the houses in question. I do not think that the natural meaning of this cumbrous and periphrastic sentence would be such as to arm the county council with the power which it seeks. If I am right in my opinion that a landlord exercises the general management, regulation and control of his property although it is subject to the Rent Acts, it seems to me to follow that a local authority cannot be said to require possession of a house for the purpose of enabling it to exercise its power under the Housing Acts when it already owns the house and has let it in proper performance of its duty under those Acts. It is already exercising the powers

of "general management, regulation and control" in respect of that very house. It would have been easy for Parliament to say, if it so intended, that the Rent Acts should not apply in any case where a local authority was seeking to recover possession from a tenant of a house provided and let in pursuance of the Housing Acts. Parliament has not said so in terms, and I am by no means satisfied that Parliament was minded to say so. So far as this consolidating Act is concerned, it is more likely that the legislature intended s. 156 (1) (a) to be read as referring to the parties mentioned in the group of sections beginning with s. 71, to which the attention of the reader would normally be directed. My Lords, it is on these grounds that I am for allowing these appeals, and I am happy to find some support for my view in the doubts which were expressed by the learned judges in the Divisional Court, who might well have come to a different conclusion had they not been bound by authority.

LORD MORTON OF HENRYTON (read by LORD DU PARCQ): My Lords, each of the appellants occupied a dwelling as tenant of the respondents. Each tenancy has been duly determined by a notice to quit which has expired. Each of the appellants was duly served with a notice of the intention of the respondents to apply to the court for possession under the Small Tenements Recovery Act, 1838, s. 1, the provisions whereof were fully complied with by the respondents. If the appellants' main contention, which I am about to mention, is unsound, there can be no doubt that the respondents were and are entitled, in each case, to the issue of a warrant for delivery of possession. In regard to the "subsidiary points" mentioned in the judgment of LORD GREENE, M.R., I need only say that I agree entirely with the views which he has expressed on each of them. I also agree with his conclusion on the appellants' main contention, but, as the point is of general importance, I shall state my opinion briefly in my own words.

The appellants contend that they are protected by the Rent and Mortgage Interest Restrictions Acts. The Housing Act, 1936, s. 156 (1), provides:—

"Nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, as amended by any subsequent enactment shall be deemed to . . . prevent possession being obtained—(a) of any house possession of which is required for the purpose of enabling a local authority to exercise their powers under any enactment relating to the housing of the working classes."

I have omitted certain words, relating to obtaining possession of a house with respect to which a demolition order or a clearance order has been made, as these words are wholly irrelevant for the present purpose. Thus, the only question remaining for consideration is: Do the respondents require possession of the dwellings in question to enable them to exercise their powers under any enactment relating to the housing of the working classes? In my opinion, they do. The Housing Act, 1936, is clearly an enactment relating to the housing of the working classes, and the respondents require possession for the purpose of enabling them to exercise the powers conferred by s. 83 (1) of that Act in the following terms:—

"The general management, regulation, and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority . . ."

I cannot doubt that the power to manage, regulate and control houses is a "power under an enactment" within the meaning of s. 156 (1) (a). The dwellings in question were erected long before 1936, but by reason of the Housing Act, 1936, s. 189 (2), they come within the class of houses mentioned in s. 83 (1). If the respondents get possession of these dwellings they are "enabled" to manage, regulate and control them, and they require possession for this purpose. I do not see how the respondents can "manage, regulate and control" houses unless they are in a position effectively to give notice to one tenant and substitute another tenant. Thus, as it seems to me, the present case comes completely within the words of the Housing Act, 1936, s. 156 (1) (a), and the Rent and

Mortgage Interest Restrictions Acts afford no protection to the appellants against an order for possession. In my view, these appeals should be dismissed.

Appeals dismissed. No order as to costs.

Solicitors: *Hewitt, Woollacott & Chown*, and *Geoffrey B. Gush & Co.* (for the appellants); *J. H. Pawlyn* (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

Re LILLY'S WILL TRUSTS. PUBLIC TRUSTEE v. JOHNSTONE.

[CHANCERY DIVISION (Harman, J.), November 5, 1948.]

Will—"Investments"—"Securities for money"—*Proceeds of life assurance policies.*

By his will, a testator gave certain legacies and continued, in cl. 3: "Subject to the foregoing legacies and duties and to the payment of all my just debts and funeral and testamentary expenses I give and bequeath all my personal property (other than investments securities for money or leasehold property) including all moneys at my bankers and in Post Office Savings Bank on either drawing or deposit account and all articles of furniture plate plated articles china glass books manuscripts pictures prints statutory musical instruments articles of vertu and all other articles of personal domestic and household use and ornament including wines provisions and consumable stores to my niece Florence Lilly Johnstone absolutely." The testator's personal property included stocks and shares, cash in two banks and two life assurance policies.

HELD: on the true construction of the will, the exception in cl. 3 of "investments" and "securities for money" referred to stock exchange investments and things which were not stocks and shares but were securities, such as debentures, but did not include the proceeds of the life assurance policies, which, therefore, passed under the bequest.

[**AS TO PRINCIPLES OF CONSTRUCTION**, see **HALSBURY**, Hailsham Edn., Vol. 34, pp. 187-204, paras. 240-257; and **FOR CASES**, see **DIGEST**, Vol. 44, pp. 702-709, Nos. 5441-5532.]

Cases referred to:

(1) *Re Rayner* [1904] 1 Ch. 176; 73 L.J.Ch. 111; 89 L.T. 681; 44 Digest 623, 4535.

(2) *Lawrance v. Galsworthy*, (1857), 30 L.T.O.S. 112; 35 Digest 598, 3388.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of the testator, the proceeds of two life policies of assurance on the life of the testator passed to the defendant, Florence Lilly Johnstone, under a bequest to her by the testator of all his personal property "other than investments securities for money or leasehold property." **HARMAN, J.**, held that the proceeds did so pass.

R. W. Goff for the plaintiff, the Public Trustee.

Myles for the first defendant, Florence Lilly Johnstone.

J. H. Sparrow for the second defendant, G. C. I. Lilly, a nephew representing nephews and nieces interested in the residue.

HARMAN, J.: The testator, a retired colonel of the Indian Army, made his will in February, 1938, and appointed the Public Trustee as executor and trustee. He gave by cl. 2 pecuniary legacies amounting to some £1,600. Clause 3 proceeded in these words:

"Subject to the foregoing legacies and duties and to the payment of all my just debts and funeral and testamentary expenses I give and bequeath all my personal property (other than investments securities for money or leasehold property) including all moneys at my bankers and in Post Office Savings Bank on either drawing or deposit account and all articles of furniture plate plated articles china glass books manuscripts pictures prints

statuary musical instruments articles of vertu and all other articles of personal domestic and household use and ornament including wines provisions and consumable stores to my niece Florence Lilly Johnstone absolutely."

The testator died in 1947, and the net value of his estate was £15,000 or a little more. At the date of his death he had certain personal property, stocks and shares to the value of over £8,000, considerable cash in two banks, and two full life policies of assurance with profits amounting to some £3,487. I have to construe the words of cl. 3. It is a gift of all his personal property, an all-embracing clause, save for the exceptions. We know that he had considerable holdings of stocks and shares which will pass either under the word "investments" or "securities for money." We know also that he had other property amounting, as I am told, in value together to about £3,000, that is, in money at the bank and in his personal chattels.

I think it is to be noted of this clause that, although it starts by saying "all my personal property," it proceeds to enumerate a great number of items beginning with money, whether immediately withdrawable or not, and going on with personal chattels. He meant to be paid out of those items legacies of £1,600, and duties and debts and funeral expenses. It will be seen, therefore, that he intended to provide a fund readily available for payment of those items, which he must have known would come to over £2,000.

What then ought I to conclude in this will that "investments" and "securities for money" mean? Those two phrases may mean almost anything within limits according to the context in which they appear. In JARMAN ON WILLS, 7th ed., vol. 2, p. 1272, there is a paragraph devoted to what "securities for money" will or will not mean, in other words, what they have been construed as meaning or not meaning in various wills. It is said authoritatively that without a context "securities for money" means something secured on property and would not include, for instance, ordinary stock exchange investments, although it would, no doubt, include debentures: see *per* ROMER, L.J., in *Re Rayner* (1) ([1904] 1. Ch. 189). In its secondary meaning, however, it may include ordinary stock exchange investments. With regard to "investment," the learned author says (*ibid.*, 1273): "'Investment' is a vague term and no general rule can be laid down as to its meaning."

Counsel for the first defendant has drawn my attention to *Lawrance v. Galsworthy* (2), in which STUART, V.-C., appears to have held—I say "appears" because the report is very obscure—that in a second mortgage of personal estate, a policy of insurance is a security for money within an exception of securities for money. I dare say it was in the document then before the court, but I do not think that helps me very much in construing this will, and I do not feel I am bound by that case. Counsel rested his claim on the word "investments," saying that anything was an investment which was a mode of laying out money with a view to obtaining a return, and that a man who put out his money to buy himself a policy to return a sum, whether at 65 or at his death, was investing money, and that the proceeds would properly be called an investment. I have no doubt that is so, but I think the problem is: What did this testator mean when he excepted "investments" and "securities for money?" I think he meant stock exchange investments—stocks and shares—and things which were not stocks or shares but were securities, such as debentures. I do not think he intended to include policy moneys in that phrase. It seems to me more probable that he intended those moneys to be used for payment of his debts, legacies, and so forth, which he must have known would arise on his death. I do not think, therefore, that the policy moneys are within the words of the exception, and I so hold.

Declaration accordingly. Costs as between solicitor and client to be paid out of fund bequeathed by cl. 3 of the will.

Solicitor: *Burton, Yeates & Hart, agents for Nye & Donne, Brighton* (for all parties).
[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re WINGHAM (*deceased*), ANDREWS AND
ANOTHER *v.* WINGHAM.

[COURT OF APPEAL (Bucknill, Cohen and Denning, L.JJ.), October 12, November 3, 1948.]

Will—Soldier's will—Actual military service—Airman training in Canada for operational duties—Wills Act, 1837 (c. 26), s. 11—Wills (Soldiers and Sailors) Act, 1918 (c. 58), s. 5 (2). A

The deceased entered the Royal Air Force in February, 1942, and in October, 1942, he was sent to Canada for training in operational duties on service as an airman. On Mar. 1, 1943, he wrote a document which he described as a will, and which he signed but did not have attested. On Aug. 11, 1943, after he had become a pilot instructor, he died from injuries received as the result of an aircraft accident. The question to be determined was whether the deceased was "in actual military service," within the meaning of the Wills Act, 1837, s. 11 (as extended by the Wills (Soldiers and Sailors) Act, 1918 s. 5 (2)), when the document of Mar. 1, 1943, was made, and, therefore, entitled to make a privileged will. B

Held: the words "actual military service," in s. 11 of the Wills Act, 1837, meant "active military service," and any soldier, sailor or airman was entitled, under the statutes, to make a privileged will if he was actually serving with the armed forces in connection with operations which were, or had been, taking place, or were believed to be imminent; and, therefore, the document of Mar. 1, 1943, was made while the deceased was "in actual military service," within the meaning of s. 11, and was admissible to probate as the deceased's will. C

In the Estate of Gossage, Wood v. Gossage ([1921] P. 194; 124 L.T. 770); and *Gattward v. Knee* ([1902] P. 99; *sub nom.* *In the Goods of Knee, Gattward v. Knee*, 86 L.T. 119), *applied*. D

Observations of LORD MERRIVALE, P., in Re Booth, Booth v. Booth ([1926] P. 133-135; 135 L.T. 234, 235), *approved*. E

Observations of SIR HERBERT JENNER FUST in Drummond v. Parish, (1843) (3 Curt., 531; 1 L.T.O.S. 207), criticised.

In the Goods of Hill, (1845) (1 Rob. Eccl. 276); Bowles v. Jackson, (1854) (1 Eccl. & Ad. 294); In the Goods of Gibson ([1941] 2 All E.R. 91; [1941] P. 118, *n.*); and *In the Estate of Anderson* ([1943] 2 All E.R. 609; [1944] P. 1; 169 L.T. 345), *no longer of authority*. F

Decision of PILCHER, J. ([1948] 1 All E.R. 208), reversed.

[AS TO ACTUAL MILITARY SERVICE, see HALSBURY, Hailsham Edn., Vol. 14, p. 198, paras. 325, 326, and Supplement; and FOR CASES, see DIGEST, Vol. 39, pp. 333-335, Nos. 193-219, and Supplement.]

Cases referred to :

- (1) *In the Estate of Gossage, Wood v. Gossage*, [1921] P. 194; 90 L.J.P. 201; 124 L.T. 770; 39 Digest 338, 245.
- (2) *Gattward v. Knee*, [1902] P. 99; 71 L.J.P. 34; *sub nom.* *In the Goods of Knee, Gattward v. Knee*, 86 L.T. 119; 39 Digest 334, 197.
- (3) *Drummond v. Parish, (1843)*, 3 Curt. 522; 2 Notes of Cases, 318; 1 L.T.O.S. 207; 39 Digest 333, 195.
- (4) *Re Booth, Booth v. Booth*, [1926] P. 118; 95 L.J.P. 64; 135 L.T. 229; 39 Digest 334, 208.
- (5) *Re Kitchen, Kitchen v. Allman, (1919)*, 35 T.L.R. 612; 39 Digest 334, 206.
- (6) *In the Estate of Spark*, [1941] 2 All E.R. 782; [1941] P. 115; 110 L.J.P. 71; 165 L.T. 234; 2nd Digest Supp.
- (7) *In the Estate of Rowson*, [1944] 2 All E.R. 36; 171 L.T. 70; 2nd Digest Supp.

- (8) *In the Goods of Gibson*, [1941] 2 All E.R. 91; [1941] P. 118, n; 110 L.J.P. 73, n; 2nd Digest Supp.
- (9) *In the Goods of Hill*, (1845), 1 Rob. Eccl. 276; 4 Notes of Cases, 174; 39 Digest 335, 209.
- (10) *Bowles v. Jackson*, (1854), 1 Eccl. & Ad. 294; 39 Digest 334, 201.
- (11) *In the Estate of Anderson*, [1943] 2 All E.R. 609; [1944] P. 1; 113 L.J.P. 25; 169 L.T. 345; 2nd Digest Supp.
- (12) *Blyth v. Lord Advocate*, [1944] 2 All E.R. 375; [1945] A.C. 32; 113 L.J.P.C. 78; 171 L.T. 319; 2nd Digest Supp.

APPEAL by the plaintiffs from an order of PILCHER, J., dated Jan. 21, 1948, and reported [1948] 1 All E.R. 208, dismissing a motion for a grant of letters of administration with a testamentary document annexed. The document, which did not comply with the provisions of the Wills Act, 1837, s. 9, had been executed by a member of the Royal Air Force, during the war, while he was training in Canada for operational duties. The plaintiffs were beneficiaries under the document and the defendant was the father of the deceased. PILCHER, J., held that the deceased was not in "actual military service," within s. 11 of the Wills Act, 1837, when the document was made, and, therefore, was not entitled to make a privileged will. His decision was now reversed by the Court of Appeal. The facts appear in the judgment of BUCKNILL, L.J.

Harvey Moore, K.C., and *C. A. Emanuel* for the plaintiffs.

The defendant did not appear and was not represented on the appeal.

Curr. adv. vult.

Nov. 3. The following judgments were read.

HARRY BUCKNILL, L.J.: This is an appeal from an order of PILCHER, J., refusing to grant letters of administration, with a certain document annexed, to the plaintiffs, Gwendolen Andrews and Ronald Burgess. The plaintiffs claimed that the document in question was a privileged will made by Roy Wingham, deceased, within the provisions of the Wills Act, 1837. The material facts are that Roy Wingham entered the Royal Air Force in February, 1942. In October, 1942, he was sent overseas to Canada for training in operational duties on service as an airman. On Mar. 1, 1943, while on this service, Roy Wingham wrote out what he described as a will, whereby he left most of his property to Gwendolen Andrews and the remainder to Ronald Burgess. The deceased signed the will, but did not get it attested. At that time he was stationed at a camp about five miles away from the town of North Battleford, Saskatchewan, where he was undergoing flying training as a pilot at 35 Service Flying Training School. On Aug. 11, 1943, Wingham, who had become a pilot instructor, died in the Royal Air Force Hospital, Moosejaw, Saskatchewan, from injuries received as the result of an aircraft accident.

In these circumstances the plaintiffs contended that the will was a valid will. The Wills Act, 1837, s. 11, is in the following terms:

"Provided always, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."

The words are almost identical with s. 22 of the Statute of Frauds, 1677. The Wills (Soldiers and Sailors) Act, 1918, s. 2, extended s. 11 of the Wills Act, 1837, to any member of His Majesty's naval or marine forces not only when he is at sea, but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section. By s. 5 (2) of the Act of 1918 "soldier" includes a member of the Air Force for the purposes of s. 11 of the Wills Act, 1837.

At the hearing before PILCHER, J., Mr. Frank Wingham, the father of the deceased, who had been joined as defendant to the motion, appeared and submitted that the case did not fall within the provisions of s. 11 of the Act of 1837.

Mr. Frank Wingham did not appear to argue the case before us. It was clear from a letter written by him to the plaintiffs' solicitors, which was read to the court, that he had ample notice of the date when the appeal would be heard and that his absence was deliberate. PILCHER, J., dismissed the motion on the ground, to quote his own words ([1948] 1 All E.R. 213):

"... that service personnel in time of war who are *in expeditione*, or, to use the words of the Wills Act, 1837, 'in actual military service,' are confined at least to those who: (1) are actually engaged on a campaign, (2) are proceeding or are under orders to proceed or to hold themselves in readiness to proceed on a campaign, (3) are situated in what can properly be called a beleaguered fortress or a war base from which active offensive or defensive operations are being conducted."

The learned judge declined to accede to the argument of counsel for the plaintiffs that in 1943 Saskatchewan should be regarded as a theatre of war, and said that the deceased, who was sent under orders to a place far removed from the fighting zones in order that he might pursue his training without hostile interference, was not in actual military service. The crucial matter in the judge's opinion was that (*ibid.*):

"... by his removal to Canada, the deceased was enabled to pursue his ... training in an area which was not subject to hostile interference or attack."

The question for our decision is whether this interpretation of the words "actual military service" is correct. The meaning of these words have been considered in a number of cases in courts of first instance, not all of them reconcilable with one another. We were only referred to one case, *In the Estate of Gossage, Wood v. Gossage* (1), in the Court of Appeal, in which the point may be said to have arisen indirectly. In that case the testator was a soldier, and in October, 1915, when he was under orders to proceed with his unit to South Africa, he made a will which strictly complied with the provisions of the Wills Act, 1837. On Jan. 9, 1918, while he was in Cape Town, he asked his sister, who was in England and then had possession of the will, to burn it as he, the testator, had, as he said, cancelled it. His sister, accordingly, burnt it. The testator subsequently died in November, 1918, in South Africa, and the question for the decision of the court was whether the destruction of the will by the sister in England was an effective revocation of the will, having regard to s. 20 of the Wills Act, 1837, the material words of which for the purpose of the case were that no will should be revoked except by the burning of it by the testator or by some person in his presence and at his direction, with the intention of revoking it. Unless, therefore, the testator was held to be on actual military service at the time when his sister burnt the will, the burning of it by her would not act as a revocation of it. The Court of Appeal decided that the testator, being a soldier on active service, was able to revoke this will without the formalities prescribed by the Wills Act, 1837. The case is, I think, important because it appears that the court considered that active service and actual military service mean the same thing. Thus, YOUNGER, L.J., said ([1921] P. 202):

"Before the Wills Act the special testamentary privileges in relation to their personal estate which were enjoyed by soldiers and sailors on active service consisted in their being dispensed from these formalities of execution required from all other testators."

In this connection I would point out that the first meaning given to the word "actual" is "active" in the OXFORD ENGLISH, the CENTURY, and WEBSTER'S ENGLISH DICTIONARIES.

The question, therefore, seems to me to be whether Roy Wingham at the time when he made this will was "on active military service." What is the test? I do not think the test is whether the airman was in danger from enemy action

at the time when the will is made. The test applied by PILCHER, J., includes soldiers who are under orders to hold themselves in readiness to proceed on a campaign. This was so held by SIR FRANCIS JEUNE, P., in *Gattward v. Knee* (2). In that case there was no danger to the testator at the time when he made the soldier's will. The facts were that the testator was a private in a British infantry regiment and while stationed in Calcutta he wrote a letter containing testamentary dispositions. The letter was written before the outbreak of the Boer War and in it the testator said :

" . . . we are just off to South Africa again for the Boer War—if war is declared at all."

It was proved at the trial that on Sept. 7, 1899, the deceased's battalion was warned for service and two days later was ordered to mobilise for active service in South Africa, and sailed from India for South Africa on Sept. 18, 1899. The President found that the letter was written between Sept. 8 and 19 at Calcutta, before the ship left. The testator died of enteric fever on Feb. 9, 1900, during the siege of Ladysmith. SIR FRANCIS JEUNE, P., in the course of his judgment, said that mobilisation might be fairly taken as a commencement of that which in Roman law was expressed by the words *in expeditione*, and continued ([1902] P. 102) :

" . . . it is quite clear that when a force begins in a sense to engage in or to enter upon active service, it would be said to be *in expeditione*."

If the presence of danger arising from enemy activity is not essential in order that a man may be properly described as being on active military service, what is the test of such service? In my opinion, the tests are (a) Was the testator "on military service"; (b) was such service "active"? In my opinion, the adjective "active" in this connection confines military service to such service as is directly concerned with operations in a war which is or has been in progress or is imminent. If I apply these tests, then, in my opinion, the deceased was so engaged. He had abandoned his civilian status for the status of a man enrolled in the Royal Air Force at a time when this country was at war, and he had done so for the purpose of taking part in the war. He had in pursuance of this purpose left his home and the ordinary facilities for making a will which a man has in civilian life, and had been ordered overseas for the purpose of becoming more skilled in his work as a belligerent airman. While overseas he was at any time liable to be ordered to proceed to some area in order to take part in active warfare. In these circumstances, he was, in my opinion, at the time when he made this will in actual military service, and, therefore, the document should be admitted to probate as a valid will.

ABE. COHEN, L.J. : I agree that this appeal should be allowed. The facts have been stated by my Lord and I need not repeat them. The question whether the document of Mar. 1, 1943, should be admitted to probate as a testamentary document, depends on the meaning to be given to the words "in actual military service" in s. 11 of the Wills Act, 1837.

The meaning of these words has been considered in a number of cases many of which were referred to by PILCHER, J., in his careful judgment. Language has been used in some of the cases, in particular by SIR HERBERT JENNER FUST in *Drummond v. Parish* (3), which, it has been suggested, lays down the proposition that under English law the soldiers' military testamentary privilege is identical with the privilege of the Roman legionary. That view has been shown to be fallacious by LORD MERRIVALE, P., in *Re Booth, Booth v. Booth* (4) ([1926] P. 133-135). None the less, the authorities do establish that the privilege conferred by s. 11 does not extend to regular soldiers of every description at all times, but only to soldiers who are *in expeditione*. It is important, however, to observe that the courts have not given a narrow meaning to the words "*in expeditione*," but have taken a broad view of the circumstances, the existence of which justify

treating a soldier as being *in expeditione*, and have had regard to the conditions of warfare from time to time prevalent. Thus, in *Gattward v. Knee* (2), to which BUCKNILL, L.J., referred, SIR FRANCIS JEUNE, P., treated a soldier as being engaged on an expedition where his battalion was under orders to mobilise for active service in South Africa. In *Re Kitchen, Kitchen v. Allman* (5), a soldier who had been ordered to hold himself in readiness for service overseas, and when on final draft leave, was held to be entitled to make a privileged will. A similar benevolent construction has been applied to cases arising out of the 1939-45 war. Thus in *In the Estate of Spark* (6), a soldier serving at the date of the will in the army in camp in Great Britain was held to be in actual military service; so, in *In the Estate of Rowson* (7), was a member of the Women's Auxiliary Air Force. In my opinion, these cases were rightly decided, and I am unable to distinguish them in principle from the case now before us. In the last war, bombs were dropped on Tokyo by American land-based planes and the range of powerful bombers was steadily increasing. Troops were dropped from the air behind the enemy lines and it seems difficult to define any part of the territory of a belligerent as outside the range of an "expedition." PILCHER, J., said that the argument of counsel for the plaintiffs amounted to a contention that in the recent hostilities the whole world should be regarded as a theatre of war. I do not think his argument went quite so far as that. I do not think he was considering the position of a soldier on neutral territory. With that possible limitation, I see no reason to reject the argument, though it is sufficient for the present case to say, as my Lord has said:

"While overseas [the deceased] was at any time liable to be ordered to proceed to some area in order to take part in active warfare. In these circumstances, he was . . . in actual military service . . ."

I cannot part from this case without expressing my doubts whether *In the Goods of Gibson* (8) was rightly decided. The facts are as follows:

"A testamentary paper not duly executed in accordance with the provisions of the Wills Act, 1837, was put forward as a soldier's will under s. 11 of that Act. The writing was in the form of a holograph will, purporting to leave all that Colonel Gibson possessed to his sister, but it was unsigned. Colonel Gibson was killed when his house was destroyed by an enemy bomb in October, 1940. He was then attached to district command headquarters some miles away, but he lived at home."

HENN COLLINS, J., refused to admit the writing to probate ([1941] 2 All E.R. 92) on the grounds that:

"... a soldier who is carrying out peace-time duties, although he is under military authority, is no more a fighting soldier because he is in the army than an ordinary civilian, who, in the circumstances of the present war, may be said to be in the front rank of the fighting."

Read without regard to the circumstances of the particular case, this *ratio decidendi* would lead to the conclusion that a surgeon serving in a military hospital or a chaplain serving overseas was not entitled to make a privileged will. If HENN COLLINS, J., meant to go as far as that, his decision is, in my opinion, inconsistent with the cases to which I have referred and must be treated as overruled.

DENNING, L.J.: Before 1677 there were no formalities required in order to make a will. The Statute of Frauds, 1677, imposed them, but SIR LEOLINE JENKINS succeeded in obtaining in the statute a privilege in favour of soldiers and sailors. They were exempted from any formalities. He was an eminent civilian and took the idea from the Roman law. For the first 172 years that this privilege existed, there was no reported case on it. This is, perhaps, not so very remarkable. The jurisdiction was confined to the ecclesiastical courts which were not bound by precedents, and, until the time of LORD STOWELL,

their decisions were not reported. Moreover, on this subject they seem to have been content to act on the certificate of the military authorities.

The first case in which the scope of the privilege came under close review was *Drummond v. Parish* (3). General Drummond made a will in peace-time while serving in Woolwich Barracks, but it was not witnessed. He was held not to be in "actual military service." This is the case which has given rise to all the trouble, for in it SIR HERBERT JENNER FUST fell into an error. He thought (3 Curt. 531) that, because the idea of a soldier's privilege was taken from the Roman law, therefore :

"... in order to ascertain the extent and meaning of the exception, the civil law may fairly be resorted to."

Successive courts of first instance have, consequently, felt themselves bound to ignore the words of the statute and to substitute for them this test : Can the soldier be considered as having been so circumstanced that he would under Roman law have been regarded as *in expeditione* ? Sitting in this court, I am free to say that that test should no longer be applied. The words of our statutes are plain English : "in actual military service." I find them easier to understand and to apply than the Latin : "*in expeditione*." If I were to inquire into the Roman law, I could, perhaps, after some research say how Roman law would have dealt with its soldiers on Hadrian's Wall or in the camp at Chester, but I cannot say how it would have dealt with an airman in Saskatchewan who is only a day's flying from the enemy. Nor can anyone else. This supposed throw-back to Roman law has confused this branch of the law too long. It is time to get back to the statute. I find myself in full agreement with what LORD MERRIVALE, P., said ([1926] P. 135) in *Re Booth, Booth v. Booth* (4) :

"... the proposition that the English law as to the soldier's military testamentary privilege is identical with the privilege of the Roman legionary is an entirely mistaken proposition."

Rid of this Roman test, this court has to decide what is the proper test. It must be both simple and certain—simple, because it is to be understood by all ranks, and, certain, because every soldier must be able to apply it without difficulty in the situation in which he finds himself. It is quite beside the mark to inquire what are the reasons for the privilege. The privilege is one thing. The reasons for it are another. The reasons are, no doubt, that a soldier "in actual military service" is likely to be in danger and to be bereft of legal advice. It would be a great mistake, however, to argue therefrom that a soldier who is not in danger or who has legal advice at his elbow cannot make a soldier's will. That would be to confound the reasons for the rule with the rule itself. The rule is that a soldier "in actual military service" is privileged to make a will without any formalities. The plain meaning of the statutes is that any soldier, sailor or airman is entitled to the privilege if he is actually serving with the armed forces in connection with military operations which are, or have been, taking place, or are believed to be imminent. It does not, of course, include officers on half pay or men on the reserve, or the Territorials, when not called up for service. They are not actually serving. Nor does it include members of the forces serving in this country, or on routine garrison duty overseas, in time of peace, when military operations are not imminent. They are actually serving, but are not in actual "military" service, because no military operations are afoot. It does, however, include all our men serving—or called up for service—in the wars, and women too, for that matter. It includes not only those actively engaged with the enemy, but all who are training to fight them. It also includes those members of the forces who, under stress of war, both work at their jobs and man the defences, such as the Home Guard. It includes not only the fighting men, but also those who serve in the Forces, doctors, nurses, chaplains, Women's Royal Naval Service, Auxiliary Transport Service, and so forth. It includes them all,

whether they are in the field or in barracks, in billets or sleeping at home. It includes them although they may be captured by the enemy or interned by neutrals. It includes them, not only in time of war but also when war is imminent. After hostilities are ended, it may still include them, as, *e.g.*, when they garrison the countries which we occupy, or when they are engaged in military operations overseas. In all these cases they are plainly "in actual military service." Doubtful cases may arise in peace-time when a soldier is in, or is about to be sent to, a disturbed area or an isolated post, where he may be involved in military operations. As to these cases, all I can say is that, in case of doubt, the serving soldier should be given the benefit of the privilege.

I do not stop to discuss all the cases in detail. I need only say that *In the Goods of Hill* (9) and *Bowles v. Jackson* (10) are inconsistent with many later cases; that *In the Goods of Gibson* (8), is inconsistent with a later decision of HODSON, J., in *In the Estate of Spark* (6); and that *In the Estate of Anderson* (11) must be read in the light of the House of Lords' decision on the Home Guard in *Blyth v. Lord Advocate* (12). In my opinion, those four cases should no longer be regarded as of authority. Applying the test I have mentioned, this airman was in "actual military service" and, therefore, I agree that this appeal should be allowed.

Appeal allowed. Costs of both sides to come out of the estate.

Solicitors: *Cliftons* (for the plaintiffs).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

DENNIS REED, LTD. v. NICHOLLS.

[KING'S BENCH DIVISION (Lynskey, J.), October 21, 1948.]

Agency—Estate agent—Commission—Introduction of person "able" to purchase property—"Ability" to pay.

By a contract in writing, the owner of certain house property instructed a firm of estate agents "to procure for me a person able, ready and willing to purchase my property . . . at the price of £2,900 O.N.O. [or near offer]," and undertook to pay them commission on the introduction of such a person making a firm offer to purchase at the price required.

HELD: ability to purchase within the meaning of the contract did not depend on whether the purchaser had the money in hand at the time of his introduction to the purchaser, but it was sufficient if the agents proved that, if the vendor had been ready and willing to carry out his contract, the purchaser could have found at the proper time the necessary money to perform his obligation.

Dictum of ATKIN, L.J., in *James v. Smith* ([1931] 2 K.B. 322; 145 L.T. 459), *applied*.

[AS TO REMUNERATION OF AGENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 257-259, paras. 432, 433; and FOR CASES, see DIGEST, Vol. 1, pp. 512-514, Nos. 1770-1776, and Supplement.]

Cases referred to:

- (1) *James v. Smith* (1921), [1931] 2 K.B. 317, *n.*; 100 L.J.K.B. 585, *n.*; 145 L.T. 457, *n.*; Digest Supp.
- (2) *Chapman v. Winson*, (1904), 91 L.T. 17; 1 Digest 514, 1776.

ACTION by the plaintiffs, a firm of estate agents, to recover commission alleged to be due to them from the defendant in respect of the introduction of a prospective purchaser of the defendant's property.

The defendant, the owner of certain freehold premises, entered into a contract with the plaintiffs to the following effect:

"I hereby instruct you, Messrs. Dennis Reed Ltd., to procure for me a person able, ready and willing to purchase my property described above at the price of £2,900 O.N.O. [or near offer] and I undertake to pay you commission at the rate of 5 per cent. of the first £300, and 2½ per cent. of the remainder of the purchase price upon your introducing such a person who makes a firm offer to purchase at the price required by me."

A The plaintiffs introduced a Mr. Minski as a prospective purchaser, and his offer of £2,800 was accepted subject to contract, being a deposit of £20 paid by him. Subsequently, the defendant withdrew from this conditional agreement and disposed of the property to another purchaser for £2,900.

The judge held that the plaintiffs had introduced Minski as a person able and willing to purchase the property, and that, accordingly, they were entitled to their commission.

B *Lloyd-Jones* for the plaintiffs.

Blain for the defendant.

C **LYNSKEY, J.:** In this case the plaintiffs, Dennis Reed, Ltd., are claiming from the defendant, Mr. H. F. Nicholls, the sum of £77 10s., being commission which they say is due to them in respect of the introduction of a proposed purchaser of certain premises which belonged to the defendant, situate at 3, Weston Drive, Stanmore, Middlesex. The defendant was the owner of the freehold of those premises, and, as he was anticipating going to Australia, he desired to dispose of them. On July 10, 1948, the defendant rang up the plaintiffs, and, in consequence, Mr. Mills, who was employed as a "negotiator" by the plaintiffs, called on the defendant who confirmed that he desired to place his house for sale with the plaintiffs. Mr. Mills produced a printed form containing the contract to be made between the defendant and the plaintiffs with regard to, first, a description of the premises, and, secondly, the commission to be paid to the plaintiffs for any work that they might do under the terms of the contract, and the particulars of when that remuneration should be earned. The operative part of the document reads:

E "I hereby instruct you, Messrs. Dennis Reed Ltd., to procure for me a person able, ready and willing to purchase my property described above at the price of £2,900 O.N.O. [or near offer] and I undertake to pay you commission at the rate of 5 per cent. of the first £300, and 2½ per cent. of the remainder of the purchase price upon your introducing such a person who makes a firm offer to purchase at the price required by me,"

F and it is signed by the defendant.

[His LORDSHIP reviewed the circumstances in which the plaintiffs introduced a proposed purchaser, Mr. Minski, whose offer was provisionally accepted by the defendant, who subsequently sold the premises to another purchaser, and continued:] In those circumstances I have to decide whether, in view of the terms of the contract made between the plaintiffs and the defendant, the plaintiffs have earned their commission—whether, on the true interpretation of the written contract, it entitles them to their commission. What the plaintiffs have to do under the contract to earn their commission is set out in the three lines which appear above the signature: "I hereby instruct you, Messrs. Dennis Reed, Ltd., to procure for me a person able, ready and willing to purchase my property described above at the price of £2,900, or near offer." Stopping there for a moment, there is an obligation on the plaintiffs to procure a person, and that person must be able, ready and willing to purchase the defendant's property at the price of £2,900, or near offer. The first part of the contract calls on the plaintiffs to procure a person, and the person procured was Mr. Minski. He had to be able and ready and willing to purchase the property. That he was ready and willing is quite clear. He made an offer for the property and he was willing to purchase it, and he was in communication with the defendant on the pre-

liminary arrangements to go into the premises. The only question is whether he was able to purchase the property at the price of £2,900 or near offer. He was not ready and willing to purchase the property at £2,900. He was purchasing it at a near offer and I am satisfied that £2,800 was an offer near to the price required by the defendant.

The question is : Was Mr. Minski able to purchase this property at the near offer of £2,800 ? I take the word "able" to mean what it was described as meaning by ATKIN, L.J., in *James v. Smith* (1), when he said ([1931] 2 K.B. 322) :

"I think that 'ability' does not depend upon whether the purchaser has the money in hand at the time ; to my mind it is a question of fact. I do not think it depends upon whether he has a binding agreement by which some third person is obliged to provide him with resources to carry out the contract. I think it is sufficient if it is proved by the agent or by the purchaser that the circumstances are such that if the vendor had been ready and willing to carry out his contract, he on his part at the proper time could have found the necessary money to perform his obligation."

In other words, it is a question of fact for me whether Mr. Minski was in a position, if the defendant had carried out his conditional agreement by making it a binding one, to have carried out the terms of the contract. Mr. Minski had been employed at Messrs. Harrods for some 20 years. He was a foreman in the grocery department and was earning £8 a week. In addition, he had a house which, according to Mr. Mills, he valued at about £3,800, and for which, according to Mr. Mills, he already had a prospective purchaser, for the sum, I think, of £3,700. That being the position, I am satisfied that he could have found the money, and that, even if the contract had not gone on, even though he had not sold his own house, he would have had little difficulty in finding the money by way of mortgage or going to his bankers and getting a charge on his house. I am satisfied that Mr. Minski was a purchaser able to implement the purchase of this house for £2,800.

The next fact that one has got to consider is that it has been argued that the "price required by me" in the contract means the "price which has been accepted by me." I am referred again to *James v. Smith* (1) this time to the judgment of SCRUTTON, L.J., quoting from LORD COLLINS, M.R. (91 L.T. 19) in *Chapman v. Winson* (2) ([1931] 2 K.B. 320) :

"The first question in all these commission cases is a very obvious one, but one which is frequently overlooked . . . 'The parties can agree upon any particular event upon which commission is to become payable, and the question in the present case is what is the event upon which the parties have agreed that commission shall be payable ?' It is quite open to the parties to use language that makes it clear that the commission is only payable on the money ultimately received or which might have been received but for the vendor's fault. It is quite possible for the parties to make it clear that the commission is to be payable as soon as a contract for purchase has been made, whatever happens to it and with whomsoever it is made. What the event is which entitles the agent to commission depends on the contract in the particular case."

That statement, with great respect, I adopt entirely, and that is the question I have got to decide here. What is the event on which the commission has to be paid ? It is quite clear, it seems to me, that what the agents have got to do to earn their commission is to find a person able, ready and willing to purchase the property at £2,900, or a near price, and I have found that £2,800 was a near price. Having found such a person, the plaintiffs had to introduce him to the defendant, the vendor, and they did introduce him to the vendor. That person, having been introduced, had to make a firm offer to purchase at the price required.

A firm offer to purchase does not mean to enter into a binding agreement, but it has the meaning it has in ordinary contractual language, an offer capable of acceptance so as to become a contract. There was a firm offer made by Mr. Minski to purchase this property for £2,800 subject to contract. That offer could have been accepted by the defendant if he had desired by simply saying : "Right, I accept it. We will agree the contract at once." I think there was a firm offer here which the defendant purported to accept, but he later changed his mind because he got a better offer. The plaintiffs have earned their commission, they having found a person able, ready and willing to pay and having introduced such a person to the defendant, and that person having made a firm offer to buy at the price required by the defendant.

Judgment for the plaintiff with costs.

Solicitors : *Kingsley, Napley & Co.* (for the plaintiffs) ; *Allen & Son* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Reversed. C.A. [1949] 1 All E.R. 1056.

BALL AND ANOTHER v. LONDON COUNTY COUNCIL.

C [KING'S BENCH DIVISION (Stable, J.), November 2, 3, 1948.]

Negligence—Landlord—Gratuitous installation of domestic boiler—Boiler in dangerous condition—Tenant's daughter injured by explosion—Liability of landlord.

The landlords of a dwelling-house during the tenancy thereof by B., installed gratuitously in the house a new boiler to replace an old one. During very cold weather, B.'s daughter, C., lit a fire in the boiler, which exploded, causing C. serious injuries. The court found as a fact that the boiler, which lacked a safety valve, was dangerous, and that its condition was known or capable of being known to the landlords.

HELD : the landlords were liable in negligence to C. for installing a boiler which might be a source of danger to persons using it, and the mere fact that the relationship of landlord and tenant existed between the landlords and B. was irrelevant.

[AS TO LIABILITY OF A LANDLORD FOR NEGLIGENCE, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 596-600, paras. 846-850 ; and FOR CASES, see DIGEST, Vol. 36, pp. 35-49, Nos. 206-306.]

Cases referred to :

- F (1) *Travers v. Gloucester Corporation*, [1946] 2 All E.R. 506 ; [1947] K.B. 71 ; 115 L.J.K.B. 517 ; 175 L.T. 360 ; 110 J.P. 364 ; 2nd Digest Supp. (2) *Davis v. Foots*, [1939] 4 All E.R. 4 ; [1940] 1 K.B. 116 ; 109 L.J.K.B. 385 ; 2nd Digest Supp. (3) *Bottomley v. Bannister*, [1932] 1 K.B. 458 ; 101 L.J.K.B. 46 ; 146 L.T. 68 ; Digest Supp.

G ACTION for damages for personal injuries and pecuniary loss arising from negligence.

In or about 1936 a house in Woodberry Grove, London, was let by the defendants' predecessors in title to the first plaintiff and her husband. The husband died, and the first plaintiff became the tenant of the house. In 1938 the defendants acquired the reversion and thereafter the first plaintiff was their tenant. During this tenancy, in or about 1940, the defendants installed a new boiler in the house. Very cold weather was experienced in February, 1947. On Feb. 23 the second plaintiff, who was the first plaintiff's daughter, came down shortly before 10.30 a.m. and lit a fire in the boiler with the object of heating water. After an interval of about half an hour the boiler blew up with a violent explosion and the second plaintiff sustained very serious injuries to her leg. The plaintiffs claimed that the boiler which the defendants installed was dangerous because it had not got a safety valve, and they pleaded that :

"In carrying out the said installation the defendants their servants or agents owed a duty to the first-named plaintiff, the members of her family, and all persons entering and being or likely to enter and be within the said kitchen to carry out the same in a proper and workmanlike manner and so to instal the said boiler that it would be as safe for the said purpose as reasonable skill and care could make it." The defendants denied that the boiler was dangerous, and contended that, even if it were, in as much as the defendants were the landlords and the first plaintiff was the tenant, the defendants owed no duty to the first plaintiff, and *a fortiori* they owed no higher duty to a stranger who was in the position of the second plaintiff. They also alleged contributory negligence on the part of the second plaintiff in lighting the fire in the circumstances. The court gave judgment for the plaintiffs.

C. A. Morgan Blake for the plaintiffs.

Russell Vick, K.C., and *Roderic Bowen* for the defendants.

STABLE, J. : [HIS LORDSHIP stated the facts, and found as a fact that the boiler was dangerous, that its condition was either known or was such as, by the exercise of reasonable skill and care, would have been known to the defendants, that the second plaintiff, in lighting the boiler as she did, had not acted in a way in which a reasonable person would not have acted, and that neither of the plaintiffs had given thought to whether there was a safety valve on the boiler or to whether its absence would be dangerous. HIS LORDSHIP continued :] That brings us to the question of law. It seems to me that on the authorities it is plain beyond argument that, if the tenancy or the occupation of the house had begun after the boiler was there, that is to say, if it had been the then existing boiler that had blown up and not the new one, the claim of the plaintiffs in this action must have failed. Counsel for the defendants has called my attention to a number of authorities which support that view. It is sufficient to refer to two : *Travers v. Gloucester Corporation* (1), where LEWIS, J., discussed the authorities in great detail, and the decision of the Court of Appeal in *Davis v. Foots* (2). The plaintiffs' counsel has not relied on the duty owed by the landlord, as such, to the tenant or to other persons who come into the house. He has based the claim on the fact that during the subsistence of this tenancy the defendants put in this boiler, and he says that it is completely irrelevant that the defendants happened to be the landlords of the premises, for it is not that relationship and the obligations that arise out of that relationship that the court has to consider. The plaintiffs say that the duties spring from the relationship which arose when the defendants, with the consent of the plaintiffs, went into the premises and put in this boiler.

In my judgment, in the absence of authority to the contrary, that contention of the plaintiffs is sound. What does it matter whether the landlords put in the boiler or whether some independent contractor did it for the first plaintiff ? The relationship of landlord and tenant has nothing whatever to do with it. It is just as irrelevant as though the contractor who put the boiler in was the occupier's son-in-law, or stood in some other relationship to the occupier. The question is : From what does the duty arise ? In my judgment, the duty arose from the fact that the defendants were the people who undertook to put in a boiler.

It is remarkable how little authority there is. I have been referred to a passage in SALMOND ON TORTS, 10th ed., at p. 503, and to a passage in the judgment of DU PARCQ, L.J., in *Davis v. Foots* (2). DU PARCQ, L.J., said ([1939] 4 All E.R. 7) :

"I have come to the same conclusion. The case as pleaded is not based on the undertaking or agreement on which the learned judge has founded his decision ; but speaking for myself, if I had thought that the judge's decision could be supported on that ground, I should have felt no difficulty in saying that the pleadings ought to be amended in order to enable us to

give effect to the learned judge's decision. I think, however—and I have very little to add to what has been said—that it is impossible on that ground, or on any ground, to support the decision to which the judge came. The facts give rise to some difficulty. Undoubtedly some support is to be found for the learned judge's decision in a statement of his view of the law by SIR JOHN SALMOND in his work on "Torts"; but I cannot find any authority binding on this court to support the judge's view. On the contrary, the authorities seem to me to be against it."

Pausing there, it is to be observed that in *Davis v. Foots* (2) the misfeasance which was alleged was an act or omission that happened two days before the commencement of the tenancy. DU PARCQ, L.J., later says (*ibid.*):

"... if somebody chooses to undertake an obligation, even gratuitously, to do a service to another person, and does it negligently, he may well render himself liable. But here—I do not repeat the reasons which have been given—there is no question of doing a service for the plaintiff or her husband at all."

If I may say so with the utmost respect, it is not easy to reconcile those two passages. Certainly in the latter passage, DU PARCQ, L.J., without, perhaps, expressing a view, leaves his mind open to the proposition that once the occupation has begun, if a gratuitous obligation is undertaken by the person who happens to be the landlord, that relationship attracts certain duties. Why the duties should be different as between a landlord who, during the subsistence of a tenancy undertakes to render some service and somebody other than the landlord, I do not know.

On the other side of the picture there are the observations of GREER, L.J., in *Bottomley v. Bannister* (3). In particular, I refer to the passage ([1932] 1 K.B. 478) where, having dealt with the position *vis-a-vis* landlord and tenant or anybody who comes into the demised premises where at the commencement of the tenancy the property is defective and dangerous, GREER, L.J., says:

"The result is unsatisfactory, because in the present case, if the landlord instead of doing the work himself before he sold the house, had done it afterwards as a contractor to Mr. Bottomley, he would have been liable if there were sufficient evidence that it was negligence on his part to have installed the Halliday boiler without a flue."

He proceeds to deal with the facts and the evidence in that case. The learned LORD JUSTICE there says that, had the landlord done the work after the commencement of the tenancy as a contractor, he would have been liable if there had been sufficient evidence that there was negligence on his part in installing the boiler without a flue.

In my judgment, that principle applies even though the boiler was put in gratuitously without extra charge, and the duty depends, as I think GREER, L.J., clearly indicates it does, on the law of tort and not of contract. It is a duty that is owed to the persons who, in the ordinary course of human life, would use the things. Accordingly, this action succeeds, and there will be judgment for the plaintiffs.

Judgment for the plaintiffs with costs.

Solicitors: *G. Howard & Co.* (for the plaintiffs); *J. H. Pawlyn* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

HOPES v. HOPES.

[COURT OF APPEAL (Bucknill and Denning, L.J.J., and Harman, J.), October 20, 21, November 3, 1948.]

Desertion—Parties living under same roof—Need to prove de facto separation—Parties sharing household.

A
A husband and wife were at all material times living under the same roof until a date within one month before the husband filed a petition for divorce on the grounds of his wife's desertion. He claimed that desertion began more than three years before the presentation of the petition by reason of the wife withdrawing to a separate bedroom, no marital intercourse taking place, the frequent occurrence of quarrels between them, and his wife doing no mending or washing of his clothes and no separate cooking for him. B
On the other hand, he always had his meals, which were cooked by the wife, in the common dining room with the other members of the family, and, when not in his bedroom, he shared the rest of the house with his wife and daughters.

C
HELD: while *de facto* separation, which with *animus deserendi* is an essential element of desertion, can exist even while the parties are under the same roof, there can be no such separation until husband and wife cease to share one household and set up two households. On the facts in this case there had been no *de facto* separation, and there was, therefore, no desertion of the husband by the wife.

Smith v. Smith ([1939] 4 All E.R. 533; [1940] P. 49; 162 L.T. 333), *distinguished*. D

Wanbon v. Wanbon ([1946] 2 All E.R. 366), *criticised*.

Thomas v. Thomas ([1948] 2 All E.R. 98; [1948] 2 K.B. 294), *discussed*.

Evans v. Evans ([1947] 2 All E.R. 656; [1948] 1 K.B. 175), *disapproved by* DENNING, L.J.

E
[AS TO WHAT CONSTITUTES DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 835-838, para. 1338; and FOR CASES, see DIGEST, Vol. 27, pp. 307-310, Nos. 2840-2880 and p. 322, Nos. 3000-3013.]

Cases referred to :

- (1) *Smith v. Smith*, [1939] 4 All E.R. 533; [1940] P. 49; 109 L.J.P. 100; 162 L.T. 333; 2nd Digest Supp.
- (2) *Pardy v. Pardy*, [1939] 3 All E.R. 779; [1939] P. 288; 108 L.J.P. 145; 161 L.T. 210; Digest Supp.
- (3) *Jackson v. Jackson*, [1924] P. 19; 27 Digest 308, 2852.
- (4) *Diver v. Diver* (unreported).
- (5) *Weatherley v. Weatherley*, [1947] 1 All E.R. 563; [1947] A.C. 628; [1947] L.J.R. 869; 176 L.T. 434; 111 J.P. 220; 2nd Digest Supp.
- (6) *Wilkes v. Wilkes*, [1943] 1 All E.R. 433; [1943] P. 41; 112 L.J.P. 33; 168 L.T. 111; 2nd Digest Supp.
- (7) *Angel v. Angel*, [1946] 2 All E.R. 635; 176 L.T. 90; 111 J.P. 14; 2nd Digest Supp.
- (8) *Shilston v. Shilston*, (1945), 174 L.T. 105; 2nd Digest Supp.
- (9) *Pulford v. Pulford*, [1923] P. 18; 92 L.J.P. 14; 128 L.T. 256; 27 Digest 307, 2846.
- (10) *Fitzgerald v. Fitzgerald*, (1869), L.R. 1 P. & D. 694; 38 L.J.P. & M. 14; 19 L.T. 575; *subsequent proceedings*, (1874), L.R. 3 P. & D. 136; 27 Digest 307, 2845.
- (11) *Wanbon v. Wanbon*, [1946] 2 All E.R. 366; 2nd Digest Supp.
- (12) *Evans v. Evans*, [1947] 2 All E.R. 656; [1948] 1 K.B. 175; [1948] L.J.R. 276; 2nd Digest Supp.
- (13) *Thomas v. Thomas*, [1948] 2 All E.R. 98; [1948] 2 K.B. 294.

H

- (14) *Hadley v. Perks*, (1866), L.R. 1 Q.B. 444; 7 B. & S. 375; 35 L.J.M.C. 177; 14 L.T. 325; 30 J.P. 485; 33 Digest 315, 322.
(15) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 2nd Digest Supp.
(16) *Littlewood v. Littlewood*, [1942] 2 All E.R. 515; [1943] P. 11; 112 L.J.P. 17; 167 L.T. 388; 2nd Digest Supp.

A APPEAL by a wife from a judgment of Mr. COMMISSIONER RICHARDSON, granting the husband a decree *nisi* of divorce on the ground of the wife's desertion. The husband also alleged cruelty in his petition, but the learned commissioner made no finding on that issue. The Court of Appeal reversed the decision of the commissioner, and ordered a new trial on the issue of cruelty. The facts appear in the judgment of BUCKNILL, L.J.

B *Norman Black* and *Miss A. F. Dixon* for the wife.
William Temple for the husband.

Cur. adv. vult.

Nov. 3. The following judgments were read.

C BUCKNILL, L.J. : This is an appeal from a judgment of Mr. COMMISSIONER RICHARDSON, granting a decree to Jasper Hopes of dissolution of his marriage to May Hope on the ground of her desertion for 3 years immediately preceding the presentation of the petition, which is dated June 27, 1947. In the petition there is also an allegation of cruelty by the wife which injured the husband's health. The learned commissioner in his judgment decided that the wife had deserted the husband since 1934. Having come to that conclusion he made no finding on the issue whether the wife had been guilty of cruelty.

D The parties were married in 1916. The husband is now 58 and the wife 53 years of age, and there are two daughters of the marriage aged 30 and 22. There has been no marital intercourse since 1934, when the wife started to occupy a separate bedroom. The immediate cause of that was that the husband had to leave for work very early, and objected to his wife coming to bed after he had retired there. After 1934, it does not appear from the evidence that he ever asked his wife for marital relations, or that she ever suggested it. Their friendship gradually ceased. The wife objected to the husband going out at night in connection with some concert party of which he was a member. She abused his friends, and appears to have done nothing for his comfort. The quarrels between them were so frequent that the husband said he often retired to his bedroom for the sake of peace. He alleged that she did no mending or washing of his clothes, and did no separate cooking for him. On the other hand, it appears from the evidence that he always had his meals, which were cooked by the wife, in the common dining room with the other members of the family, and, when not in his bedroom, shared the rest of the house with his wife and his daughters. On Jan. 24, 1947, he had a final round table conference with his wife and daughters, and he then complained of his wife's conduct and said he could not stand it much longer. He eventually left the home on May 17, 1947.

G The learned commissioner, in his judgment, pointed out that to justify a decree on the ground of desertion there must be an intention to end the conjugal society—such a course of conduct that the innocent party is compelled to leave the home. At the end of his judgment he said that he thought he was entitled to hold on the evidence before him that the wife, since 1934, had a deliberate purpose of abandoning the conjugal society. The husband admitted that the wife was a good mother to her children, and there was evidence that she was much crippled by rheumatism. The feud between the parents caused the daughters to some extent to take sides, the younger daughter giving evidence for her father, and the elder daughter giving evidence for her mother. It seems to me that the learned commissioner, in his judgment, did not distinguish between a case of actual desertion and a case of constructive desertion. If the facts justified it, the commissioner might have found that the case came within the

principle laid down in *Smith v. Smith* (1), and that the wife withdrew from cohabitation with the husband in 1934, or, at any rate, within 3 years of the petition. On the other hand, the commissioner might have found that the conduct of the wife compelled the husband to leave the matrimonial home. That, in my view, would be constructive desertion. In that case the desertion would start from the time when the husband left the house, in other words, only a month before he filed his petition. Therefore, on the issue of desertion, it seems to me that the husband cannot succeed unless he shows on the evidence that the wife physically deserted the husband for a period of 3 years before June 27, 1947. In my opinion, the evidence does not establish such desertion.

In *Pardy v. Pardy* (2), SIR WILFRID GREENE, M.R., when considering the question whether a separation which began by being consensual could acquire the character of desertion without a previous resumption of cohabitation said ([1939] 3 All E.R. 782):

"The word 'desertion' may describe an act, or it may describe a state. For the act of desertion both the *factum* of separation and the *animus deserendi* are required. A *de facto* separation may take place without there being an *animus deserendi*, but if that *animus* supervenes, desertion will begin from that moment unless, of course, there is consent by the other spouse."

This passage makes it clear that in the present case there must be the *factum* of separation before the wife can be said to desert her husband. The mere fact that the wife behaved in such a way to her husband as to indicate that she wished him to leave the house is not in itself desertion. If it were so a wife might be said to desert her husband although she shared the same bed and board with him, but in every other respect treated him as non-existent. On the question whether there can be desertion while the parties are under the same roof, I think the most helpful case is *Smith v. Smith* (1). The facts in that case were that the husband and wife were living in a house of which the whole basement was occupied by the husband's mother. After the husband and wife's final quarrel the husband left his wife's bedroom and made his home with his mother in the basement. He slept with his son on the first floor, leaving his wife in possession of the ground floor. He neither expected nor desired any services from his wife, but allowed her £1 a week. SIR BOYD MERRIMAN, P., sums up the position by saying that, although there was no physical separation between the basement and the ground floor, it was impossible in any real sense of the word to describe the husband as living with his wife. He, therefore, found that the husband had deserted the wife. It seems to me that the withdrawal of the husband to a separate part of the house distinguishes *Smith v. Smith* (1) from the present case, where there was no such withdrawal of the husband. The fact that he retired at times to his bedroom does not in itself make that room a separate part of the house. He and his wife and the daughters comprised one household. They shared the same living room, kitchen, stairs, passages and offices, and to say that in these circumstances the wife deserted the husband while they were so living is, in my opinion, to give the word "desertion" a very artificial meaning. I think the conclusion at which I have come is consistent with the decisions in the following cases.

In *Jackson v. Jackson* (3), the husband and wife lived in the same house, but the husband refused to sleep with his wife, and on that ground the wife applied to the justices for a separation order on the ground of desertion. The justices made the order, but, on appeal to the Divisional Court, SIR HENRY DUKE, P., said ([1924] P. 23):

"If there is abandonment by one of the spouses of the other, that is desertion. If one of the spouses causes the other to live separate and apart, that is desertion... I am not aware of any case in which it has

ever been said that desertion could be found upon notional grounds while the parties were living together. When one of the parties has deserted the other they are living separate and apart."

HILL, J., in the same case said (*ibid.*, 26) :

A "There may be desertion though the husband continues to live under the same roof with the wife, but in such case the facts must be very strong. They must show that the husband really causes the wife to live apart against her will—not only sleep apart, but to live apart."

B HILL, J., also referred to *Diver v. Diver* (4), decided by himself, which goes the farthest in deciding that ill-treatment of one spouse by the other while living together in the same house may amount to desertion. HILL, J., when referring to his judgment in *Diver v. Diver* (4) said (*ibid.*, 28) :

C "It appeared that not only was he insisting on sleeping in a separate room, but that he never spoke to the wife, that when the wife spoke to him he never answered her, and when she asked him why he so treated her, he knocked her down. It does not seem to me that in that case it was a very strong inference to draw that he had already begun his desertion two months before he left the house. The decree *nisi* which was granted in that case may also be supported by the fact that I may have found—I have no recollection whether I did, one way or the other—cruelty on the assault."

I infer from this concluding remark that HILL, J., was a little doubtful whether on reconsideration the facts in *Diver's* case (4) justified a finding "that the wife lived apart from her husband," and, therefore, deserted him.

D In *Weatherley v. Weatherley* (5) the simple issue was whether refusal of sexual intercourse could by itself amount to desertion. The House of Lords, affirming the Court of Appeal, held that it was not. In *Wilkes v. Wilkes* (6) the husband, after saying to his wife : "This is the end," never slept with her again, and refused to share her sitting room or to have meals with her. HODSON, J., held on the facts that the common home had been put an end to by the husband in E March, 1937, and he granted a decree to the wife on the ground of the husband's desertion. In *Angel v. Angel* (7), LORD MERRIMAN, P., in giving judgment in the Divisional Court on an issue of desertion, referred to *Smith v. Smith* (1) and *Wilkes v. Wilkes* (6), and said that these cases were rightly decided as instances of what must necessarily be the rare class of case where it is possible for one spouse or the other to assert desertion in spite of the fact that the spouses are F physically living in the same house. In *Shilston v. Shilston* (8), the husband and wife lived in the same five-roomed bungalow at all material times. After a violent quarrel the wife moved into a separate bedroom and denied the husband his marital rights. The husband kept his own rations in his own room, and the only meal he had in the bungalow was the breakfast which he cooked himself. At night he simply came home, and went to his bedroom and to bed. The wife G also by letters which she wrote to her husband made it clear that she did not intend to do anything for him or have anything to do with him. On these facts, BARNARD, J., held that the wife had deserted the husband because there was a complete abandonment by her of all her duties as a wife. The learned judge based his judgment partly on the statement by SIR HENRY DUKE in *Pulford v. Pulford* (9), that "desertion is not the withdrawal from a place, but H from a state of things." These remarks of SIR HENRY DUKE, however, were reconsidered by him in *Jackson v. Jackson* (3) ([1924] P. 25).

In *Pulford v. Pulford* (9) the facts were that the parties were married in 1883, and lived together for 10 months, when the wife was removed to an asylum as a person of unsound mind. She was not finally discharged until 1902. In 1892 the husband removed to London and bought a business there, lived under an assumed name, and started an adulterous intercourse with another woman. He knew where his wife was after her discharge and sent her money until 1905.

In 1922, the wife took out a summons against him for neglecting to maintain her. The summons was duly served on the husband, but no order was made at the hearing. A fortnight later a fresh summons was taken out charging him with desertion, and an order was made. On appeal to the Divisional Court, counsel on behalf of the husband argued that after the wife was taken to the asylum there was not any existing state of cohabitation to be determined, and he relied on LORD PENZANCE'S *dictum* in *Fitzgerald v. Fitzgerald* (10) (L.R. 1 P. & M. 697) that "desertion means abandonment, and implies an active withdrawal from a cohabitation that exists." SIR HENRY DUKE decided that in *Pulford's case* (9) the husband had deserted his wife during the whole period (presumably from the time when he started his adulterous intercourse) because "there had been a complete renunciation by him of every conjugal duty." SIR HENRY DUKE was reminded of his judgment in *Pulford's case* (9) when he was considering *Jackson v. Jackson* (3), and in his judgment he pointed out that in *Pulford's case* (9) the parties had lived together, but were at last living separate and apart, and that his observations were addressed to that question. In *Wanbon v. Wanbon* (11) the facts as stated ([1946] 2 All E.R. 366) by PILCHER, J., in his judgment that :

"More than 10 years ago the wife withdrew from the husband's bedroom and has ever since refused to have any marital relations with him. During this time the wife has never addressed a word to her husband except to find some fault with him ; she has refused to cook dinner for him, make his bed, mend his clothes or perform any wifely duty for him whatsoever."

The learned judge on these facts, although the evidence was that the husband and wife had lived, not only under the same roof, but also in the same household, granted the husband a decree on the ground of desertion. I must respectfully say that I find it difficult to reconcile this case with the principle laid down in the cases as to what constitutes desertion.

The cases to which I have referred establish that there may be desertion, although husband and wife are living in the same dwelling, if there is such a forsaking and abandonment by one spouse of the other that the court can say that the spouses were living lives separate and apart from one another. On the other hand, when husband and wife are living together, as they were in the present case, it seems that to grant a decree of divorce on the ground of conduct by the wife which *ex hypothesi* did not amount to cruelty and which did not amount to a life separate and apart from her husband would be to introduce a new ground for divorce. In my judgment, therefore, the decision of the learned commissioner in the present case cannot stand, and the appeal must be allowed. The issue whether the wife's conduct amounted to cruelty must be decided, and, in my opinion, the proper course to pursue is to order a new trial on that issue of cruelty before another judge.

DENNING, L.J. Since the housing shortage the innocent party in a matrimonial dispute is often forced to remain in the same house as the guilty party, because he or she has nowhere else to go or has not the means to go elsewhere. This has given rise to a number of cases where the innocent party has claimed maintenance or a divorce while they are both living under the same roof. The matrimonial offences of cruelty and adultery can, of course, be committed by the guilty party (and be not condoned by the innocent party) while they are living under the same roof, but, can the matrimonial offence of desertion be committed ? One of the essential elements of desertion is the fact of separation. Can that exist while the parties are living under the same roof ? My answer is "Yes." The husband who shuts himself up in one or two rooms of his house and ceases to have anything to do with his wife is living separately and apart from her as effectively as if they were separated by the outer door of a flat. They may meet on the stairs or in the passageway, but so they might if they each had separate flats in one building. If that separation is brought

about by his fault, why is that not desertion? He has forsaken and abandoned his wife as effectively as if he had gone into lodgings. The converse is equally true. If the wife ceases to have anything to do with, or for, the husband, and he is left to look after himself in his own rooms, why is not that desertion? She has forsaken and abandoned him as effectively as if she had gone to live with her relatives. The judges of the Divorce Division have adopted this realistic view with complete unanimity right from the decision of HILL, J., in *Diver v. Diver* (4) to the decision of the Divisional Court of the Probate, Divorce and Admiralty Division in *Angel v. Angel* (7). I find myself in agreement with all the decisions of the Divorce Division, except, perhaps, *Wanbon v. Wanbon* (11), where the parties were said to be still in one household. If that means that, although living at arms' length, they were still sharing the same living room, eating at the same table and sitting by the same fire, then I cannot agree with the finding of desertion. It is most important to draw a clear line between desertion, which is a ground for divorce, and gross neglect or chronic discord, which is not. That line is drawn at the point where the parties are living separately and apart. In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households, or, in other words, when they are no longer residing with one another or cohabiting with one another.

There is one case, however, which I cannot fit into a consistent body of law on this subject. It is *Evans v. Evans* (12). There the husband had bolted the doors of the house against the wife. She re-entered through the windows and afterwards lived in a different part of the house from him. The justices found that he had deserted her, a finding which was fully justified on the principle I have stated, and ordered him to pay maintenance for the wife and children. When the wife sought to enforce the order, the Divisional Court, by a majority, held it was unenforceable because, although the husband had deserted her and was still deserting her, she was still residing with him. That seems to me to be self-contradictory. How can anyone say that, at one and the same time, a wife is residing with her husband and that he has deserted her? She may be residing at her husband's house, but she is not residing *with* him. The puzzle does not end there. In *Thomas v. Thomas* (13), a husband had driven his wife out of the house and she obtained a maintenance order on the ground of his desertion. She afterwards returned to the house and occupied rooms in the house which were entirely separate from those occupied by him, a situation indistinguishable from that in *Evans v. Evans* (12). The Divisional Court held that she was still entitled to enforce her maintenance order because she had not resumed cohabitation with her husband. That means that the husband had deserted her and she was not cohabiting with him, but at one and the same time, if *Evans v. Evans* (12) is right, she was still residing with him. I cannot follow that. Indeed, there seems no good reason why Mrs. Thomas should have been able to enforce her order and Mrs. Evans should not. If Mrs. Evans, instead of getting back straight through the window, had stayed away a few nights so as to be able to say she had been "living apart" from her husband, she would, apparently, have been able to enforce her order just as Mrs. Thomas did: but, because she had nowhere else to go, she could not. It is impossible to suppose that the legislature intended such a result.

I think I can see how all this trouble has arisen. In *Evans v. Evans* (12) the Divisional Court were faced with an Act of Parliament which contained different phrases, "reside with" and "cohabit with," and they applied the well known rule of construction of legal documents that, if a draftsman uses different words, he presumably intends a different meaning. That, however, is by no means a safe guide to Acts of Parliament, as BLACKBURN, J., pointed out in *Hadley v. Perks* (14). The draftsman may change the wording simply to improve the style. The simple intention of the Summary Jurisdiction (Separation

and Maintenance) Act, 1925, was that a maintenance order was not to be enforceable while husband and wife were residing with one another or cohabiting with one another, but only while they were living apart or living separately and apart. This distinction is conveyed by various phrases. The parties must not be "residing with" one another. They must be "living separately and apart" or "living apart" from one another, or they must not be "cohabiting with" one another. All these phrases mean the same thing, to my mind. At least, I can see no sensible distinction between them. They all express the fact of separation. A

It seems also to have been assumed both in *Evans v. Evans* (12) and *Thomas v. Thomas* (13) that, before the Act of 1925, the wife, in order to get a maintenance order, had to show that she had quitted her husband's house. That was true in the case of cruelty or neglect, but not in the case of desertion. The Act of 1925 made no change in the law as to maintenance orders for desertion. In desertion the fact of separation was always necessary, but HILL, J., had previously pointed out in *Jackson v. Jackson* (3) ([1924] P. 26) that this might happen while the parties were living under the same roof. Before 1925, therefore, a wife in the position of Mrs. Evans could get a maintenance order for desertion and enforce it. If *Evans v. Evans* (12) is rightly decided, it means that the position of a deserted wife is worse since 1925 than before. I cannot think that the legislature intended such a result. B C

It may be said that it is unnecessary to consider *Evans v. Evans* (12), that that is a decision as to a maintenance order and not as to divorce, and that it turns on the wording of the Act of 1925 which is not in question here. I would point out, however, that desertion is desertion, whether so found by the justices or by the divorce judges, and it has the same meaning in the Summary Jurisdiction (Married Women) Act, 1895, as in the Matrimonial Causes Act, 1937. There are really only three choices, either to say that the line of the decisions in the Divorce Division is wrong, or to say that the decision in *Evans v. Evans* (12) is wrong, or to say that a deserted wife cannot enforce her maintenance order. Faced with this choice, I am of opinion that *Evans v. Evans* (12) was wrongly decided. Not only did CROOM-JOHNSON, J., dissent from it, but it has also been vigorously criticised by PROFESSOR GOODHART (64 L.Q.R. 8) and PROFESSOR GOWER. In my opinion, any wife in the position of Mrs. Evans is not only entitled to a maintenance order on the ground of desertion, but is also entitled to enforce it. D E

Relieved of *Wanbon v. Wanbon* (11) and *Evans v. Evans* (12) the law becomes consistent throughout this subject, and I agree with all that BUCKNILL, L.J., has said about it, and as to the application of it to the facts of this case. I agree that the appeal should be allowed. F

HARMAN, J. : Cruelty not being an issue in this court, the husband, in order to succeed in this suit, must show that his wife deserted him for a period of three years immediately preceding June 27, 1947, when the petition was presented. In fact, the husband and wife lived under the same roof till May, 1947, and, therefore, there can have been no desertion for three years in the ordinary sense of that word. It is, however, well settled now that there can be desertion, though the same roof has covered the parties even up to the time when the petition is heard, and the learned commissioner must have found in order to justify his decree that this was the state of things here. Desertion must connote, in my judgment, a real separation of one spouse from the other. There must be something more than a mere intention or design to end the conjugal society. That, no doubt, is the *animus*, but it is not the *factum* of desertion, and both elements are necessary, as the judgment of LORD GREENE, M.R., in *Buchler v. Buchler* (15) clearly shows. The learned commissioner accepted the evidence of the husband and rejected that of the wife, and I am prepared to accept that view, though I deprecate the language of hyperbole employed in G H

the statement that it was the wife's intention to make the husband's life "a veritable hell on earth." But whatever this phrase may mean, it does not suggest desertion to my mind, though it does suggest cruelty on which the learned commissioner made no finding. The degree of separation necessary to constitute desertion has been discussed in a number of cases. Of these I would wish to rely on *Smith v. Smith* (1), a case decided by the learned President after a careful argument addressed to him at his request on the part of the King's Proctor. This case decided that there could be separation where the spouses lived in different parts of the same house, but it is to be noted that there was nothing else in common between them. This case is described by PILCHER, J., in *Littlewood v. Littlewood* (16) as the strongest case on the subject. He declined to go beyond it, and it may be taken as the high-water mark. I cannot think that the same learned judge can have intended to extend the doctrine in the later case of *Wanbon v. Wanbon* (11), though the report of that case makes it seem as if he did so. This case was an undefended cause and is not fully reported. It may well be that the facts brought it within the limits of *Smith v. Smith* (1) and, if so, the decision was justified. If not, I should not be disposed to follow it. I am of opinion that the true criterion is that of *Smith v. Smith* (1), not, of course, that the facts must be the same, but the degree of separation, and judged by that the husband must here fail. In this case there was a family home, a common table was kept and a common life to some extent maintained, to such a degree indeed that to an outsider the position did not appear abnormal. I cannot think that in these circumstances the wife, however badly she behaved to her husband, was deserting him, and, if so, he cannot obtain a decree on that ground.

Appeal allowed with costs.

Solicitors: *Francis Miller & Steele*, agents for *Dickinson, Miller & Turnbull*, Newcastle-upon-Tyne (for the husband); *Smith & Hudson*, agents for *F. A. Waller & Hamilton*, Newcastle-upon-Tyne (for the wife).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Re CASTLE'S WILL TRUSTS. THE PUBLIC TRUSTEE v. FLOOD.

[CHANCERY DIVISION (Jenkins, J.), October 22, 26, 27, 1948.]

Will—"Surviving" two events—*Satisfaction of requirement by persons living at date of second event only.*

By his will, a testator, who died on Oct. 20, 1891, gave certain shares of his residuary estate on discretionary trusts for the benefit of his son, O.H.W., and his issue, and on the death of O.H.W. without issue to the testator's two daughters. He further directed that on the death of the daughters without issue the shares were to pass to H.C.F. for his own use and benefit absolutely. The will continued: "Provided always that if the said H.C.F. shall predecease me or shall be dead upon the happening of the event aforesaid [*i.e.*, the death of the survivor of the daughters without issue] leaving issue of his own surviving me and the happening of the aforesaid event then such issue shall take and if more than one equally between them as tenants in common the share which the said H.C.F. would have taken had he been then living." O.H.W. died on Feb. 24, 1931, without having been married, and H.C.F. died on Dec. 28, 1937, leaving issue. The first daughter of the testator died a spinster on Sept. 14, 1947, and on Nov. 22, 1947, the second daughter died, also a spinster. Issue of H.C.F. survived both daughters.

HELD: although *prima facie* a gift to a class "surviving" an individual meant a class living at his death and did not extend to persons coming

into existence after that date, where the requirement was that two events should be survived, it would properly be satisfied where a member of the class was living at the happening of the last of the two events specified, and, therefore, all issue of H.C.F. living on Nov. 22, 1947, even if born after the death of the testator, were entitled to take.

[AS TO VARIATION OF *Prima Facie* MEANING BY CONTEXT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 192-197, paras. 246-251; and FOR CASES, see A DIGEST, Vol. 44, pp. 574-581, Nos. 3911-4023.]

Case referred to :

- (1) *Elliot v. Joicey*, [1935] A.C. 209; 104 L.J.Ch. 111; *sub nom. Re Joicey*, *Joicey v. Elliot*, 152 L.T. 398; Digest Supp.

ADJOURNED SUMMONS to determine, *inter alia*, whether, on the true construction of a will, a gift to persons surviving the testator and a certain event conferred beneficial interests on persons born after the death of the testator but living at the date of the occurrence of the said event. JENKINS, J., held that such persons were entitled to benefit. B

Geoffrey Cross for the plaintiff (the Public Trustee).

Drcoop for the first three defendants (children of H.C.F. living at the happening of both events). C

J. A. Wolfe for the fourth defendant (representing issue of H.C.F. born after the testator's death).

Peter Foster for the fifth and sixth defendants (legal personal representatives of the testator's two daughters).

JENKINS, J. : Having regard to my answers to the previous questions the shares are now held on trust for the testator's nephew, the Rev. Henry Castle Floud, D

" Provided always that if the said Henry Castle Floud shall predecease me or shall be dead upon the happening of the event aforesaid leaving issue of his own surviving me and the happening of the aforesaid event then such issue shall take and if more than one equally between them as tenants in common the share which the said Henry Castle Floud would have taken had he been then living." E

The question I have to decide is whether the class of issue entitled to participate is confined to issue who were living at the death of the testator and also on Nov. 22, 1947, or whether it extends to the issue of the nephew who were living on Nov. 22, 1947, but were not born until after the death of the testator. The question turns on the meaning of the expression " surviving " in the will. F

It must be regarded as settled by the decision of the House of Lords in *Elliot v. Joicey* (1) that the *prima facie* and ordinary meaning of " surviving " means " living at and after the event " and requires that the person who is to survive shall be living both at and after a particular point of time. So, *prima facie* a gift to a class of individuals " surviving " an individual means a gift to persons of that class living at the event in question and does not extend to persons coming into existence after that event. That *prima facie* meaning of the word " surviving," therefore, suggests that no issue of the nephew survived the testator within the meaning of the will unless they were in existence at the death of the testator, but it is to be observed that here the requirement is that issue should survive, not a single, but a double, event, *i.e.*, both the death of the testator and the failure of the prior trust. It seems to me that this makes a material difference to the meaning of the word " survive." I think that, while fully accepting the meaning as living at the happening of the specific event, when the requirement is that two events should be survived, the word can be given proper effect by interpreting it as living at the happening of the last of the two events specified. When the requirement is to survive both the death of the testator and that of G H

another named person, that requirement is met when a person is living at the date of the last of the events which has happened. If the prior trust had failed during the lifetime of the testator and the nephew had had issue after such failure but in the testator's lifetime who survived the testator, it seems plain that such issue would be entitled to take by virtue of being alive at the death of the testator, the later event.

A I think that that is the proper construction of the word "surviving" in this case, and that I am justified, on the true construction of this will and without departing from the general meaning of the word "survive," in deciding that a person living on Nov. 22, 1947, although not born until after the testator's death, is entitled to benefit. This conclusion is born out by the general form of the provisions of the will. It is to be observed that the share which the issue is to take is the share which the nephew would have taken had he been living. B For these reasons I hold that on the true construction of this particular will the gift over operates in favour of all issue of Henry Castle Floud who were living on Nov. 22, 1947, including those not born until after the death of the testator.

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the estate.

C Solicitors: *Druces & Attlee* (for the plaintiff, and the fifth and sixth defendants); *Speechley, Mumford & Craig* (for the other defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Approved. FOWLER v. BRATT. [1950]
1 All E.R. 662.

D E. H. BENNETT AND PARTNERS v. MILLETT.

[KING'S BENCH DIVISION (Hilbery, J.), November 3, 1948.]

Agency—Estate agent—Commission—Contract to pay commission on introduction of a "purchaser able and willing to complete"—Able and willing purchaser found—Vendor's refusal to complete.

E After an interview with the defendant at which they were instructed to sell the defendant's house, the plaintiffs, a firm of estate agents, wrote to the defendant: "We confirm that in the event of our introducing a purchaser who is able and willing to complete the transaction, our commission will be in accordance with the recognised scale . . ." The court held as a fact that these words were the basis of the contract between the parties. F The plaintiffs introduced a prospective purchaser, whom the court found to have been at all times able and willing to purchase, but the defendant refused to complete. It was argued by the defendant that the qualification of the word "purchaser" in the plaintiffs' letter—"able and willing to complete the transaction"—was otiose and should be struck out, and, therefore, the plaintiffs had not performed the contract until they had introduced a purchaser who actually completed the purchase.

G HELD: the expression "a purchaser who is able and willing to complete the transaction" meant, not a person who did, in fact, ultimately purchase the property, but one who was prepared to purchase it at the seller's price, and, as the estate agents had found such a person, they were entitled to their commission.

H [AS TO REMUNERATION OF AGENTS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 256-263, paras. 431-436; and FOR CASES, see DIGEST, Vol. 1, pp. 488-503, 508-518, Nos. 1664-1728, 1753-1801.]

Cases referred to:

- (1) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
- (2) *Giddys v. Horsfall*, [1947] 1 All E.R. 460; 2nd Digest Supp.

ACTION for commission.

The plaintiffs were a firm of auctioneers and estate agents and they claimed commission alleged to be due from the defendant under an agreement dated June 17, 1947, on the introduction to the defendant of a purchaser able and willing to complete the purchase of certain premises known as St. Martin's, Mapledale Avenue, Shirley, Croydon. The defendant contended that, as he had withdrawn from the transaction before completion, there had been no purchase and the plaintiffs had not found a purchaser within the terms of the contract. The court held that the plaintiffs had found such a purchaser and were entitled to their commission. The facts appear in the judgment. A

Sir John Cameron for the plaintiffs.

P. St. John Back for the defendant.

HILBERY. J.: On June 16, 1947, the defendant walked into the offices in Croydon of the plaintiff firm to inquire about a property, a photograph of which he had seen in the window of the plaintiffs' premises. The plaintiffs are auctioneers and estate agents. After making some inquiries, purporting to be made on behalf of a friend, about this particular property, the defendant instructed the plaintiff firm to sell a property known as "St. Martins," No. 24, Mapledale Avenue, Shirley, Croydon. He gave particulars of this house which had four bedrooms and two reception rooms, and occupied one-third of an acre of ground, and he instructed the plaintiffs that the purchase price was £8,500 unfurnished, and £12,500 if sold with the furniture which was in it. The following day the plaintiffs wrote a letter dated June 17 in these terms: B C

"Dear Sir. St. Martins, Mapledale Avenue, Shirley. Further to your call at our offices this afternoon, we write to confirm and thank you for your instructions for us to dispose of the freehold of the above premises at a figure of £8,500, vacant possession to be given on completion of the purchase. We confirm that in the event of our introducing a purchaser who is able and willing to complete the transaction, our commission will be in accordance with the recognised scale of the Auctioneers and Estate Agents' Institute, namely, 5 per cent. on the first £300 of the purchase price, 2½ per cent. on the next £4,700, and 1½ per cent. on the residue. We should like to make an inspection of the property in the near future, and will telephone to you for an appointment as arranged with our Mr. Bennett." D E

Following that letter, which the defendant, undoubtedly, received, the defendant arranged a date on which the plaintiffs made their inspection of the premises and took all the particulars that they wished, and the plaintiffs entered the property on their books and advertised it in local newspapers. There was no demur by the defendant to the terms of that letter. No answer was sent by him to it, but following it he allowed the plaintiffs to go on busying themselves in an effort to find a purchaser for the property. I use that word "purchaser" in a neutral sense, and not as more descriptive of a person who is looking for a property which he is willing to buy than of a person who actually completes a purchase. Subsequently, the plaintiffs, with the consent of the defendant, allowed a sub-agent to seek a person able and willing to pay the price of the property, and they found a Mrs. Bell who was willing to pay what the defendant finally instructed the plaintiffs was his minimum price (£7,500) and Mrs. Bell paid a deposit of £750. I find as a fact that she was at all times an able and willing purchaser of the property at the price of £7,500. The correspondence shows that solicitors on each side were instructed, and, finally, notwithstanding the pressure which Mrs. Bell was bringing to bear on the defendant to go on with the matter to enable her to take possession, the defendant refused to do so because he could not find alternative accommodation for himself and his wife and probably also his furniture. F G H

In those circumstances the plaintiffs say (1) that they were employed to act on the terms of the letter of June 17; and (2) that, in accordance with

the terms set out in that letter, they have earned their commission on the scale which was also set out with particularity in the letter. In his defence, the defendant has raised more than one point. In the first place, he says: "My instructions were given at the interview, and they were to sell. I never contracted on the terms of the letter." In the second place he says: "The whole of the instructions to sell were at all times subject to this condition that I must have alternative accommodation. In other words, at all times I made it clear that I was only a seller for whom you could find a purchaser and in such way earn your commission if first I was found, or I found for myself, alternative accommodation." Lastly, he says: "Even if that is not right, and I am bound by the terms of the letter, then, as a matter of construction of that letter, you have not performed the services which you were employed to perform, and on which alone in accordance with the terms of your letter you are to be paid your commission."

[HIS LORDSHIP dealt with the defendant's first two contentions and held that the plaintiff firm were employed on the basis of their letter and that there had been no condition precedent to the sale that the defendant should have alternative accommodation. He proceeded:] The sole point in this case is the construction of the letter of June 17. It is odd, in face of the decision on the meaning of the word "purchaser" in *Luxor (Eastbourne), Ltd. v. Cooper* (1), and in contradistinction to it the decision of LEWIS, J., in *Giddys v. Horsfall* (2), that the letter in this case should have been written in this form. To put it shortly, in the *Luxor* case (1) the court held that where an agent contracts for a commission to be paid to him on finding a purchaser, he must find some one who, in fact, completes a purchase. In *Giddys' case* (2), where the agents stipulated for their commission as becoming payable to them in the event of their being instrumental in introducing a party prepared to purchase on the terms of the vendor's instructions, or on terms acceptable to him, the court held that the language there did not require the agents to find some one who actually completed a transaction of sale and purchase because the language was such that they could perform the duties they had to perform and earn their commission if they introduced a party prepared to purchase on the terms of the instructions given to them or on terms acceptable to the vendor. In this case, almost as though it were intended to set a fresh problem for the courts, the agents have used language which seems to fall somewhere between those two decisions, for here the words which the agents choose to use are: "We confirm that in the event of our introducing a purchaser who is able and willing to complete the transaction." Now, no person can be a purchaser in the strict sense of the word (and as construed by the House of Lords in the *Luxor* case (1)) unless he completes the purchase. He cannot complete the purchase unless he has been ready and willing to do it at all times. I cannot conceive of a purchaser who actually buys who was not ready and willing to buy and able to buy in as much as he pays the price which has been asked, and in consequence of that counsel for the defendant says that those words following the word "purchaser" in this contractual letter ought to be taken to be surplusage and merely otiose. He argues that those words should be struck out, and the contract should be construed strictly against the persons putting it forward. He says they have chosen to speak of a "purchaser," and that, for the reasons given, the qualifying words should be disregarded.

I have given careful consideration to that contention, but I do not think it would be right to give effect to it. Having considered these words very anxiously, in my view, the words "able and willing to complete the transaction" obviously indicate a qualification of the word "purchaser" which would not otherwise be there. To speak of a "purchaser" without any qualifying words, the courts have said, is to speak of one who actually does complete the contract of sale and purchase, but, in common parlance, one does not always speak of a purchaser in that limited sense of the word. "Buyer"

certainly is a word of description in many business firms for a person holding a general office of buying for the firm. Though he does not buy anything for months, he remains a buyer. In ordinary parlance, I think we do not use the word "purchaser" as necessarily restricted to a person who actually completes a transaction of purchase and sale, and here in this letter, I think, the very fact that they add the words "who is able and willing to complete the transaction" shows that they are speaking of some one who is in the character of a buyer—who is taking the part, if I may borrow an expression from the stage, of a buyer—and is in a position to complete the transaction, that is to say, to become in the full sense of the term as construed by the courts an actual buyer who has completed the transaction of purchase and sale. I think that those words are a clear indication that what the plaintiffs were offering was their services for introducing a person able to buy at the figure asked by the defendant—a person willing and able to complete the transaction so as to become, in the strictest sense of the word, the purchaser. I think these are words of qualification which can be given a sensible interpretation, and should be given a sensible interpretation in the circumstances. There must be judgment for the plaintiffs because I hold the view, in giving the words that construction, that they have earned their commission.

Judgment for the plaintiffs with costs.

Solicitors: *Kinch & Richardson*, agents for *Pringle & Co.*, Redhill (for the plaintiffs); *Clutton, Moore & Lavington*, agents for *A. Rawlence*, Croydon (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Applied. Re HOWELL (dec'd.). [1952] 1 All E.R. 363.

Re SHEPHERD. PUBLIC TRUSTEE *v.* HENDERSON AND OTHERS.

[CHANCERY DIVISION (Harman, J.), October 26, 27, November 5, 1948.]

Estate Duty—Legacy duty—"Further legacy . . . duty"—Settled legacy of £20,000—Duty payable on death of tenant for life—Payment out of capital of legacy or residue—Finance Act, 1947 (c. 35), s. 49.

The testator who died in 1919, bequeathed to the plaintiff (the sole surviving trustee) £20,000 upon trust to pay the income to his granddaughter, the first defendant, for life and on her death, in the event which happened, to her daughter, the second defendant, absolutely, and he directed the said sum of £20,000 be set aside and invested within three months from his death and to bear interest at 5 per cent. per annum from that date. By cl. 17, the testator declared "that all the before-mentioned legacies and specific and pecuniary bequests whether settled or otherwise . . . shall be paid free of all legacy and other death duties (if any) and that all such duties shall be paid out of my residuary estate." Clause 18 gave power to the trustees to provide for the payment of annuities by appropriation and so to free the residuary estate, which was, by cl. 19, given to the trustees upon the usual trusts for sale and conversion, and, by cl. 20, out of the moneys arising from such sale and conversion to pay his funeral and testamentary expenses and debts and legacies and "make provision for the payment of the annuities hereinbefore bequeathed and the duties on any legacies annuities or bequests bequeathed free of duty" and to hold the residue of the proceeds of sale and conversion in trust for such hospitals in London as his trustees should select.

Held: (i) on the construction of the will, the words conferring freedom from duties were confined to duties arising in consequence of the testator's

death and not in consequence of the dispositions made by his will, and, therefore, on the death of the life tenant estate duty would be payable out of the capital of the legacy of £20,000 and not out of the testator's residuary estate.

(ii) the effect of the further legacy duty imposed by the Finance Act, 1947, s. 47, was merely to raise the rate of legacy duty payable under the Legacy Duty Act, 1796, and the duty under both those Acts was payable out of residue.

[As to "FREE OF DUTY" PROVISIONS IN WILLS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 299-301, para. 312; and FOR CASES, see DIGEST, Vol. 21, pp. 37, 38, Nos. 235-243.

FOR THE FINANCE ACT, 1947, s. 49, see HALSBURY'S STATUTES, Vol. 40, pp. 507-509.]

Cases referred to :

- (1) *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601; 90 L.J.Ch. 322; 125 L.T. 146; 21 Digest 36, 226.
- (2) *Re Palmer, Palmer v. Palmer*, [1916] 2 Ch. 391; 85 L.J.Ch. 577; 115 L.T. 57; 21 Digest 35, 220.
- (3) *Re Laidlaw, Wilkinson v. Lyde*, [1930] 2 Ch. 392; 99 L.J.Ch. 463; 143 L.T. 761; Digest Supp.
- (4) *Re Jones, Lambert v. Colbourn*, [1928] W.N. 227; Digest Supp.
- (5) *Re Stoddart, Bird v. Grainger*, [1916] 2 Ch. 444; 86 L.J.Ch. 29; 115 L.T. 540; 21 Digest 37, 232.

ADJOURNED SUMMONS to determine whether, on the construction of a will, estate duty payable on the death of the first defendant, the life tenant of a settled legacy of £20,000 under the will, would be payable out of the capital of the settled legacy or out of the residuary estate of the testator, and whether legacy duty payable under (a) the Legacy Duty Act, 1796, and (b) under the Finance Act, 1947, s. 49 (being a duty which became leviable after the death of the testator) would be payable out of the legacy or residue. The judge ruled that estate duty was payable out of the legacy and legacy duty out of residue.

J. A. Wolfe, for the plaintiff (trustee under the will).

Winterbotham, for the first and second defendants, tenant for life and remainderman under the will.

Danckwerts, for the Attorney-General.

Curr. adv. vult.

Nov. 5. **HARMAN, J.**, read the following judgment. William Shepherd, with whose estate this summons is concerned, was a successful builder who died in 1919 leaving a large fortune of which he disposed by his will dated Mar. 19 of that year. Of this document the plaintiff is now the sole trustee, having been appointed by cl. 1. By cls. 3, 5, 6, 9 and 10 the testator bequeathed various pecuniary and specific legacies. By cl. 8 he authorised his trustees for a period of twenty years after his death to continue out of income to pay the charitable subscriptions which he had made in his lifetime. By cls. 11, 12, 13 and 14 the testator bequeathed annuities, some of them immediate and some deferred. By cl. 16 he bequeathed to his trustees the sum of £20,000 upon trust to invest it and pay the income to his granddaughter, the first defendant, during her life, and, after her death, in the event which has happened, to her daughter, the second defendant, absolutely (though the event was not certain at the testator's death), and he directed this sum of £20,000 to be set aside and invested within three months of his death and to bear interest at 5 per cent. per annum if not so invested. Clause 17 of the will reads as follows :

"I declare that all the before-mentioned legacies and specific and pecuniary bequests whether settled or otherwise and all the said annuities

whensoever payable shall be paid free of all legacy and other death duties (if any) and that all such duties shall be paid out of my residuary estate."

Clause 18 contained a power to the trustees to provide for the payment of annuities by appropriation and so to free the residuary estate which was, by cl. 19, given to the trustees upon the usual trusts for sale and conversion, and by cl. 20, the trustees were to pay his funeral and testamentary expenses and debts and legacies and

" . . . make provision for the payment of the annuities hereinbefore bequeathed and the duties on any legacies annuities or bequests bequeathed free of duty,"

and to hold the residue in trust for such hospitals in London as the trustees should select. That selection has not yet been made, and the Attorney-General appears here to represent the hospitals which may be hereafter selected.

I am asked to determine three questions : (i) whether the estate duty which will or may become payable at the death of the first defendant, as tenant for life of the settled legacy of £20,000, will be payable out of the capital of that legacy or out of residue ; (ii) a similar question as to legacy duty under the Legacy Duty Act, 1796 ; and (iii) a similar question as to what is called the " further legacy duty " under s. 49 of the Finance Act, 1947. These are all future questions, but I think there are sufficient reasons why I should decide them now.

I will deal with the estate duty first. The question is whether the words conferring freedom from duty are confined to duties (a) arising in consequence of or on the testator's death, or (b) extend to all duties arising in consequence of the dispositions made by his will : see the judgment of LORD STERNDALE, M.R., in *Re Wedgwood, Allen v. Public Trustee* (1). The answer to this is a question of construction depending on the particular will under consideration : see the judgment of LORD COZENS-HARDY, M.R., in *Re Palmer, Palmer v. Palmer* (2) ([1916] 2 Ch. 398), and the judgment of PICKFORD, L.J., at p. 401. It is, therefore, a question of ascertaining the testator's intention from the words he has used, but it is fair to say that there is by now a presumption that a testator only intends to provide for such duties as are payable by reason of his own death and that to rebut this presumption a clear intention to provide for further duties must be found : see the judgment of EVE, J., in *Re Laidlaw, Wilkinson v. Lyde* (3). There has been a great number of cases on this question, and I find it stated in the 1946 edition of HANSON ON DEATH DUTIES, at p. 139, that, since the decision in *Re Wedgwood* (1), there has only been one English case in which the wider construction has been adopted. That case is *Re Jones, Lambert v. Colbourn* (4). There the words were so wide, namely, " the due carrying out or giving effect to the dispositions made " by the will, " or incorporated in or incidental to the due administration of my estate," that they left no room for doubt, but, short of some such expression, it is hard now to think of a form of words which would be construed in the wider sense. In *Re Stoddart, Bird v. Grainger* (5), SARGANT, J., took the wider view, relying on the direction that legacies should be " paid and enjoyed " free of duty, and a further direction to the trustee to " provide for " all duties. Words hardly less strong appear in *Re Laidlaw* (3), but EVE, J., did not feel that they justified him in taking the wider view. He relied for the contrary view on an indication that the testator there anticipated that the amount of his residue would be known within a short time.

What, then, are the indications here ? Clause 17 simply refers to payment and not to enjoyment, and this is in favour of a narrow view. On the other hand, cl. 20 uses the words " make provision for " which were so much relied on by SARGANT, J., in *Re Stoddart* (5), and it is urged on me that the present testator clearly contemplated that the administration of his estate would remain open for a long time, having regard, in particular, to the authority

given to his trustees to continue for twenty years to pay charitable subscriptions, and that, therefore, the argument as to convenience has no force. On the other hand, there is a positive direction to set apart this £20,000 fund at once, and that has always been taken as an indication that no further calls on residue shall come from that quarter. There is, in addition, the authority to appropriate for the rest of the annuities, and it is urged that the direction about making provision for duties is satisfied by the legacy duty with which

A I shall have to deal under Question 2. I come to the conclusion that the narrower view is right, and that, when the testator directed that this legacy should be paid free of duty, he referred to the period when it was paid to the trustees by his executors, and it matters not that at that time the executors and trustees were the same persons. Consequently, I answer Question 1 by holding that the duty falls on the legacy.

B As to Question 2, it was not disputed that the 1 per cent. legacy duty under the Legacy Duty Act, 1796, which will arise on the death of the first defendant, is payable out of residue. The reason for this is explained in *Re Wedgwood* (1), and the position is well settled. Legacy duty, where payable at different rates on a settled legacy, is not exigible on the testator's death except on the value of the first life interest, but it is, nevertheless, a sum owing to the Crown

C *debitum in praesenti solvendum in futuro*. Freedom from this duty was, therefore, enjoined by the will on any view, and residue must bear it.

Question 3 is necessarily a novel one. The Finance Act, 1947, s. 49, imposed what is called "a further legacy duty," and it is said that this, not having been a duty which arose or was charged at the testator's death, is a future duty and falls into line with the estate duty under Question 1 and not the legacy duty under Question 2. If this be right, it results in one of those absurdities arising out of a subtlety of the law which makes it stink in the nostrils of the public who cannot understand why what is in effect one half the legacy duty should be drawn out of one fund and the other out of another. I say "in effect" because in practice the section doubles the rate of legacy duty, and the event has happened which LORD STERNDAL, M.R., in *Re Wedgwood* (1), considered a bare possibility so unlikely as to be negligible. In my judgment, this is the effect of the new section at law as well as in practice. I hold that the so-called new duty is merely a raising of the rate of the old duty and that the two fall on the residue together.

Costs to be levied as between solicitor and client to be paid out of the residue.

F Solicitors: *Moon, Gilks & Moon* (for the plaintiff, the public trustee); *Savory, Pryor & Blagden* (for the first and second defendants, legatees under the will); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

WARREN v. HENLYS, LTD.

G [KING'S BENCH DIVISION (Hilbery, J.), November 8, 9, 1948.]

Master and Servant—Liability of master to third persons for acts of servant—Acts within scope of authority and course of employment—Threat by garage customer to report employee—Assault on customer by employee.

H Erroneously believing that the plaintiff had tried to drive away from the garage without paying or surrendering coupons for petrol which had been put into the tank of his car, a petrol pump attendant used violent language to him. The plaintiff paid his bill and gave up the necessary coupons, and, after calling the police, told the pump attendant that he would report him to his employers. The pump attendant then assaulted and injured him. In an action for damages for personal injury by the plaintiff against the employers:

HELD: the defendants were not liable for the wrongful act of their

employee, since that act was one of personal vengeance on the employee's part and was not done in the course of his employment, it not being an act of a class which the employee was authorised to do or a mode of doing an act within that class.

Observations of BANKES and SCRUTTON, L.JJ., in Poland v. Parr (John) & Sons ([1927] 1 K.B. 240, 243), *applied*.

[AS TO THE MASTER'S LIABILITY FOR WRONGFUL ACTS OF HIS SERVANT IN THE COURSE OF EMPLOYMENT, see HALSBURY, Vol. 22, pp. 225-230, paras. 403-409; and FOR CASES, see DIGEST, Vol. 34, pp. 125-131, Nos. 964-1006.]

Cases referred to:

- (1) *Poland v. Parr (John) & Sons*, [1927] 1 K.B. 236; 34 Digest, 117, 890.
- ✓ (2) *Dyer v. Munday*, [1895] 1 Q.B. 742; 64 L.J.Q.B. 448; 72 L.T. 448; 59 J.P. 276; 34 Digest 130, 996.
- ✓ (3) *Bayley v. Manchester, Sheffield & Lincolnshire Ry. Co.*, (1873), L.R. 8 C.P. 148; 42 L.J.C.P. 78; 28 L.T. 366; 8 Digest 113, 765.

ACTION for damages for personal injuries.

The defendants were the occupiers of premises known as Henly's Garage on the North Circular Road, London, where they employed Thomas Edwin Beaumont as their servant for the purpose *inter alia* of selling petrol to motorists, receiving payment in cash, and accepting the surrender of petrol coupons. On May 12, 1947, Beaumont assaulted the plaintiff by a blow on the face with his fist, thereby causing him injury, loss and damage. At the hearing the defendants called no witnesses, but contended that the assault and beating were not carried out by Beaumont in the course of his employment by them and that he was not acting in pursuance of any duty owed to them by him, and that, accordingly, they were under no liability for the assault. HILBERY, J., held that there was no evidence that Beaumont was acting in the course of his employment when he committed the assault. He, therefore, discharged the jury and gave judgment for the defendants. The facts appear in the judgment.

Beney, K.C., and *George Pollock* for the plaintiff.

Paull, K.C., and *Cassels* for the defendants.

HILBERY, J.: Not without some hesitation, I have come to the conclusion, that there is no evidence before the court on which a jury could be entitled in law or in fact to fix the defendants with vicarious responsibility for the act of their servant, Beaumont, of which the plaintiff complains.

The plaintiff arrived at Messrs. Henlys', the defendants', garage and service station on the North Circular Road at about 10.30 p.m. on May 12, 1947. He was driving with his wife in a utility van and he was followed by two of the artistes of his troupe in a Ford truck. He drove into the service station with a view primarily to getting some air pumped into a tyre, but he asked for petrol to be put in his utility van. Beaumont, who was the defendants' pump attendant, served the petrol to the utility van. While he was doing so, the plaintiff ascertained from his men in the Ford truck that they, too, would be glad to have some petrol put into that truck. When the utility van had received the petrol ordered for it, the plaintiff got into the driving seat and began to drive away from the pump, to make room for the Ford truck to draw ahead. The plaintiff, when he drove off, was followed hotly by Beaumont, who had made up his mind, apparently, that the plaintiff intended to abscond with the utility van and the petrol without giving money or coupons for it. It was an entirely erroneous conclusion, but he ran after the plaintiff, and, using violent language to him, called on him to stop. The plaintiff stopped, and was incensed at the incivility with which he was being treated by Beaumont. He demanded petrol for his Ford truck in addition to that which had been put into the utility van, but it was refused by Beaumont and they repaired to the cash desk where the plaintiff paid for the petrol he had had and delivered

A the appropriate coupons. The plaintiff came away from the cash desk, and, seeing a police car going by, he jumped into his utility van, drove after it, stopped it, and brought it back with Police-constable Simonds. The plaintiff was in a violent temper and the other members of his party were all very excited, and Simonds asked Beaumont what his version was. Beaumont said: "This man [the plaintiff] came into the garage a few minutes ago and asked me to put five gallons into his utility. This I did and he then got into the driver's seat, started up, and commenced to pull away. As he had not given me any money or coupons for the petrol, I shouted for him to stop, which he did. He then started shouting about my conduct and incivility to him and said he would report me." "I asked the plaintiff if he agreed with this," said the constable, "and the plaintiff said 'That is quite right,' but the plaintiff said that Beaumont also swore at him and he added: 'If you are not going to do anything, I shall certainly report his conduct to Henlys, as I am a good customer of theirs.'" The constable tells me that he thought he had to some extent soothed the parties to the argument, and he turned to go to his car, and as he was about to step into it he heard a scream. He looked round and the plaintiff was lying on his back on the concrete, unconscious. The officer thereupon went back to Beaumont, asked him to account for this, and took down the statement which Beaumont made to him. Beaumont said: "I asked Warren if he was going to report me to the firm and he said 'Yes,' so I gave him one on the chin to get on with. I hope he is not hurt too much." The constable thereupon took Beaumont into custody. Those words of Beaumont are of high importance. He is there giving in his own words and in his own way his reason for having struck the blow.

D On those facts certain things seem clear. The plaintiff had had his car filled with petrol. Beaumont had performed the duty he was there to perform regarding the petrol and had seen to it that the customer paid. The only reasonable inference that can be drawn is that, although the Ford truck had pulled up, no petrol was going to be delivered to that truck. So far as the plaintiff and Beaumont were concerned, the plaintiff's business with the defendants was at an end. He had paid his money and handed over the coupons. He had actually gone off thereafter on a matter which concerned him personally in his relations with Beaumont—that is, he had gone for the police and made a complaint to them about Beaumont's conduct towards him, and when the policeman said he was not taking action because he did not consider it a police matter, the plaintiff had actually turned to go to his car to leave, clearly, I think, showing—and no jury could otherwise find—he had finished with the defendants at that stage. Then Beaumont speaks to him, asks him if he is going to report him, and, hearing that the answer is in the affirmative, gets hold of him, twists him round and strikes him, an act of personal retribution for something which Beaumont thought would affect him personally.

G Is there any evidence in those circumstances to go to a jury on the case which is sought now to be made, to place vicarious responsibility for this act on the defendants? Without going through a lot of authorities, it seems to me that I cannot do better than adopt the general statement of the law expressly cited and approved by the Court of Appeal through the mouth of BANKES, L.J., in his judgment in *Poland v. John Parr & Sons* (1) ([1927] 1 K.B. 240). It is a statement of law which is to be found in SALMOND ON TORTS, 10th ed., p. 89. It is in these terms:

“A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master.”

It is equally accurately said in SALMOND a little further on (p. 90), when dealing with the same topic :

" . . . if the unauthorised and wrongful act . . . is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible : for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

I think that accurately states the law, so I ask myself : Is there any evidence here on which a jury could find that this assault, committed in the circumstances which I have just given, was so connected with the acts which the servant was expressly or impliedly authorised to do as to be a mode of doing those acts ? It seems to me the answer must be "No." Of course, as in *Dyer v. Munday* (2), if a manager, who, in the course of the very duties in the business goes to recover furniture, so conducts himself in recovering the furniture that he commits an assault, that is a tortious mode of doing the class of act which he is authorised to do. Without multiplying the ways in which this matter has been expressed and judges have sought to mark the limitations or bounds within which a master is to be held liable, I may use one more quotation. It is from SCRUTTON, L.J., in *Poland v. John Parr & Sons* (1) ([1927] 1 K.B. 243) :

"To make an employer liable for the act of a person alleged to be his servant the act must be one of a class of acts which the person was authorised or employed to do. If the act is one of that class the employer is liable, though the act is done negligently or, in some cases, even if it is done with excessive violence. But the excess may be so great as to take the act out of the class of acts which the person is authorised or employed to do."

Clearly, there is no evidence here that this act belonged to the class of acts that Beaumont was authorised to do. In extension of what SCRUTTON, L.J., has said, I have also examined the matter in the light of that statement of the law which I have already read from SALMOND ON TORTS, so as to ask whether, although it was not of the class of acts which Beaumont was authorised to do, it was so connected with that class of acts as to be a mode of doing some act within that class. It seems to me that it was an act entirely of personal vengeance. He was personally inflicting punishment, and intentionally inflicting punishment, on the plaintiff because the plaintiff proposed to take a step which might affect Beaumont in his own personal affairs. It had no connection whatever with the discharge of any duty for the defendants. The act of assault by Beaumont was done by him in relation to a personal matter affecting his personal interests, and there is no evidence that it was otherwise. Counsel for the plaintiff has relied strongly on the passage so often cited from the judgment of WILLES, J., in *Bayley v. Manchester, Sheffield and Lincolnshire Ry. Co.* (3), where WILLES, J., said (L.R. 7 C.P. 420) :

"A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done ; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done ; provided that what was done was done, not from any caprice of the servant, but in the course of the employment."

It is unfortunate the words "in the course of the employment" seem to have given rise to so much difficulty, but, if one thinks of the course of the employment as meaning, coupling that phrase with what SCRUTTON, L.J., said, in the course of doing an act which was one of the class of acts which the servant was authorised or employed to do, the matter becomes reasonably clear. In

those circumstances, it is equally clear what WILLES, J., is meaning to indicate by the proviso that what is done by the servant must be done, not from any caprice on his part, but in the course of his employment. I ventured, in the course of argument, to say that "caprice" sometimes suggests a lightness in the conduct of the servant, while the tortious acts in question may be grave and done by a servant for his own personal ends or advantage or to satisfy, perhaps, his own personal malice or desire for revenge, as in this case.

In the circumstances, I cannot see any evidence on which a jury could be asked to find that the defendants were responsible, and there must be judgment for the defendants.

Judgment for the defendants with costs.

Solicitors : *Kenneth Brown, Baker, Baker* (for the plaintiff) ; *Simon, Haynes, Barlas & Cassels* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A/S TANKEXPRESS v. COMPAGNIE FINANCIERE BELGE DES PETROLES S.A.

[HOUSE OF LORDS (Lord Porter, Lord Wright, Lord Uthwatt, Lord du Parcq, Lord Morton of Henryton), June 8, 9, 11, 14, 15, 16, 17, and November 9, 1948.]

Charterparty—Hire—Default in payment—Method of payment agreed between parties—Extrinsic evidence to prove method.

By a charterparty, dated Mar. 18, 1937, shipowners let the vessel P. to charterers for 7 years at a monthly rate of hire commencing on the date of delivery. Clause 11 of the charterparty provided that : "Payment of the said hire is to be made as follows : In cash monthly in advance in London. In default of such payment the owners shall have the faculty of withdrawing the said vessel from the service of the charterers, without prejudice to any claim they (the owners) might otherwise have on the charterers in pursuance of the charter." The vessel was delivered on the 27th of the month. On Sept. 3, 1939, the vessel was in Venezuela and certain disputes arose between the owners and charterers on the outbreak of war. The disputes were settled on Sept. 25, 1939, and on that date, in accordance with the practice thitherto always followed, the charterers sent to Hambro's Bank in London a cheque for the amount of hire due on Sept. 27, and notified the owners at Oslo and their broker in Paris of this payment. Owing to delay in post caused by war conditions, the cheque was not received by Hambro's Bank until Oct. 3. On Sept. 29 the owners telegraphed Hambro's Bank asking if they had received the remittance, and on Sept. 30 the bank replied stating that they were unable to trace that the payment had been made. The owners, thereupon informed the charterers that the hire had not been received and that they considered the charterparty cancelled. The matter was submitted to arbitration and the arbitrator found *inter alia* : "That the accepted method between the parties during the currency of the charter with regard to the payment of hire, had been for the charterers to make the payment of hire in London at the office of Hambro's Bank, Ltd., by sending a cheque in favour of Hambro's Bank, Ltd. . . . to be placed by them to the credit of the owners with the Kristiana Folkbank, Oslo . . . The payment of hire had been regularly and properly paid in this way during the currency of the charter, and had always been paid on its due date until the payment of the hire due on Sept. 27, 1939."

Held : if payment on the due date had not been excused by special circumstances payment even a day late would not have protected the

charterers even though no blame or fault could have been imputed to them : *Nova Scotia Steel Co., Ltd. v. Sutherland Steam Shipping Co., Ltd.* (1899) (5 Com. Cas. 106), *disapproved* ; but extrinsic evidence was admissible to prove the method of payment accepted by both parties (*dictum* of LORD DAVEY, in *Bank of New Zealand v. Simpson* ([1900] A.C. 187 ; 82 L.T. 104), *applied*), namely, payment to Hambro's Bank by cheque posted at such time as would in the ordinary course of post reach London on the 27th of the month, and the charterers, who were not to blame for the delay in the receipt of the payment in London, had acted in accordance with that method with the result that, in the absence of notice that in future they required more strict compliance with cl. 11 of the charterparty, the owners were not entitled to cancel the charterparty on the ground that payment of hire by the charterers had been delayed.

Panoutos v. Raymond Hadley Corporation of New York ([1917] 2 K.B. 473 ; 117 L.T. 330), *applied*.

Per LORD DU PARCQ : I have not been persuaded that a charterer who has agreed to pay a month's hire in advance is absolved from making the payment if, although the owners have not sought to repudiate the contract, the ship is not, in fact, at the disposal of the charterers for some days immediately before and after the first day of the month of hire. It would be more reasonable to argue that, if the hire is not paid "in advance" the owners are absolved from giving those services in respect of which the hire has to be paid.

Observations by LORD MORTON OF HENRYTON on the form of the cessation of hire clause in the charterparty.

[AS TO WITHDRAWAL OF SHIP IN DEFAULT OF PAYMENT, see HALSBURY, Hailsham Edn., Vol. 30, pp. 299, 300, para. 493 ; and FOR CASES, see DIGEST, Vol. 41, p. 363, Nos. 2107-2114.]

Cases referred to :

- (1) *Nova Scotia Steel Co. v. Sutherland S.S. Co.*, (1899), 5 Com. Cas. 106 ; 41 Digest 363, 2111.
- (2) *Bank of New Zealand v. Simpson*, [1900] A.C. 182 ; 69 L.J.P.C. 22 ; 82 L.T. 102 ; 17 Digest 325, 1364.
- (3) *Macdonald v. Longbottom*, (1860), 1 E. & E. 987 ; 29 L.J.Q.B. 256 ; 2 L.T. 606 ; *affg.*, (1860), 1 E. & E. 977 ; 17 Digest 325, 1357.
- (4) *Duff Development Co. v. Kelantan Government*, [1923] 1 Ch. 385 ; 92 L.J.Ch. 273 ; 129 L.T. 290 ; *on appeal, sub nom. Kelantan Government v. Duff Development Co.*, [1923] A.C. 395 ; 21 Digest 618, 2059.
- (5) *Panoutos v. Raymond Hadley Corp'n. of New York*, [1917] 2 K.B. 473 ; 86 L.J.K.B. 1325 ; 117 L.T. 330 ; 12 Digest 434, 3516.

APPEAL from an order of the Court of Appeal.

A dispute having arisen between the owners of the Norwegian tanker, *Petrofina*, and charterers whether the owners were entitled to cancel a charterparty dated Mar. 18, 1937, between the parties, the arbitrator, subject to a Case stated by him for the opinion of the court, found that the owners were entitled to withdraw the vessel. The award was set aside by ATKINSON, J., who made an award in favour of the charterers. An appeal from this decision came before a Court of Appeal consisting of two Lords Justices, and, they being divided in opinion, the judgment of ATKINSON, J., was affirmed. The owners appealed to the House of Lords who now dismissed the appeal. The facts appear in the judgments.

The House took time for consideration.

Le Quesne, K.C., and *Ashton Roskill* for the appellants.

Sir William McNair, K.C., and *Eustace Roskill* for the respondents.

Nov. 9, 1948. **LORD PORTER**: My Lords, this appeal comes to your Lordships from the Court of Appeal consisting of two Lords Justices, who differed as to the result to be arrived at, and, consequently, the finding of the learned judge who tried the case was confirmed. The dispute concerns the right of the owners of the Norwegian tank vessel Petrofina to withdraw that vessel from the service of the charterers from and after Sept. 30, 1939.

A By a charterparty dated Mar. 18, 1937, the owners let that vessel to the charterers for 7 years. Under that charterparty the rate of hire was 5s. 6d. per ton on the vessel's dead weight capacity commencing on and from the day of her delivery and at and after the same rate for any part of a month, and was to be paid in cash monthly in advance in London. In default of such payment the owners were to have the faculty of withdrawing the vessel from the service of the charterers: By cl. 13 of that charterparty it was provided that the whole reach of the vessel's holds, decks and burthen should be at the charterers' disposal. B By cl. 14 the captain was to prosecute his voyages with the utmost despatch. By cl. 16 he was to be under the orders and direction of the charterers as regards employment, agency or other arrangements. By cl. 27, in the event of deficiency of men or stores, repairs, breakdown of machinery or boilers (whether partial or otherwise), collision or stranding preventing the efficient working of the vessel C for more than 48 hours, or breach of orders or neglect of duty on the part of the captain causing delay, the payment of hire was to cease from the commencement of such loss of time until the vessel should again be in an efficient state to resume her service. Clause 34 contained the usual exceptions in favour of the owners, but ended by providing that nothing in it should limit the charterers' right to suspension of hire for any period the vessel might not be at the charterers' D disposal for a period exceeding 48 hours. The charterparty also contained an arbitration clause and incorporated the Chamber of Shipping War Clause and a special war clause both of which made provision as to the mutual obligations of the parties in the event of war breaking out during the currency of the charter, but their contents are immaterial so far as this case is concerned and it is not necessary to set out their terms.

E On Sept. 3, 1939, the vessel was in the neighbourhood of Venezuela, a dispute took place between the owners and charterers with regard to the voyage which the charterers then intended to make, and the owners declined to allow the vessel to be at the charterers' disposal until this dispute had been settled. Eventually, however, it was settled on Sept. 25, 1939, at which time the vessel was lying in F Guiria roadstead in ballast, the captain having received instructions from his owners not to commence loading until instructed by them. The settlement was effected by two telegrams both dated Sept. 25—the first of which was sent by the owners to the charterers in the following terms:—

G “Yours Mejlaender we awaiting your telegraphic confirmation direct that Petrofina not to be sent to belligerent ports without our consent stop further understood we cover kroner 4½ million your account any delay caused at Venezuela not to be considered off hire stop we reserve right divert vessel safe ports if agreement discussed Copenhagen not reached telegraph.”

The reply was in the following terms:—

H “Confirm Petrofina not to be sent to belligerent ports without your consent stop other terms your cable all right stop please hurry despatch.”

Thereupon the owners on the same date again telegraphed to the charterers: “Yours to-day instructed master to commence loading,” and followed this up with a telegram to the master running “Commence loading for Lisbon.” Unfortunately, that cable, which was addressed to “Master Petrofina c/o Stanocoven Guiria,” never reached the master with the result that the ship was never placed at the charterers' disposal for loading. The owners had been requested by the

charterers on Sept. 17 to cable the captain c/o Stanocoven Caripito and did send one cable so addressed on Sept. 19, but all other cables were addressed to him c/o Stanocoven Guiria and with the exception of the cable of Sept. 25 reached him safely. That cable, by some mistake, was delivered to the charterers' agent at La Guaira who thought it referred to a vessel about to load at that port and awaited her arrival. The result was that the master was, so far as he knew, still under orders not to allow the charterers to load. The vessel appears to have been delivered to the charterers on the 27th of the month. Accordingly, as soon as the dispute had been settled, the charterers despatched from Brussels to Hambro's Bank, Ltd., a letter containing a cheque for £3,766 13s. 0d., being the agreed net amount due on Sept. 27 for the month's hire in advance, and by other letters informed the owners at Oslo and their brokers in Paris of the despatch of the cheque. In so doing they were acting in accordance with the procedure previously adopted in transmitting the hire. The letter, however, was not received by Hambro's Bank until Oct. 3 and meanwhile, on Sept. 29, the owners telegraphed to them in London: "Have you received Petrofina hire from Compagnie Financiere—please telegraph yes or no eventually stating amount." To this telegram Hambro's Bank replied on Sept. 30: "Yours yesterday cannot trace receipt of hire Petrofina." (In fact, the remittance was not received until Oct. 3 owing to the delay in post caused by war conditions and was then returned on the owners' instructions by the bank to the charterers). On receiving this telegram the owners telegraphed to the charterers: "Accordance telegram received from Hambro's Bank to-day hire not received consequently consider charterparty cancelled" and to the captain: "90 Stanocoven Guiria. Hire not paid stop loading await instructions acknowledge." This message was received by the master on Sept. 30. The charterers did not accept the owners' claim to cancel and replied by a telegram saying: "Cannot understand your telegram payment hire having been made as usual according our letter 25th. Hold you responsible for all eventual damage."

In addition to the matters stated above the arbitrator also found (i) that the practice between owners and charterers was for the latter to pay the hire on the 27th of each month deducting from the hire any amount for time off hire during the currency of the previous month, (ii) that both parties were unaware that in consequence of the non-receipt of the telegram of Sept. 25 the master had not placed the vessel at the disposition of the charterers, and (iii) that the accepted method between the parties during the currency of the charter with regard to the payment of hire had been for the charterers to make payment of hire in London at the office of Hambro's Bank by sending a cheque in favour of that bank, drawn on the Italo-Belgian Bank of London, to be placed by them to the credit of the owners with the Kristiana Folkbank, Oslo, and the payment of hire had been regularly and properly paid in this way during the currency of the charter and had always been paid on its due date until this payment of the hire due on Sept. 27. On these facts and findings the arbitrator, subject to a Case which he stated, found that the owners were entitled to withdraw the vessel. This award was set aside by ATKINSON, J., who upheld the alternative award in favour of the charterers. From his decision an appeal was taken to the Court of Appeal which, owing to the illness of SCOTT, L.J., consisted of two Lords Justices and, they being divided in opinion, the judgment of ATKINSON, J., was affirmed.

My Lords, in these circumstances the case for the owners can be put in the simplest possible terms. The charterparty, they say, requires payment on a specific date which, in the events which happened, is the 27th of each month with the right of withdrawal of the ship if payment is not made on that date; the charterers failed to pay on the due date; and, consequently, the ship was rightly withdrawn. It matters not that the charterers carried out their part in the way usually adopted. Their duty was to pay in London on the due date and

they have not done so. The charterers put forward a number of arguments in answer to this claim. They say, first, that the right of withdrawal only arises if they are in default, and, having paid in the usual and recognised way, they are not in default though, in fact, their cheque did not reach Hambro's Bank on the 27th of the month. Secondly, that, even assuming that their obligation was to place a cheque in the hands of Messrs. Hambro in London on that date, the owners being themselves in default by withholding the services of the ship, were not in a position to withdraw those services. Thirdly, that default implies a deliberate act and does not include an accidental omission for which they were in no way to blame. Fourthly, following the decision of BIGHAM, J., in *Nova Scotia Steel Co. v. Sutherland Steam Shipping Co.* (1), they did pay as near the due date as their contract compelled, and, finally, that in order to make the settlement of Sept. 25 work, a term must be implied that a payment made in the ordinary course immediately on its conclusion would be in time.

My Lords, it is a commonplace that the phraseology still adopted in the case of the charter of a ship where her services are put at the disposal of a charterer but she is not demised are deceptive. The ship is not leased or withdrawn. Her services and that of her crew are put at the disposal of the charterers when the charter begins and when the withdrawal of the ship is spoken of it merely means that those services are no longer supplied. Consequently, so the charterers contend, the owners are *prima facie* in breach of their obligations if they withdraw those services, and in the present case there is no finding which excuses them.

My Lords, whichever party may be right in the dispute which took place at the end of September, I can find no provision in the charterparty which would entitle the owners to withhold the services of the ship at any rate after it was settled on Sept. 25, but the fact that they instructed the captain not to load does not necessarily absolve the charterers from the obligation to pay the advance hire on the stipulated date. It would only do so if the obligations of furnishing the ship and paying hire were mutually inter-dependent. It was maintained on behalf of the charterers that the owners did more than withhold their vessel temporarily and that in substance they renounced the charterparty and thereby excused the charterers from further performance until the dispute was cleared up and the mutual obligations of the charter again resumed. I doubt, however, whether such a state of affairs has, in fact, been established and, even if it had, I doubt whether there is any half-way house between acceptance of the repudiation and continuance of the charter with the consequent obligation to continue to pay hire, but, having regard to my opinion on another aspect of the case, I do not think it necessary to reach a conclusion on this topic or on the question whether the payment of hire and provision of the services of the ship are mutually dependent one upon the other. So, too, I do not think it necessary to come to a conclusion as to the analogous question whether the owners are precluded from withdrawing the ship while they are themselves in default, nor whether they are or are not entitled to sue for the hire so soon as the due date has been reached. The charterers contended that no hire was payable while the ship was not at their disposal, and, therefore, not only was non-payment during such a period not a default, but that in any case during a time at which they were not given the services of the ship, the right of withdrawal ceased. As I have said I do not think it necessary to decide these questions and prefer not to pronounce on them.

Two further arguments on behalf of the charterers are, I think, unsound. Default, in my opinion, means in this charterparty a failure without excuse to pay hire on the due date. Apart from some special circumstances excusing performance it is enough to constitute default that payment has not, in fact, been made. Neither deliberate non-performance nor negligence in performing the contract is required. Nor do I think that, if payment on the due date was required and not excused by special circumstances, payment a day or two late was timeous enough. In my view, *Nova Scotia Steel Co. v. Sutherland Steam*

Shipping Co., Ltd. (1) was wrongly decided so far as this point is concerned and is none the less wrong though the provision in that case was not for payment *simpliciter* but for punctual and regular payment. Further, if the obligation to pay on the due date remained of full force under the terms of the charterparty I should not myself imply a term in the settlement of Sept. 25 that payment by letter of that date was enough. Certainly, if the owners are right in contending that, if the settlement had not been effected, the charterers would have been under an obligation in all circumstances to pay the month's hire in advance and must do so however much the owners were in default or had broken their contract, I see no reason for implying such a term. But even if so extreme a position be not maintained, I do not see why a dispute between the parties, even if it results in the temporary withdrawal of the ship, necessitates the implication that the charterers shall be excused from taking any step towards implementing their obligation to pay until the dispute is settled. It is true that they could not be certain of the length of time the ship was off hire between Aug. 27 and Sept. 27 until an agreement had been reached, but they could still have paid the full sum and deducted from future hire whatever might ultimately be agreed to be deductible for the period during which the ship was off hire.

Whatever view may be taken of these matters I think that the charterers are entitled to succeed in their first contention. This result must follow, if it is to follow at all, from the findings of the arbitrator. He states them in paras. 5, 7 and 9 of the award. He says in para. 5 that the charterers despatched their cheque to Hambro's Bank in London from Brussels on Sept. 25 and on the same day wrote to the owners at Oslo and their brokers in Paris of the despatch of the cheque. All this, as he finds, was in accordance with the procedure which had previously been adopted. The delay in delivery in London resulted from the outbreak of war. In para. 7 he sets out the practice between owner and charterers during the currency of the charter under which hire was paid on the 27th of each month, but from the gross sum was deducted any reduction for time off hire during the previous month. Paragraph 9 sets out the method accepted by both parties for payment of hire which was effected by sending a cheque in favour of Hambro's Bank to be placed by them to the credit of the owners. The arbitrator adds "the payment of hire had been regularly and properly paid in this way during the currency of the charter and had always been paid on its due date until this payment..." The last part of this sentence I take to mean that the cheque had always hitherto been received in London on the 27th of each month. In a contract between charterers and shipowners, when the former are in Brussels, the latter in Oslo and their brokers in Paris, and when the contract stipulates for payment in cash in London, obviously some further terms are required to regulate its performance. Admittedly, Hambro's Bank was nominated as the place of payment, a cheque drawn on a foreign bank substituted for cash, and receipt by post accepted, at any rate, when the letter arrived by or before the 27th of the month, the 25th being, apparently, the accepted day for posting. In these circumstances I think the true inference to be drawn is that the method of performance of the contract was varied by an arrangement for payment to Hambro's Bank by cheque posted at such time as would in the ordinary course of post reach London on the 27th of the month. "Regularly and properly" are the words used by the arbitrator and "properly" I think means in accordance with the accepted practice. No doubt, the owners could at any time have insisted on a strict performance of the contract after due notice, but they were not, in my view, entitled suddenly to vary the accepted method of performance without first notifying the charterers in time to enable them to perform the contract in the manner demanded. I think, therefore, that payment was duly made in accordance with the practice adopted and accepted between the parties and in the way and at the time stipulated. At one time some reliance appears to have been placed on behalf of the charterers on the terms of cl.

27 and 34, but that attitude was not persisted in before your Lordships, or, indeed, in the Court of Appeal, and, having regard to the grounds of my conclusion, the question whether the ship was off hire between Sept. 25 and 30 becomes immaterial. For my own part, I would decide this case solely on the ground that the charterers have performed their contract by the method accepted by both parties and would leave all other contentions to be disposed of when their determination is required for the decision of another case. I would dismiss the appeal and order that the owners do pay the charterers' costs.

LORD WRIGHT : My Lords, the dispute between the parties is whether the shipowners were entitled to cancel the charterparty dated Mar. 18, 1937, between them as owners of the Norwegian tanker *Petrofina* and the charterers. The question comes before your Lordships on a Case stated by the third arbitrator submitting certain questions to the opinion of the court. As the full terms of the Case and of the charterparty are before the House it will here only be necessary to state that the charter was for a period of 7 years, with an option to the charterers to extend for a further period of 3 years at a monthly rate of hire commencing on and from the date of her delivery. The charterparty was not a demise and "delivery" was the term used to describe the rights to the service of the vessel enjoyed by the charterers under the contract. The hire was to continue until the hour of her re-delivery to the owners. There was no express provision for the interruption of the hire between the dates of delivery and re-delivery except cl. 27, in which it was provided that in various events payment of hire should cease. It was, however, clear that that clause was not material in the facts of the case. There were, however, the usual provisions for the event of loss of the vessel and for the case where payment of hire fell due when she was on her way to the port of re-delivery. Clause 11 of the charter is that on which the dispute primarily turns. It provides that :

"Payment of the said hire is to be made as follows : in cash monthly in advance in London. In default of such payment the owners shall have the facility of withdrawing the said vessel from the service of the charterers, without prejudice to any claim they (the owners) might otherwise have on the charterers in pursuance of the charter."

The day of the month on which the vessel was "delivered" under the charter was the 27th. That fact determined the day of the month on which the first and subsequent advance payments of hire were due.

When war broke out the vessel was in Venezuela expecting to load for the charterers a cargo of oil, but some disputes arose on the outbreak of war. Their nature is not stated in the Special Case and is not here material. These disputes were settled on Sept. 25, 1939, on terms stated in cables exchanged between the owners and charterers by which the owners were given rights in excess of those given to them by the charter in the event of war. The terms of the settlement were that the vessel was not to be sent to belligerent ports without the owners' consent, that the war risk insurance cover was to be increased to 4½ million kroner, and that any delay at Venezuela was not to be considered as time off hire. The charter was in this way varied to the advantage of the shipowners. The vessel had been withdrawn from service for some days pending the settlement, but the owners, when the disputes were settled on Sept. 25, sent instructions to the master to commence loading for Lisbon, in accordance with the charterers' telegram to the owners immediately after the settlement was reached—"Please hurry despatch." By an accident for which neither party was responsible, the master did not receive the owners' orders, but still acted on the instruction he had received from them not to load until instructed. The accidental difficulty was not known at the time to either party, and on Sept. 25, immediately the settlement was arrived at, the charterers sent from Brussels to Hambro's Bank in London, a cheque for the agreed net amount of hire due in advance from Sept. 27, and wrote to the owners at Oslo and to the owners' brokers

in Paris stating what they had done. What they did was in accordance with methods previously adopted in remitting the hire, but on Sept. 29 the owners' bank in Oslo, Kristiana Folkbank, telegraphed to Hambro's Bank in London asking if they had received the hire, and for reply by telegraph. Hambro's Bank wired on Sept. 30 that they could not trace receipt of the hire. The owners then on the same day telegraphed to the charterers that Hambro's Bank had telegraphed that the hire had not been received and they considered the charterparty was cancelled. The charterers telegraphed in reply that they could not understand the owners' telegram, payment for hire having been made as usual on Sept. 25, but the owners maintained their cancellation, returned the cheque, and on Oct. 6 chartered the vessel on their own account. The matter then went to arbitration.

The Special Case states that the reason why Hambro's Bank did not receive the letter from the charterers enclosing the hire until Oct. 3 arose owing to the delay in the post occasioned by the state of war. The charterers had no intention of failing in their obligation to pay, which, as cl. 11 provided, was to be performed by payment in cash in London. The payment of hire was a vital matter because, if there was default of "such payment" (*i.e.*, in cash monthly in advance in London), the owners were entitled to cancel the long and valuable charter. Default in payment, that is, on the due date is not, in my opinion, excused by accident or inadvertence. The duty to pay is unqualified so far as the express terms of the charterparty go. I think this is the true construction of the terms of the contract, and is confirmed by the cases cited in argument. A *dictum* or decision of BIGHAM, J., in *Nova Scotia Steel Co. v. Sutherland Steam Shipping Co.* (1), has been relied on as an authority that a certain latitude was permissible so that payment made two days after the due date did not constitute a default in payment, but I cannot agree that so drastic a departure from the specific words of the charter can be supported. In that case the clause provided for regular and punctual payment. These adjectives, however, add nothing to the stringency of the simple and unqualified language in the charter before this House. I think that so much of BIGHAM, J.'s, judgment as conceded a latitude as to the date of payment is erroneous in law and should be overruled. The importance of this advance payment to be made by the charterers is that it is the substance of the consideration given to the shipowner for the use and service of the ship and crew which the shipowner agrees to give. He is entitled to have the periodical payment as stipulated in advance of his performance so long as the charterparty continues. Hence the stringency of his right to cancel. But, at least, that makes it essential to understand precisely what constitutes "payment." All that the clause says is "In cash monthly in advance in London." Cash to whom? What is meant by cash—coin or currency or transfer of credit? The shipowners were in Oslo and the charterers in Brussels. How was transfer to take place? It is not enough to say that the charterer must act at his peril. He is entitled to know what he is to do. Such matters are essential to be specified in order to ascertain whether the charterers have made the payment and at what time they made it. To meet these difficulties a method of performance was "accepted between the parties" as stated in para. 9 of the Special Case which ran as follows:

"The accepted method between the parties during the currency of the charter with regard to the payment of hire had been for the charterers to make the payment of hire in London at the office of Hambro's Bank Ltd. by sending a cheque in favour of Hambro's Bank Ltd. (drawn on the Italo-Belgian Bank Ltd. of London) to be placed by them to the credit of the owners with the Kristiana Folkbank, Oslo, and the payment of hire had been regularly and properly paid in this way during the currency of the charter and had always been paid on its due date until this payment of the hire due on Sept. 27."

This is a finding of fact which was necessary to fill up the gap in the written charter. Evidence was admissible for this purpose :

“ Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their mind and were negotiating about.”

So the rule was stated by LORD DAVEY, delivering the judgment of the Judicial Committee in *Bank of New Zealand v. Simpson* (2). The situation of the parties in this case required some definition of what constituted payment beyond the bare usual and conventional words of cl. 11 of the charterparty. How that definition was effected appears from para. 9 of the Special Case. In the *Bank of New Zealand* case (2) the question was whether the words “ estimate of the cost of works ” included the cost of the land plus the engineer’s commission. LORD DAVEY said ([1900] A.C. 187) :

“ These words point to something which was known to and in the contemplation of both parties to the contract, and with reference to which they contracted ; and, in order to construe and apply the contract, you must ascertain what was included in “ the estimate of £35,000 ” on the reduction of which the contract depended.”

Here “ payment in cash in London ” must involve some definition of what was to be done by the charterers in order to effect payment, the mode and machinery of performance in the contemplation of the parties. The third arbitrator has found what the parties contemplated. He does not say on what evidence he proceeded. It must have been extrinsic and additional to the actual words of the contract which did not contain the necessary words of specification. He may have found it in the declarations of the parties before the contract was made as in the authority just cited, or in the machinery actually employed or in some other evidence. This House cannot go behind his finding or inquire on what evidence he acted. It is enough that he found that there had been an accepted method *between* the parties with regard to the payment of hire under the charter. LORD DAVEY, in his judgment, proceeded to give other instances in which courts have received evidence in order to give a specific content to general expressions used in the contract. He quoted LORD CAMPBELL’s words in *Macdonald v. Longbottom* (3), saying ([1900] A.C. 189) :

“ ‘ There cannot be the slightest objection to the admission of evidence of this previous conversation, which neither alters nor adds to the written contract, but merely enables us to ascertain what was the subject-matter referred to therein ’.”

What was there in question was the meaning of the words “ your wool.” Equally here the relevant subject-matter was “ payment in cash in London.” The necessary definiteness is supplied by para. 9 of the Special Case. A similar ruling is to be found in *Kelantan Government v. Duff* (4). In that case the finding of an arbitrator that there was to be implied in the deed a contract to construct a railway was upheld. LORD CAVE, L.C., ([1923] A.C. 413) referred to some relevant stipulations and considerations which he quoted and said :

“ These stipulations may not be enough by themselves to lead to an implication of a contract to construct the line ; but I am not prepared to say that these considerations, coupled with evidence of facts of which the courts know nothing, and into which they are not entitled to inquire, cannot properly have led the arbitrator to his conclusion.”

He had already pointed out that the implication was not contrary to the deed. It is true that in that case the arbitrator was judge both of fact and law, but that does not affect the general significance for the present case of the words I have quoted.

Payment by cheque is, indeed, only conditional payment until the cheque has been cleared and the credit transferred. As I read para. 9 of the Special

Case, the third arbitrator, in finding that "the payment had been regularly and properly paid in this way" during the currency of the charter and had always been paid on its due date until this payment of the hire due on Sept. 27, is finding that the allowance of a two days' course of post was *inter alia* the correct procedure under the contract. The trouble was the failure in the course of post. Paragraph 9 of the Special Case is clear. The third arbitrator is finding, not only what the accepted method of payment was, but also that "the payment of hire had been regularly and properly paid in this way." That means, I think, that the sending of the cheque constituted payment for the purpose of cl. 11 of the charter. Then he added that the payment of hire "had always been paid on its due date until this payment of the hire due on Sept. 27." He has found that payment of hire had been regularly and properly paid in "this way," that is, by sending the cheque to Hambro's Bank. He was, I think, taking note that the cheque was only conditional payment, and adding that no difficulty had arisen in London, no doubt because there was no delay in the post and the cheque was duly honoured by means of the ordinary machinery of the clearing house so that eventually the charterers' bank, the Kristiana Folksbank, received the credit. There was no question of the solvency of the charterers or of the goodness of their cheque. The effect of the method was simply to put on the shipowners the inconvenience of any delay in the course of post, which because of the war happened on the critical occasion and resulted in a delay between Sept. 27 and Oct. 3. Some such risk may always be incidental to international business involving the transmission of cash, and in the light of the facts as to the accepted method, it results that the risk of that delay fell on the shipowners. In my judgment, it follows that no default in payment of hire can be attributed to the charterers and the owners were not entitled to claim to cancel the charter. I should, therefore, answer the third arbitrator's question in the Special Case for the opinion of the court in that sense.

There was a further and alternative way of looking at the position which would require the same answer to the question propounded in the Special Case. The third arbitrator has found in para. 9 of the award what was the accepted way of paying in cash in London. The owners, it is contended, having accepted that method for the earlier months, could not suddenly without reasonable notice insist that the charterers should have adopted a different method of paying the hire and withdraw the vessel on the ground that the charterers were in default of payment. I think this contention is sound on the principle laid down in *Panoutos v. Raymond Hadley* (5). The contract there was for the sale of goods by instalments subject to a confirmed credit opened by the buyer. The buyer opened a credit which was not confirmed. Notwithstanding this breach of the contract, the seller made some shipments and received payments by means of the credit. Then, without any previous notice, he cancelled the contract for the balance on the ground that there was no confirmed credit. It was held by the Court of Appeal that he could not cancel in that way. The contract, it is true, was not changed by the buyer's failure to provide the agreed credit, but the seller could not, having waived strict compliance by the buyer with the contract terms in this respect, put an end to the contract as to the future performance without giving the buyer an opportunity of complying with the condition. LORD READING, C.J., in giving the judgment of the Court of Appeal, said ([1917] 2 K.B. 479):

"I cannot find any authority to support the proposition that, when one party has led another to believe that he may continue in a certain course of conduct without any risk of the contract being cancelled, the first-mentioned party can cancel the contract without giving any notice to the other so as to enable the latter to comply with the requirement of the contract."

In that case the buyer was admittedly in breach, and the breach was capable of

simple and obvious correction in the future deliveries. The present is a *fortiori* a case for the application of this principle which is that of fair dealing and justice. Here, even if the opinion I have just stated on the first point is not right, the charterers were adopting the agreed method of making the payments from one place to another. Hence, while the shipowners were entitled to insist for the future months of the charter on what might be regarded as a more correct fulfilment of the terms of cl. 11, they could only do so on giving reasonable notice of their intention and could not cancel until the notice had operated. On this alternative view also the shipowners would not be entitled to cancel the charter in the events which happened.

These conclusions render it unnecessary to express any opinion on the remaining questions raised in the Case. One question I take to be whether a term should be implied in the settlement of Sept. 25 that sufficient time should be allowed to enable the charterers to make the necessary payment in time to avoid forfeiture. In different circumstances something might be said in support of such an implication, but it is not necessary to consider it in view of the conclusions I have expressed. The other question I may notice is the question whether the owners had not legally disentitled themselves to enforce the forfeiture by failing in fact, though not in intention, to restore the vessel to the service of the charterers when the withdrawal of the vessel from the charterers' service had terminated in consequence of the settlement so that the vessel was being without justification withheld from their service when the notice of cancellation was given. That question, again, it is not material to decide in view of my conclusions already stated. I only wish to add that I do not express any opinion on hypothetical cases in which the right of cancellation given by cl. 11 may not be available to the shipowner because of some legal bar affecting him. I should dismiss the appeal.

LORD UTHWATT (read by **LORD MORTON OF HENRYTON**): My Lords, clause 11 of the charterparty, so far as material, is in the following terms:

"Payment of the said hire to be made as follows: In cash monthly in advance in London. In default of such payment the owners shall have the faculty of withdrawing the said vessel from the service of the charterers . . ."

It was found by the arbitrator that the hire normally became due on the 27th of each month.

Two short questions of construction arise on the clause. First, reliance was placed by the charterers on an opinion expressed by **BIGHAM, J.**, in *Nova Scotia Ltd. v. Sutherland Steam Shipping Co. Ltd.* (1), where it was held that payment made two days after the day appointed for payment "was a regular and punctual payment within the meaning of the charterparty, and was not made too late." In my view, this opinion is wrong, unless there were other provisions in the charterparty there under consideration which had the effect of putting a substantial gloss on the meaning of the words "regular and punctual payment." A stipulation for payment on a fixed day or for punctual payment on a fixed day (unless controlled as to meaning by other provisions of the document) means exactly what is said. Payment is not made on the fixed day if it is made later. Parties are at liberty to make such bargains as to dates as appeal to them and full effect must be given to such bargains however unreasonable it may appear that the exact terms should be insisted on. Courts of equity, indeed, in appropriate cases relieve against failure to pay on a stipulated day, but, in so doing, they do not affect to modify the terms of the bargain, though they alter the result of failure to comply with them. Secondly, it was argued that there was no default of payment unless the charterers, though not having a legal justification or legal excuse, were in some sense blameworthy or at fault in not making the payment. If this construction were accepted, then it was argued that in the particular circumstances of the case, no blame or fault could be imputed to

the charterers. They were victims, not sinners. I do not propose to consider the effect of those circumstances, for, in my opinion, "in default of payment" has in this charterparty no meaning other than "on failure so to pay." The phrase "default" on its face relates to the payment, not to the qualities of the payer. The remaining question is whether in light of the finding of the arbitrator as to the accepted method between the parties with regard to the payment of hire there had, in fact, been default of payment on Sept. 27. But for the parties coming to some working arrangement, the charterers—a Belgian corporation—with cash in hand, would have had to search for the shipowners—a foreign corporation—in London, and, inasmuch as a corporation can act only through agents, pay the cash to some agent of the shipowners in London duly authorised to receive the cash, it being the duty of the shipowners to provide and duly notify to the charterers some person duly authorised to receive payment on their behalf. Some arrangement was obviously necessary in the interests of the shipowners as well as the charterers. The "accepted method" specified by the arbitrator contains the arrangement, and it is, indeed, a sensible arrangement from the point of view of both parties. So long as the arrangement stood, it represented an agreed method of working out the obligation as to payment imposed by the charterparty, as distinct from an agreement to vary its terms. So long as it stood, the shipowners could not demand, nor the charterers insist on making, payment otherwise than in accordance with the terms of the arrangement. The accepted method as found by the arbitrator is, in my opinion, to be looked at in the same manner as a commercial bargain. The arbitrator is specific in the use of the phrase "by sending a cheque drawn on" the charterers' London bank and it would be toying with unrealities to treat this as meaning anything but sending in the ordinary course of post a cheque drawn on the named bank, which on presentation was duly met. In an arrangement for the common convenience of the charterers and shipowners I see no reason for not giving the word "sending" its proper meaning. "Sending" means sending and does not involve receipt, just as "specified day" means a specified day and does not include later days. In neither case is there over-indulgence in a passion for accuracy. How, then, does the matter stand? I fail to see that it is implicit in this particular arrangement that the charterers are to take the risk that the agreed machinery, to which they must adhere, fails in a particular instance to perform the functions that both have assigned to it. There is no reason why that should be implicit. The charterers have done their part. In the ultimate analysis the post is, in the matter in hand, working for the shipowners. In my opinion, therefore, the charterers, having complied with the working arrangement as to payment involved in the accepted method, had not breached the contract. In the result, the cheque reached the shipowners' bank on Oct. 3. In my opinion, the shipowners were (subject to the cheque being duly honoured) bound to accept that cheque so sent and so received as representing by virtue of the working arrangement the payment due to be made on Sept. 27. I would dismiss the appeal.

LORD DU PARCQ: My Lords, one of the questions formulated by the arbitrator for the consideration of the court was in the following words:—

"Whether, on the facts stated, and on the assumption the hire became due on Sept. 27 notwithstanding the fact that the captain had not received the owners' instructions to load, the charterers were excused from paying the hire on Sept. 27 owing to the fact that the charterers' letter of Sept. 25 was delayed in the post."

The wording of this question is, perhaps, open to some criticism, but, when it is read together with, and in the light of, the facts found, it may be said at least to give rough expression to one of the contentions of the charterers at your Lordships' Bar. I believe that this contention was sound, and that the right answer

to the question is "Yes." If I am right, this appeal can be disposed of on a short and simple ground.

A The charterparty which contains the contract between the parties is dated Mar. 18, 1937. Hire was to be paid "in cash monthly in advance, in London." The first payment was made on the day when, in the language of the charterparty, the vessel was "delivered," and thereafter, the parties are agreed, a payment fell due on the 27th of each month. When payments are made in advance, it is possible that events may show that there has been an over-payment, and the parties had adopted a sensible and not unusual practice by which the charterers were permitted to deduct from the hire payable such sum as represented the amount paid for time off hire during the currency of the previous month. The clause of the charterparty which contains the express words as
B to the payment of hire which I have already quoted went on to provide that in default of such payment the owners should have the faculty of withdrawing the vessel from the service of the charterers. Having regard to the practice as to payment, it is right to treat the 27th of each month as the due date under the contract, and on that view I have no doubt that, if each party had been minded to insist on a literal performance of the contractual obligation, a payment made
C even a day late would not have sufficed to protect the charterers against cancellation. I cannot agree with the view expressed by BIGHAM, J., in *Nova Scotia Steel Co., Ltd. v. Sutherland Steam Shipping Co., Ltd.* (1) that a payment of hire made two days after the prescribed time "was a regular and punctual payment within the meaning of the charterparty and was not made too late." The learned judge's decision in that case may have been right, but, notwithstanding the respect which I have for any opinion of his, I cannot doubt that this *dictum*
D was wrong.

The terms of the charterparty in the present case were thus clear and precise as to the time, mode and place of payment, except in one particular. Payment was to be made in London—but at what place in London, and to whom? No answer to these questions is supplied by the charterparty. The owners were a corporation with, so far as appears, no office in London. The charterparty did not name
E any person authorised to receive payment on their behalf. It was obvious that some arrangement had to be made to enable the contract to be carried out. This was of course recognised, and the arbitrator's findings (set out in para. 9 of the Special Case) show the form which the arrangement took. He says:

"The accepted method between the parties during the currency of the
F charter with regard to the payment of hire had been for the charterers to make the payment of hire in London at the office of Hambro's Bank Ltd. by sending a cheque favour of Hambro's Bank Ltd. (drawn on the Italo-Belgian Bank Ltd. of London) to be placed by them to the credit of the owners with the Kristiana Folkbank, Oslo, and the payment of hire had been regularly and properly paid in this way during the currency of
G the charter and had always been paid on its due date until this payment of the hire due on Sept. 27 [*viz.*, Sept. 27, 1939]."

My Lords, it appears to me that these findings leave no room for doubt that the parties had, not indeed varied the contract, but adopted for the time being a substituted mode of performance of the contract which was acceptable to, and accepted by, each of them. If a contract provides for payment in cash, the
H party to whom payment is due may accept in substitution payment by cheque. Instead of money, a creditor may be willing to accept meal or malt, and he may be willing to postpone the date of performance of a contractual duty. No one would doubt this, if a single payment were due under a contract. One who has plainly manifested his willingness to accept a substituted method of performance cannot, when payment is made in the accepted manner, take advantage of some provision in the contract which gives him a remedy in default of payment. It is true that in the present case your Lordships are concerned, not with a single pay-

ment, but with payments which fell due monthly over a long period, but I think it can hardly be disputed that, where periodical payments have to be made, a substituted method of payment which has been "accepted between the parties" from the beginning must be regarded as fully satisfying the requirements of the contract until timely notice is given, by one or other of the parties, that he withdraws his acceptance of it. That such notice might be given effectively I do not doubt. The distinction between varying a contract and acceding to a variation of the mode of performance of it is well established in our law and, as I have said, there was no variation of the contract in the present case. I conclude, therefore, that, if the charterers, when the time came to make the payment due in September, 1939, in fact acted in accordance with the "accepted method," the owners were not entitled, on the ground that, through no fault of the charterers, receipt of the payment was delayed, to exercise a remedy which was open to them only "in default of" the payment stipulated by the contract. A B

The question then is whether, in September, 1939, the charterers did follow the "accepted method." They sent a cheque, and they sent it, as on each previous occasion they had sent their cheque, through the post. It is not suggested that there were not funds in the bank to meet it or that it would not have been met on presentation. They sent it on Sept. 25. Normally it would have arrived by Sept. 27, but, as the arbitrator has found, "owing to the delay in the post occasioned by the state of war," Hambro's Bank did not receive it until Oct. 3. There is no finding, and nothing in the Special Case to suggest, that the charterers were negligent in not posting it earlier, or that they had any reason to expect that there would be an unusual delay in transmission. What they did was done (I now quote from para. 5 of the Special Case) "in accordance with the procedure that had been previously adopted in remitting the hire." C D

My Lords, to say in these circumstances that the owners were entitled to do what they could only do "in default of payment," that is, to withdraw the vessel from the service of the charterers, is to affirm a proposition which does not accord with good sense, good business, or good law. I say this with the utmost respect for the argument of counsel for the owners, who, of course, put their case as forcibly as it could be put. They asked your Lordships not to construe too literally or too precisely the words in which the arbitrator set out the "accepted method." These were, they suggested, mere narrative, not intended to convey the impression that the owners had given up, or suffered to be modified, any of their contractual rights. They protested against a reading of the words which, they said, laid undue stress on the word "sending." Further, relying on the finding of the arbitrator that the payment of hire, until September, 1939, had always been paid on its due date, they argued that it was an essential condition of the "accepted method" that the cheque should arrive in London not later than the 27th of the month. If it was delivered later, they said, payment could not be said to have been made on that date, and the owners were entitled to their drastic remedy under the charterparty. I have been anxious not to lay too much stress on any words used by the arbitrator, but I must observe that your Lordships are not now interpreting the loose language of an inartistically drawn contract or the careless words of an inexperienced witness, but language used in a Special Case which may be assumed to have been chosen with precision by the arbitrator, who is, your Lordships were told, an experienced solicitor. He cannot be supposed to have set out facts which he did not consider to be relevant to the questions involved, and, indeed, the facts which he has found in para. 9 are directly relevant to the question which I began by quoting. The words "the accepted method between the parties" cannot be explained away as a mere equivalent to some such phrase as "the method which the charterers had, in fact, adopted without objection on the part of the owners." They must surely mean that the owners had not only acquiesced in the method, but had also approved its continuance at least until they chose to notify the charterers that E F G H

they withdrew their acceptance. I see no reason to give the word "sending" any but its natural meaning. If the owners were willing that payment should be made by cheque, it was natural and businesslike for them to agree that the charterers, a corporation resident in Brussels, should be permitted to send the cheque from Brussels to London, and, as the parties showed by their conduct and course of dealing, they both recognised that there was no better way of sending it than by post. Whatever form of transmission is adopted, there is a possibility of delay, though it may be a slight possibility. If one party elects to rely on the postal service, or on any messenger of his own choice, he has to bear the responsibility for his agent's delay, but when, as in this case, both parties are agreed that a cheque is to be sent, and it is, in fact, sent by suitable, and normally expeditious, means, the creditor must run the risk of delay equally with the debtor. It seems to me to be hopeless to contend that the owners' acceptance of the method of payment was subject to a condition, unexpressed but implied, that, if the cheque did not arrive in London on Sept. 27, the charterers, though they were not to blame for the delay, should be treated as having made default, and so would incur the risk of losing a contract of great value. If such a condition had been expressly stated, the charterers might well have thought that they were being asked, not to conform to a sensible business arrangement, but to walk into a trap. It was said with great force by counsel for the owners that the owners would never have agreed that the mere sending of a cheque should be equivalent to payment. Here I agree with him. The owners cannot truly be said to have received payment until they received the proceeds of the cheque. There is always a risk that a cheque may be lost in transit, especially when it has to cross the sea, and since all men, and even banks, are capable of error, it may, through some blunder, not be met, although there are funds to meet it. In either of these events the charterers would, no doubt, remain liable to pay the hire due, but in neither case would the delay in payment justify cancellation of the contract. The owners have not gone so far as to contend that the receipt of a cheque would not in the circumstances be a sufficient performance of the contract if it arrived too late to be cleared on the 27th of the month. It follows that they had accepted a system which involved, on their own showing, a possible delay in actual payment. The risk of delay in the post was hardly more serious than the risk of delay in clearing the cheque. That these risks should be accepted by the owners is not surprising. It is much more surprising that they notified the charterers on Sept. 30 of their decision to cancel the contract without making any inquiry of them whether the cheque had been despatched.

For the reasons I have given I am satisfied that the owners have misunderstood their rights, and I agree with the decision of ATKINSON, J., though on grounds different from his and from those of BUCKNILL, L.J. I will only add two observations with regard to the other contentions on which the charterers chiefly relied before the learned judge and in the Court of Appeal. First, I have not been persuaded that a charterer who has agreed to pay a month's hire in advance is absolved from making the payment if, although the owners have not sought to repudiate the contract, the ship is not, in fact, at the disposal of the charterers for some days immediately before and after the first day of the month of hire. It would surely be more reasonable to argue that, if the hire is not paid "in advance," the owners are absolved from giving those services in respect of which hire has to be paid. It must be remembered in this connection that the course of dealing between the parties was such that any sum overpaid in respect of time off hire in the previous month could be deducted from each monthly payment. Secondly, I doubt whether the dispute which arose between the parties after the outbreak of war, as to the rights and wrongs of which your Lordships are hardly in a position to judge, and the fact that until the parties came to terms on Sept. 25 the owners were refusing to put the ship at the disposal of the charterers, ought to affect your Lordships' decision. I am not myself

convinced that any term can be implied in the agreed settlement to the effect that a payment which (*ex hypothesi* for the sake of this argument) would otherwise have been too late could properly be made by dispatching a cheque after the negotiation of the settlement. I need not, however, say more about this aspect of the cause, because, in my view, the charterers do not need the protection of any such implied term. They sent a cheque. They sent it in due time. They were not in default, and are entitled to recover damages for the heavy loss which the owners' wrongful repudiation of the contract has inflicted on them. I am for dismissing the appeal.

LORD MORTON OF HENRYTON : My Lords, I have had the opportunity of reading in print the speech which has just been delivered by my noble and learned friend LORD DU PARCQ. I agree that this appeal should be dismissed for the reason which he gives, and I also agree with his comments on *Nova Scotia Steel Co. Ltd. v. Sutherland Steam Shipping Co. Ltd.* (1). I have not found it necessary to form a concluded opinion on the other contentions of the charterers to which my noble and learned friend refers, but I desire to make some comments on cl. 27 of the charterparty, as its meaning and effect were very fully discussed in the course of the argument, and I understand that a clause in this form frequently appears in charterparties. To my mind, this clause is one which would very readily give rise to doubt and litigation. In saying this, I intend no reflection on the draftsman of the charterparty now before your Lordships. No doubt, he merely adopted a form which is generally in use, but I venture to think it is time that the form was revised. I shall now read cl. 27, inserting the numerals (1) to (7) and the letters (a) to (g) for a purpose which will shortly appear.

" 27. (1) In the event of loss of time through deficiency of men or stores, repairs, breakdown of machinery or boilers (whether partial or otherwise), collision or stranding, or damage preventing the efficient working of the vessel for more than 48 running hours, or breach of orders or neglect of duty on the part of the captain causing delay, (a) the payment of hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service; and (2) should the vessel from any of the aforementioned causes put into any other ports than those to which she is bound under the instructions of the charterers, (b) the port charges, pilotages, and other expenses at those ports, loss of time consequent upon putting in, shall be borne by the owners; also (3) should the vessel put back while on voyage, by reason of any accident (c) the hire shall be suspended from the time of her putting back until she be again in the same position and the voyage resumed therefrom; but (4) should the vessel be driven into port or to anchorage by stress of weather (d) such detention or loss of time shall be at the charterers' risk and expense. (5) In the event of detention of the vessel by authorities at home or abroad in consequence of legal action against the owners of the vessel, unless brought about by charterers whereby the vessel is rendered unavailable for charterers' service (e) the charter shall be suspended until the service can again be resumed. (6) In the event of the nation to which this vessel belongs becoming engaged in hostilities, (f) the hire to cease during the continuance of such hostilities, if the charterers find it impossible to employ the vessel in consequence. It is agreed that all detention or loss of time provided for in this clause and not paid for shall count as part of the guaranteed time specified under this charter. All graving dock charges to be at owners' expense. (7) Time in and waiting turn to enter graving dock (g) not to count as on hire. In which event owners are to have the right to employ the ship on their own account."

It will be observed that the clause deals with seven different sets of circumstances in which "loss of time" may occur, and states in each case the effect which such loss of time is to have on the financial arrangements between the

parties. For the purpose of stating this effect the following phrases are employed:—(a) “The payment of hire shall cease” during a specified period. (b) “Loss of time . . . shall be borne by the owners.” (c) “The hire shall be suspended” during a specified period. (d) “Such detention or loss of time shall be at the charterers’ risk and expense.” (e) “The charter shall be suspended” during a specified period. (f) “The hire to cease” during a specified period. (g) Time in and waiting turn to enter graving dock “not to count as on hire.” Thus, seven different phrases are used, in one and the same clause, and certainly they are not intended to convey seven different meanings. Nor does it appear that all the phrases used have a clear and certain meaning to persons well versed in commercial law. To take one example only, in the present case your Lordships heard a very interesting argument on the question whether the first of these seven phrases meant that during the specified period the charterers were entitled to decline to pay the hire, even if a monthly payment became due under cl. 11, or whether the phrase was directed only to the computation of the amount of the monthly instalments payable by the charterers. In the course of his argument counsel referred to all the other six phrases which I have quoted, and sought to draw some deduction from them. I do not propose to express any opinion, which would clearly be *obiter*, as to the meaning of this difficult clause, but I feel sure that it would be possible to express the intention of the parties more clearly and more simply. I believe that each of the various events specified in this form of clause has been inserted by reason of some decided case, but even if it is necessary to retain the list of events, it is surely unnecessary to employ seven different phrases of which some, at least, are not free from ambiguity, to describe what is to be the result of each of these events.

Appeals dismissed with costs.

Solicitors: *Sinclair, Roche & Temperley* (for the owners); *Ince, Roscoe, Wilson & Griggs* (for the charterers).

[Reported by C. ST. J. W. NICHOLSON, *Barrister-at-Law*.]

Re WALTER'S WILL TRUSTS. STUART v. PITMAN AND OTHERS.

[CHANCERY DIVISION (Jenkins, J.), November 4, 5, 1948.]

F *Will*—*Accruer*—*Accruer* “to the shares of the daughters of mine who shall at the time of the death of such daughter not have been married”—*Implication of requirement of survival.*

G A testator, who died on Nov. 15, 1888, by his will gave certain securities to trustees to divide into as many parts as there should be daughters of his living at his death, and to appropriate one part to each daughter. He directed that the share of each daughter who should have attained the age of 21 years and should be for the time being unmarried or should have married or should marry with the consent of a certain person was to be held on trust for that daughter for life and thereafter for the daughter’s issue as she should appoint. In default of issue the trustees were directed to pay the income of the daughter’s share to any surviving husband, and subject thereto “ . . . the share of such daughter and the . . . income thereof . . . shall go over and be added by way of accruer to the shares of the daughters of mine if any who shall at the time of the death of such daughter not have been married with such consent as aforesaid and if more than one such share shall be added in equal portions or subdivisions to and between or among such respective shares . . . ” The testator was survived by eight daughters, of whom only two, L. and G., married, both with consent. The six spinster daughters all predeceased L. and G.

L. died on Oct. 31, 1945, and G. died on Feb. 3, 1947, neither leaving issue, and neither being survived by a husband.

HELD: on the true construction of the testator's will there was no justification for limiting the accruer to the shares of daughters living at the date of the accruer, especially as the accruer was to the shares of the daughters and not to the daughters personally, and, therefore, the shares of L. and G. accrued on their respective deaths to the shares of the deceased unmarried daughters.

[AS TO ACCRUER CLAUSES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 364-368, para. 413; and FOR CASES, see DIGEST, Vol. 34, pp. 1215-1217, Nos. 10507-10533.]

Cases referred to:

- (1) *Lassence v. Tierney*, (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 43 Digest 643, 790.
- (2) *Hancock v. Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; affg. *S.C. sub nom. Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482; 43 Digest 643, 792.

ADJOURNED SUMMONS to determine the construction of an accruer clause in a will. The facts appear in the judgment.

Elverston for the plaintiff, the sole trustee of the will.

E. I. Goulding for the first defendant, the personal representative of L., one of the testator's married daughters.

Rink for the second defendant, the Public Trustee, the trustee of the will of William Walter, junior.

H. E. Francis for the third defendant, representing the estate of a deceased son of the testator.

A. C. Nesbitt for the fourth defendant, the personal representative of G., one of the testator's married daughters.

JENKINS, J.: The testator died on Nov. 15, 1888, leaving a will dated Dec. 20, 1883, which, with two codicils, was duly proved after his death. The testator had four sons and eight daughters. His will was primarily directed to making provision for his daughters, and the question which I have to decide concerns the destination of the settled shares in the trust fund provided by the testator of the two last of his daughters to die, all the children being now dead, namely, Mrs. Amy Lipscomb, who died on Oct. 31, 1945, and Mrs. Annie Greeves, who died on Feb. 3, 1947. The only other facts which I think are necessary to make the will intelligible are that the two daughters I have mentioned were the only daughters of the testator to marry, Mrs. Greeves having married in the testator's lifetime with his consent, and Mrs. Lipscomb having married in 1892 with the consent of the trustees of the will. That question of consent was relevant to a provision in the will. Neither of these two ladies had any children.

Turning to the will, the testator recites that he is possessed of £20,000 odd in Consols, and £400 in Government New 3 per cent. stock, or thereabouts. He recites the state of his family consisting of 12 children, 4 sons and 8 daughters, setting out their names. He further recites that he has already provided for his eldest son, William Walter junior. He proceeds to bequeath to two named persons, whom he appoints his trustees and executors, the investments in question, *i.e.*, the Consols and the Government New 3 per cent. stock, on trust to make certain payments which I do not think are material for the present purpose:

"And as to the rest residue and remainder of the said Government Consols and New 3 per cent. stock Upon trust that the said trustees or trustee for the time being of this my will shall divide the same or consider the same

to be divided into as many equal parts or shares as there shall be daughters of mine living at my death and shall appropriate one of such parts or shares or consider and treat the same as appropriated to each such daughter of mine living at my death and shall stand possessed of the part or share appropriated or to be treated as appropriated to any daughter of mine in the same premises (hereinafter for brevity referred to as the share of such daughter) . . .”

- A Then follow beneficial trusts which begin with provisions applicable during the minority of any daughter concerning maintenance, the accumulation of surplus income, and so forth. The testator proceeds to give to each daughter who should have attained the age of twenty-one years and should for the time being be unmarried or should have married or should marry whether before
- B or after attaining the age of twenty years with his consent during his life or with the consent of the trustees after his death a life interest in the income of such daughter's share and after her death the share is to be held in trust for the daughter's issue as she shall appoint, and, in default of appointment, in trust for her children at 21, or, in the case of daughters, on marrying under that age, and, if more than one, in equal shares. There is the usual proviso
- C for hotchpot, and there is a power of advancement, and then there is this provision in the event of the failure of the trusts of a daughter's share :

“ Provided always and I declare that if with regard to any such daughter of mine as aforesaid there shall be no child of such daughter living at my death or born afterwards and who being a son shall attain the age of twenty one . . .”

- D that is to say, failure of the trusts in default of appointment to which I have already referred, the trustees are to pay the income of the daughter's share to any surviving husband. Nothing turns on that in the events which have happened. Subject to the husband's life interest, there is this provision :

- E “ Subject to such trust in favour of her husband if any the share of such daughter and the interest dividends and income thereof or so much thereof as shall not have become vested or have been applied under any of the trusts or powers of this my will shall go over and be added by way of accruer to the shares of the daughters of mine if any who shall at the time of the death of such daughter not have been married with such consent as aforesaid and if more than one such share shall be added in equal
- F portions or subdivisions to and between or among such respective shares and every addition to any such share by way of accruer as aforesaid shall after the accruer thereof be blended with and thenceforth form part of and follow the destination of the share to which the same shall be so added Provided always and I hereby declare that in the case of any of my said daughters who shall die without having been married with such consent
- G as aforesaid the share of the one so dying if only one or the shares both original and accruing of the survivor of them so dying if more than one shall subject and without prejudice to the trusts hereinbefore declared and after the death of such one or of such survivor as the case may be go remain and be held upon trust for my said three sons their executors administrators and assigns in equal shares as tenants in common.”

- H There follows this proviso regarding marriage without the testator's consent :

“ Provided always and I hereby declare that if any daughter of mine shall being a spinster marry without my consent during my lifetime or after my death without the consent of the trustees or trustee for the time being of this my will then and in any such case the share which any such daughter would otherwise have taken shall go over and devolve as the same would have devolved by virtue of this my will had such daughter died after my death without having been married.”

There are powers of investment, with which I need not trouble, and then there is a residuary gift, the character of which as a true residuary gift has been called in question before me :

"And as to the furniture goods and chattels in my house in Stephen's Green Dublin and all the rest residue and remainder of my goods chattels and effects whatsoever I bequeath the same to John Alfred French of St. Jane's Terrace Clonskeagh George West Frazer of No. 77 Wellington Road and John Clarke Powell of Sandymount in the county of Dublin whom I hereby appoint guardians of the persons and fortunes of my minor children to be applied by them according to their discretion and as they may consider most for the benefit of my said eight daughters hereinbefore named."

The two codicils are not directly material. There was a provision with respect to the testator's daughter, Emily, in the first codicil, apparently made by the testator in consequence of some difference of opinion with her to the effect that in certain circumstances the trustees might cause the whole or some part of the benefit receivable by Emily under the will to go to the testator's other daughters in the same way as their own shares as provided by the will. There is a reference, therefore, to the other daughters' "own shares." In the second codicil there is a reference to certain payments which the testator had made by way of financing a visit to Australia by two of his daughters, and he provided with respect to the advances so made that the trustees should deduct them "out of such sum as may be coming to each" of the named daughters "out of the bequests so made to them." That is a rather obscure provision, because there is no previous reference in the codicil to the provision for these two named daughters to which the expression "the bequests so made to them" can be referred, but the passage is called in aid along with the reference to the daughter's own share in the previous codicil as throwing light on the character of the gift given to the two daughters by the will, and as supporting the contention that this is one of those cases in which the testator has given absolute interests and engrafted trusts on them, in which case, if the trusts do not exhaust the entire beneficial interests in the events which have happened, the initial absolute gift remains and takes effect in accordance with the rule in *Lassence v. Tierney* (1) and *Hancock v. Watson* (2).

The first question I must endeavour to answer is: What has happened to Mrs. Amy Lipscomb's share on her death without issue on Oct. 31, 1945? The competing views which have been argued before me are, first, that there was no trust applicable to her share in the events which have happened, with the result that under the rule in *Lassence v. Tierney* (1), there being, according to this argument, an initial absolute gift to her, her estate takes under the initial absolute gift which *ex hypothesi* has not been effectively cut down or taken away by the engrafted trusts. Another view is, not only that there is no declared trust applicable in the events which have happened, but, further, there is no sufficient indication of an initial absolute gift in this will to make the rule in *Lassence v. Tierney* (1) applicable, with the result that the share passes under the residuary gift. A further view is to the same effect as to the failure of the declared trusts and the absence of anything amounting to an initial absolute gift, but adduces as a consequence that there must be an intestacy of the testator with reference to the share in question because it is said that what I have referred to as the residuary gift is not a true residuary gift, or, alternatively, in the events which happened there was no one to take under it. Finally, it is said that the trusts declared of a daughter's share do, in the events which happened, exhaust the whole beneficial interest in Mrs. Lipscomb's share. It is said that, if the ultimate trust as declared by the testator is properly construed, it will be found that, in the events which happened, Mrs. Lipscomb's share is carried over to the estate of the testator's

three younger sons. Those are the questions with respect to Mrs. Lipscomb's share, and substantially the same questions arise with regard to Mrs. Greeves' share.

The difficulty seems to have been occasioned by the distinction the testator made between his married and his unmarried daughters. It will be remembered that, on the failure of the trusts in favour of the children or remoter issue of a daughter, the share is to

" . . . go over and be added by way of accruer to the shares of the daughters of mine if any who shall at the time of the death of such daughter not have been married with such consent as aforesaid . . . "

The effect of those words " who shall at the time of the death of such daughter not have been married with such consent as aforesaid " obviously excludes the share of any daughter who has married, so that Mrs. Lipscomb's share could not go over to the share of the one surviving daughter, Mrs. Greeves, because Mrs. Greeves, being a daughter who had married with the requisite consent, is excluded by definition from the accruer clause. In the ordinarily drawn will one would have expected, in default of issue, a simple accruer which would have ultimately carried the fund to the last survivor of the daughters. If, in the events which happened, there had, in fact, been an unmarried daughter surviving Mrs. Lipscomb, or, in the case of Mrs. Greeves, surviving Mrs. Greeves, it would not, I think, have been disputed by anyone that the shares now in question would have gone over to the share of such surviving unmarried daughter, and on the subsequent death of the unmarried daughter her share, original and accruing, would have gone to the estate of the three sons, but, unfortunately, events were not so obliging, and, as I have already stated, at the respective deaths of these two married daughters all the unmarried daughters were already dead.

It has been argued that in those circumstances the accruer clause is incapable of being applied. It is said that it is limited in its operation to shares of daughters of the testator who shall, at the time of the death of the daughter whose share is being dealt with not only " not have been married with such consent as aforesaid," but who shall furthermore be living at the time of the death of such daughter. It is said that by necessary implication personal survivorship is imported into this accruer clause as a condition of participating in the accruer. If that view is right, then, as all the unmarried daughters were already dead, the accruer clause could not apply. The trusts declared by the testator would not, in the events which have happened, have exhausted the whole beneficial interest, and the destination of the fund in each case, that is to say, of the share of each of these two daughters would depend on the application or otherwise of the rule in *Lassence v. Tierney* (1), and failing its application, on the construction and effect of the so-called residuary gift, the question in the latter case being whether the shares passed under the residuary gift, or were not disposed of at all by the testator and passed as on an intestacy.

Is there any real justification as a matter of construction for confining the accruer to shares of daughters living at the date of accruer in addition to being daughters who have not at that date " been married with such consent " ? In my judgment, there is, as a matter of construction, really no justification for so limiting it. It should be noted that the accruer is expressed to be " to the shares of the daughters," not to the daughters. If the accruer had been expressed to be to the daughters as opposed to their shares, that would have been a point in favour of the view that personal survivorship was required, but it is " to the shares of the daughters," and one must remember that by definition that means the shares appropriated, or to be treated as appropriated, under the preceding provisions of the testator's will to the daughters in question. The existence of those shares, it seems to me, does not depend on the survivor.

ship of the daughters, nor does it seem to me that a daughter who has never married ceases to come within the definition of a daughter who shall not have "married with such consent as aforesaid" because she has died. On her death, no doubt, the possibility of her ever marrying with consent or otherwise comes to an end, but she still is quite properly described as a daughter who has not been "married with such consent as aforesaid." I, therefore, find myself unable to read this accruer clause as operating only in favour of the shares of unmarried daughters who are living at the date of accruer. I suggested in the course of the argument by way of illustration the converse case. Supposing the accruer had been "to the shares of the daughters of mine if any who shall at the time of the death of such daughter have been married with such consent as aforesaid." It seems to me that that would clearly have included a daughter who had married with the requisite consent and who had died before the date of the accruer. To hold the contrary in that hypothetical case might very well have had the effect of depriving children of the deceased married daughter of any share in the accruer merely by the accidental event of the failure of their mother to survive. Grammatically I see no more reason for importing the condition of survivorship into the qualification "not have been married with such consent as aforesaid" than there would have been in the converse qualification "have been married with such consent as aforesaid."

I am fortified in the conclusion to which I have come by the consideration that, quite plainly, the testator contemplated that, subject to provision being made for his daughters and their children, if any, the fund should ultimately go to the three sons or their respective estates. One can imagine events in which that intention might have been defeated. He does not seem to have contemplated the possibility of all his daughters marrying and all or some of them having no children. He appears to have assumed that there would be some daughter or daughters of his who would be unmarried. With that qualification, I think it is fair to say that he did contemplate that, ultimately, subject to the provisions he had made in favour of his daughters and their children, the estates of the three sons would take the corpus of the fund. The construction I have adopted accords, therefore, with what seems to have been clearly the scheme of the will. The contrary construction produces what, in my judgment, would be a capricious result, in that it would make the destination of the capital of the fund dependent on the accident of survivorship of at least one unmarried daughter of the testator at the date of the accruer. It seems to me that is a result which one should hesitate to produce unless the language of the will constrains one to do so.

For these reasons, the conclusion to which I have come, on the true construction of the will, is that on the respective deaths of Mrs. Lipcomb and Mrs. Greeves their shares, including accrued shares, if any, accrued in equal shares to the shares of the unmarried daughters of the testator, the share so accruing in each case being held on the same trusts as and following the destination of such unmarried daughters' original share. The effect of such a declaration, I apprehend, will be, so far as the corpus of the fund is concerned, to carry it in equal shares to the estates of the three sons. The conclusion to which I have come on this question of construction makes it unnecessary for me to express any view on the interesting questions which have been debated before me as to the application or otherwise of the rule in *Lassence v. Tierney* (1), in the event of the shares not being fully disposed of by the trusts, or the other interesting question as to the scope and effect of the residuary gift in this will which, it will be remembered, was somewhat curiously expressed as to its subject-matter and contained no gift to anyone except such gift as was to be implied or discretion conferred on certain named persons to apply the residue "according to their discretion and as they may consider most for the benefit of my said eight daughters hereinbefore named."

As neither of those interesting questions are material, in the view I have formed on the construction of the accruer clause in the will I will not indulge in the expression of any superfluous views about them.

Declaration accordingly. Costs of all parties as between solicitor and client out of the fund.

Solicitors: *Rowe & Maw* (for the plaintiff); *Rowe & Maw*, agents for *Llewellyn & Hann*, Cardiff (for the first defendant); *Rowe & Maw*, agents for *Carson, Baillie, Johnston & Thom*, Belfast (for the third and fourth defendants); *Radford, Frankland & Mercer*, agents for *Stanley Evans*, Manchester (for the second defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re JEEVES (deceased). MORRIS-WILLIAMS AND ANOTHER v. HAYLETT AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), November 10, 1948.]

Will—Division of fund—Per stirpes or per capita—Division “equally between daughters of S. de V. and to E.M.W.”

By her will, a testatrix declared that her residuary estate was to be divided “unto and equally between the daughters of my late brother S. de V. who are resident in America and who shall be living at the time of my decease and to Edith M.W. the daughter of my sister Sarah O.” In the event of any of her nieces dying in her lifetime her issue was to take *per stirpes* “and if more than one equally between them the shares of my residuary estate which such deceased niece would have taken had she survived me and attained a vested interest.” Her niece, Edith, died during the lifetime of the testatrix leaving three children.

HELD: the three children of Edith were to take a moiety of the estate in equal shares and the five children of the brother were to take the other moiety in equal shares.

Dictum of SARGANT, J., in Re Harper ([1914] 1 Ch. 76; 109 L.T. 927), applied.

[AS TO DISTRIBUTION PER CAPITA AND PER STIRPES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 356-359, paras. 402-405; and FOR CASES, see DIGEST, Vol. 44, pp. 991-1003, Nos. 8490-8605.]

Cases referred to:

- (1) *Re Harper, Plowman v. Harper*, [1914] 1 Ch. 70; 83 L.J.Ch. 157; 109 L.T. 925; 44 Digest 845, 6985.
- (2) *Re Walbran, Milner v. Walbran*, [1906] 1 Ch. 64; 93 L.T. 745; 44 Digest 845, 6984.
- (3) *Re Prosser, Prosser v. Griffith*, (1929), 167 L.T. Jo. 307; [1929] W.N. 85; Digest Supp.
- (4) *Re Cossentine, Philp v. Wesleyan Methodist Local Preachers' Mutual Aid Asscn. Trustees*, [1933] Ch. 119; 102 L.J.Ch. 78; 148 L.T. 261; Digest Supp.
- (5) *Re Alcock*, [1945] 1 All E.R. 613; [1945] Ch. 264; 114 L.J.Ch. 161; 173 L.T. 4; 2nd Digest Supp.
- (6) *Re Daniel, Jones v. Michael*, [1945] 2 All E.R. 101; 173 L.T. 315; 2nd Digest Supp.
- (7) *Re Hall, Parker v. Knight*, [1948] Ch. 437; [1948] L.J.R. 1430.
- (8) *Re Jeffrey, Welch v. Jeffrey*, [1948] 2 All E.R. 131.

ADJOURNED SUMMONS taken out by the personal representatives of the testatrix to determine whether, on the true construction of the will, the residuary estate of the testatrix was divisible in equal moieties or whether it was divisible into sixths. VAISEY, J., decided it was divisible in equal moieties.

Wigan for the plaintiffs (personal representatives under the will).

J. A. Wolfe for the daughters of Edith Morris-Williams.

Elverston for the daughters of the brother.

VAISEY, J.: This case raises a question of a familiar kind, and the answer to it is not very easy to give. The testatrix, Alice Mary Jeeves, who was a widow, made her will on Sept. 9, 1940. She died on Apr. 23, 1948. She gave her whole estate in trust for sale and conversion on the usual terms, and, after providing for the payment out of the proceeds of her testamentary expenses and debts and what she called the legacies bequeathed by her will, she declared that the remainder of her residuary estate was to be held as described in cl. 5 of her will, which is in these terms:

"My trustees shall pay and divide the remainder of my residuary estate unto and equally between the daughters of my late brother Samuel de Vall who are resident in America and who shall be living at the time of my decease and to Edith Martha Morris-Williams the daughter of my sister Sarah Margaret Owens provided that if any of my said nieces shall have died in my lifetime . . . leaving issue living at the date of my decease who being male attain the age of 21 years or being female attain that age or marry such issue shall take *per stirpes* and if more than one equally between them the shares of my residuary estate which such deceased niece would have taken had she survived me and attained a vested interest."

That proviso is not very accurately expressed, but its operation in the events which have happened is clear.

The niece, Edith Martha Morris-Williams, predeceased the testatrix, leaving her surviving three children all of whom have attained 21 and are parties to the present application. There is no doubt that they take the share, whatever it may be, of their mother under the proviso to cl. 5 of the will. The brother of the testatrix, Samuel de Vall, had five children, all of whom survived the testatrix and are still living. They are all of them daughters and all of them defendants to the summons. The question is whether, according to the true construction of the will, the residuary estate of the testatrix is now divisible in equal moieties, one moiety being in trust for the five daughters of Samuel de Vall in equal shares and the other moiety in trust for the daughters of Edith Martha Morris-Williams in equal shares or whether the residuary estate is divisible into sixths, one-sixth part being held in trust for each of the five children of Samuel de Vall and the remaining one-sixth in trust for the daughters of Edith Martha Morris-Williams in equal shares. Between those two possible modes of division I have to decide.

Counsel have referred me to a large number of authorities, and I confess that, whether they are reconcilable or not, they do not, either collectively or singly, give me any sure guidance to a solution of the present problem. One proposition emerges from their combined effect and from the observations of the learned judges by whom they were decided, and that is that there is undoubtedly a *prima facie* rule that where there is a direction to divide, at any rate among persons of the same generation or standing in the same degree of relationship to the testatrix, the division is to be an equal division, that is to say, a division between the various beneficiaries *per capita*. In the present case there is undoubtedly some ground for saying that the testatrix was considering her nieces not as individuals but, if I may say so, by households. She puts the daughters of her brother into one household and the daughter of her sister into another. I do not feel that it would be capricious or unreasonable for her to say, if she did say it, that half her estate should go to her brother's daughters and the other half should go to her sister's daughter. Nor, indeed, is there anything capricious in the other view, which is that she wished to benefit all her nieces without distinction and without regard to whether they were children of her brother or of her sister.

I find myself in great doubt whether it is possible for me to discover with certitude which of the two views is that which the testatrix must be considered to have intended. I adopt the words of SARGANT, J., in *Re Harper* (1) where he says ([1914] 1 Ch. 76): "Decisions in cases of this kind are necessarily rather in the nature of guesswork." The only comment I would make on that observation is that I do not think the word "rather" is wholly appropriate. These cases are almost always essentially and inevitably cases in which guesswork has to be employed in arriving at a proper solution of the difficulty. In addition to that case I have been referred to *Re Walbran* (2) a case decided by CLAUSON, J., *Re Prosser* (3), *Re Cossentine* (4), a decision of MAUGHAM, J., *Re Alcock* (5), a decision of EVERSHEED, J., a decision of mine in *Re Daniel* (6), *Re Hall* (7), and, finally, *Re Jeffrey* (8). From those cases I get some, but not a great deal of, assistance beyond the fact that there is, undoubtedly, a *prima facie* presumption that a division between persons of the same generation or standing in the same relationship to a testatrix ought to be a division *per capita*.

Turning back to the will, it seems to me that the arrangement of the words is somewhat inapt. The direction is for the payment and division of the residue unto and equally between the brother's daughters and to the sister's daughter. I have felt a great deal of doubt whether any word of equality of division is to be found in the sentence which applies to the sister's daughter at all. I think the words, grammatically read, are equivalent to a direction to divide the estate unto the brother's daughters equally and to the sister's daughter. Undoubtedly, to my mind, that indicates a stirpital division between the brother's daughters, they taking one half equally between them, and the sister's daughter taking the other half. I believe that the real problem before me now is to decide whether that is sufficient to displace the ordinary rule of a *per capita* division. It is easy, in my judgment, to say on this will that neither view could be rightly described as capricious. It may well be that the testatrix wished to benefit stocks of which the *praepositi*, if that is the correct word, were the brother and sister. It is equally likely that she regarded all her nieces with equal affection and with an equal claim on her bounty. A very close scrutiny of the words might result in there being enough in this will to favour the former of the two views, but I am not convinced that that way of looking at this kind of clause is very helpful and I take the view that it is pre-eminently a case of what SARGANT, J., described as guesswork. So treating it, I think, on the whole, that the curious collocation of words which appears to predicate equality only in relation to the children of the brother is sufficient to indicate that the testatrix was thinking about her nieces, not as individuals, but as households.

I propose to declare that the three children of Edith, niece of the testatrix, take a moiety of the residuary estate equally between them, and the five daughters of the brother take the other moiety of the estate in equal shares. I confess that I have come to this conclusion with a great deal of hesitation, but, as I am convinced that it is a matter of guesswork and equally that it is my duty to guess as best I can, I have formed a view. The costs of all parties as between solicitor and client will be taxed and paid out of the estate of the testatrix in due course of administration.

Costs as between solicitor and client to be paid out of the estate.

Solicitors: *Pontifex, Pitt & Co.*, agents for *Levick & Salwey*, Leominster (for the plaintiff); *Rowe & Maw* (for the defendant); *Churchill, Clapham & Co.*, agents for *H. Vaughan Vaughan & Co.*, Builth (for the first defendant).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

R. v. JONES.

[COURT OF CRIMINAL APPEAL (Humphreys, Lewis and Jones, JJ.), October 25, November 2, 1948.]

Criminal Law—Accessory after the fact—Direction to jury—Specification of acts alleged to have been done to assist the felon Statement made to avoid arrest on other charge.

The appellant, who had been acquitted on a number of counts charging him, with his wife and another person, of receiving stolen goods, was convicted of being an accessory after the fact to those offences of which the wife had been found guilty. The only evidence against the appellant on these charges consisted of his words and actions when the police visited his house. The assistant recorder, in his summing-up, gave the following direction to the jury on the charges of being an accessory after the fact: "An accessory after the fact is one who, knowing that another person has been guilty of felony, takes some active step to conceal the felony and to prevent the apprehension of the principal felon, and, if it is material, you will have to consider whether Jones' conduct was that of a man taking active steps to conceal a felony committed by Mrs. Jones, assuming, of course, that you think Mrs. Jones was guilty of receiving." No further reference was made to the charges of being an accessory.

HELD: it was essential that the assistant recorder should have specified the act or acts alleged to have been done by the appellant for the purpose of assisting his wife to escape conviction, and to have pointed out to the jury that, since he was also charged with the offence of receiving, his evasions and untruths may have been due to his anxiety to avoid arrest quite apart from any desire to protect his wife.

Direction to jury in R. v. Levy ([1912] 1 K.B. 159; 106 L.T. 192) approved.

[AS TO ACCESSORIES AFTER THE FACT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 36, 37, para. 35; and FOR CASES, see DIGEST, Vol. 14, pp. 99, 100, Nos. 714-728.]

Cases referred to:

- (1) *R. v. Levy*, [1912] 1 K.B. 158; 81 L.J.K.B. 264; 106 L.T. 192; 76 J.P. 123; 14 Digest 100, 717.
- (2) *R. v. Hansill*, (1849), 13 J.P. 556; 3 Cox, C.C. 597; 14 Digest 100, 719.
- (3) *R. v. Rowley*, [1948] 1 All E.R. 570; 112 J.P. 207.
- (4) *R. v. Aberg*, [1948] 1 All E.R. 601; [1948] 2 K.B. 173; 112 J.P. 206.

APPEAL against conviction.

The appellant was acquitted at Birmingham Quarter Sessions on nine charges of receiving stolen goods, but he was found Guilty of being an accessory after the fact to such felonies as the jury found were proved against his wife. His appeal, which was based on the grounds of misdirection by the assistant recorder, was allowed and his conviction was quashed. The facts appear in the judgment of the court.

Silverman for the appellant.

A. E. James for the Crown.

Cur. adv. vult.

Nov. 2. HUMPHREYS, J., read the judgment of the court. The appellant appeals from his conviction by leave of the court. He was indicted at the quarter sessions for the city of Birmingham. The indictment charged him in a number of counts together with his wife, Elsie Jones, and a third party named, Twist, with feloniously receiving a number of ladies' dresses, coats and similar articles proved to have been stolen between November, 1947, and May, 1948. Elsie Jones and Twist were convicted on some of those charges.

and do not appeal. The appellant was acquitted on all the counts against him charging receiving, but he was convicted on six counts as an accessory after the fact to such felonies as the jury found were proved against his wife. The counts were all in the same form, and each alleged that he was an accessory after the fact to receiving stolen goods in that he, well knowing that Elsie Jones had received certain property mentioned knowing it to be stolen, did, between the date of that receiving and on dates thereafter, receive, comfort, harbour, assist and maintain the said Elsie Jones. The dates alleged for the receiving varied according to the dates between which the prosecution alleged the goods to have been stolen. None of the counts, therefore, indicated any particular date as the date of the offence charged.

The appellant lived with his wife and daughter at 7, Upper Grove Street, Sinethwick, a house containing several rooms, apparently all occupied by the appellant, his wife and daughter. On May 9, 1948, the police found at that house in the living room downstairs, twenty-five ladies' coats and dresses on coat hangers attached to the picture rails, all new and nearly all bearing price tickets and labels. In the bedroom occupied by the appellant and his wife they found a considerable amount of similar goods, and, further, in every room in the house except the daughter's bedroom still other articles all subsequently identified as being stolen. There was no evidence that the appellant had been concerned in the buying, selling, or otherwise dealing in any of the stolen articles, and the appellant and his wife both gave evidence that the business carried on there was the business of the wife and that the appellant had nothing to do with it. In fact, the sole evidence against the appellant on the charges of which he was convicted consisted of what he said and did on the occasion of the police visit to his house on May 9.

As to his actions, it is right to say that the detective inspector agreed that the appellant made no attempt to prevent the police from searching the house. As to his words, the evidence of Detective Inspector Quinton so far as material, was to the following effect. He said that he went to the house on May 9. (Q) Is that a house occupied by the two prisoners Jones? (A) Yes. (Q) Will you describe the sort of house it is? (A) It is a rather large, old fashioned type of dwelling. There is an archway which leads to a garden and yard at the back, and the front door is from the archway. (Q) When you went there first at 8 o'clock did you find they were both out? (A) Yes. (Q) At 8.20 p.m. did James Leonard Jones arrive at the premises? (A) Yes. (Q) Did you speak to him? (A) I said to him: 'We are police officers. We have reason to believe you have a number of ladies' coats and dresses in the house and that they are stolen property.' (Q) What did he reply? (A) There is nothing here. (Q) What did you say to that? (A) Have you any new clothing here at all? (Q) And his reply? (A) He said 'No.' I then told him: 'I am not satisfied; I am going to search the house.' (Q) What did Jones say then? (A) 'Well, my wife did buy three coats, but I do not know where she has put them. Perhaps my daughter will know,' and he called his daughter who was in the front room." A little later, the inspector said that he found certain books and articles, and the question was put: "(Q) Did you then speak to Jones again about what you had found? (A) Yes. (Q) What did you say? (A) I said to him: 'Are there any more,' and I cautioned him then. He said: 'They are all in this room and there is nothing else in the house'." The inspector went on to say that he, not being satisfied, continued to search and went into the front room upstairs in spite of that denial. There he found nine more ladies' coats and three dresses, again all new and bearing price tickets, which were part of the property identified as having been stolen. Then he was asked: "(Q) What did Jones say about them?" (A) He said: 'These are my wife's and daughter's; they have had them a long time.' I told him the price tickets were still attached and he did not reply to that.'

The assistant recorder, who tried the case, left to the jury the receiving counts, directing them that it was open to them to find on the evidence that the stolen property was in the joint possession of husband and wife, and there was, in our opinion, ample material on which the jury could find that the appellant was well aware that the articles were stolen. Indeed, it may well be that the jury would have convicted the appellant on those charges if they had not been afforded an opportunity of finding him guilty of what they probably regarded as the minor offence of having assisted his wife throughout in her felonious dealings. In his summing-up the learned assistant recorder, after dealing with the evidence upon the receiving charges, proceeded as follows :

" Assuming that you are not satisfied as to all or any of the charges of receiving, that the property ever came into Jones' possession, you will then have to consider the remaining counts in the indictment against him, that is to say, counts 12 to 20 in which he is charged with what is known as being an accessory after the fact. An accessory after the fact is one who, knowing that another person has been guilty of felony, takes some active step to conceal the felony and to prevent the apprehension of the principal felon, and, if it is material, you will have to consider whether Jones' conduct was that of a man taking active steps to conceal a felony committed by Mrs. Jones, assuming, of course, that you think Mrs. Jones was guilty of receiving. So much as to the position generally, and you will have the indictment before you and you will have to consider each charge separately. I come now to deal with the evidence."

That was all. No further reference was made throughout the summing-up to the charges of being an accessory after the fact. That direction left the jury entirely without guidance as to what " active steps " (to use the language of the assistant recorder) by a husband will bring him within the criminal law, or what steps were relied on by the prosecution and what was the significance of the evidence with regard to them. There was, in our view, another serious omission from the summing-up in that the learned judge failed to point out to the jury that on May 9 the appellant was being questioned by the police as a suspect liable, as he knew, to be charged himself with felonious receiving, as, indeed, he was, so that it was for the jury to consider whether his evasions and untruths may not have been due to his anxiety to avoid arrest, quite apart from any consideration of his wife and her position.

The direction to a jury approved by this court in *R. v. Levy* (1) was as follows ([1912] 1 K.B. 159) :

" . . . if they were satisfied that she removed the things mentioned from Green's workshop, knowing that he was guilty of committing the felony charged against him, and did so for the purpose of assisting him to escape conviction, they should find her guilty."

In our view, it was essential in the present case that the learned judge should specify the act or acts alleged to have been done by the appellant for the purpose of assisting his wife to escape conviction, and, further, should direct the jury specifically that, if the motive in the mind of the appellant was merely a desire to avoid his own arrest, that would not be sufficient to bring him within the purview of this charge. There are offences couched in such plain terms that nothing more is required than a statement of the offence to enable a jury to say whether the evidence is sufficient to convict, but this charge of being an accessory after the fact is not one, and, in our opinion, calls for a reasoned direction to ensure that no injustice is done to the accused person. The absence of any explanation to the jury on the matters referred to rendered the summing-up in the peculiar circumstances of the case defective to such an extent as to make the trial unsatisfactory. Without saying that there was no evidence on which the appellant could be convicted, the evidence properly considered was,

in our opinion, very slight and called for a much more detailed examination than it received at the hands of the learned assistant recorder.

Two other points were taken by counsel for the appellant. The first relates to the fact that advantage was taken by the prosecution of the terms of the Larceny Act, 1916, s. 43 (b), to prove in the course of the trial a previous conviction against the appellant of factory-breaking with intent to steal. This evidence was receivable for the purpose of proving guilty knowledge on the charges of receiving. There was no specific direction to the jury that they must disregard it when considering the charge of being an accessory. It would certainly have been better that the jury should be so directed, but as they acquitted the appellant on the receiving counts to which it specifically related, we think it unlikely that it affected their minds on the other counts.

The other matter is that, in speaking of the question of possession by the then accused person, Jones, the present appellant, the learned assistant recorder said this :

“ You will have to consider as to the property generally whether this came into the possession of Jones, that would be in the joint possession of Jones and his wife, and whether at that time he knew that this was stolen property. That relates to the property generally, but there is one special matter which affects him, and you will remember that the wife, Mrs. Jones, told the detectives that he could recover some of the stolen property and that subsequently some of these articles in question were produced by Jones and handed over to the detectives. All matters of fact are for you, but it seems to me that with regard to that particular property you can have little doubt that it came into the possession of Jones when he received it and took it to the detectives. Whether he knew at the time that it was stolen property, of course is another matter.”

That passage, as it appears in the transcript, is so glaring a misdirection that we feel it is doubtful whether some mistake in copying or possibly in mishearing may not have been made, but assuming that the words were used, it is true, as pointed out by counsel for the Crown, that the learned assistant recorder was dealing with the question of possession as part of the case for the prosecution on the receiving counts. That the direction was wrong and seriously prejudicial to the appellant was admitted by counsel for the Crown, but he argues that it could only have affected the minds of the jury on those counts upon which the appellant was acquitted. Whether the court would have thought it right to act upon either of these unfortunate slips in the summing-up if they stood alone, we need not decide, but they do tend to strengthen the view that this conviction is most unsatisfactory and cannot be upheld. The appeal is allowed and the conviction quashed.

Conviction quashed.

Solicitors : *Arthur Hall-Wright & Son*, Birmingham (for the appellant) ;
M. P. Pugh, Birmingham (for the Crown).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

WRAGG v. LOVETT.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Evershed, L.J.J.), October 15, 18, 19, November 11, 1948.]

Agency—Estate agent—Authority to sell at stated price—Authority to make particular contract.

The defendant (the vendor) authorised W. & Co., a firm of estate agents, to sell his freehold dwelling-house to the plaintiff (the purchaser) for £840. The agents made the following agreement in writing as agents for the defendant: "Memorandum of agreement made this 29th day of June, 1946, between Mr. E.C.L., 349A, D. Rd., Norwich, retired, the vendor, to Mr. E.H.W., 27, L. Rd., Lower Hellesdon, the purchaser, Whereby the vendor hereby agrees to sell and the purchaser agrees to purchase the freehold semi-detached house situate and known as No. 27, L. Rd., Lower Hellesdon, at the price of £840, the purchase to be made and completed according to the National Conditions of Sale (latest edition) so far as the same are applicable to a sale by private treaty and are not inconsistent with the conditions following: (1) The deposit shall be £84 of the purchase money and shall be paid to Messrs. C.D.W. & Co., 2/4, V. St., Norwich, estate agents, as agents for the vendor. (2) The day for completion of the purchase shall be July 20, 1946, or earlier by arrangement. (3) The vendor sells as beneficial owner. (4) The title shall commence with a document forming a good root of title dated at least 20 years ago and the property is sold subject to any covenants or stipulations contained or referred to in the deeds. In an action by the purchaser for specific performance of this agreement the defendant pleaded *inter alia* that W. & Co. had only authority to make an open contract.

HELD: on the facts, that the defendant was satisfied to allow W. & Co. to make whatever contract they thought best, and so they had authority to make the contract.

Per curiam: when a vendor merely authorises a house agent to sell at a stated price he must not be taken to be authorising the agent to do more than agree the price with an intending purchaser. The making of a contract is no part of an estate agents' business, and, although, on the facts of an individual case, the principal may authorise him to make a contract, such an authorisation is not lightly to be inferred from vague or ambiguous language.

[AS TO IMPLIED AUTHORITY OF ESTATE AGENTS, see HALSBURY, Hailsham Edn., Vol. 1, p. 220, para. 380; and FOR CASES, see DIGEST, Vol. 1, pp. 377-379, Nos. 831-836.]

Case referred to:

- (1) *Keen v. Mear*, [1920] 2 Ch. 574; 89 L.J.Ch. 513; 124 L.T. 19; 12 Digest 156, 1102.

APPEAL by the defendant from a judgment of JENKINS, J., dated Dec. 3, 1947, ordering specific performance of a written agreement made between the plaintiff and a firm of estate agents acting for the defendant in the sale of the defendant's dwelling-house. The defendant pleaded that he was induced to enter into the agreement by misrepresentation and that he did not authorise the agents to make the agreement for him. His LORDSHIP held that there was no misrepresentation and that the estate agent was authorised to make a contract containing terms not less favourable to a vendor than those of an open contract. The Court of Appeal dismissed the appeal.

Lightman for the defendant.

Boraston for the plaintiff.

Cur. adv. vult.

Nov. 11. LORD GREENE, M.R., read the following judgment of the Court. The question which arises for decision is whether or not a contract binding on

- the defendant was ever made, and this depends on the answers to the questions : Did the defendant authorise the house agents, Ward & Co., to make the contract alleged, or, if he did not, did he authorise his solicitor, Mr. Hatch, to ratify the contract on his behalf ? The judge had the difficult task of extracting the relevant facts from the evidence of witnesses, one of whom, the defendant, obviously had difficulty not only in hearing, but also in understanding the questions put to him, and was also the possessor of a wholly unreliable memory. Another witness, Mr. Hatch, also had a memory on which he himself could place no reliance, while the defendant's daughter, who dealt with the agents on behalf of the defendant, naturally lacked any precise appreciation of what she was expected to say to them. In these circumstances, the learned judge, who saw the witnesses, was in the best position to form an opinion as to the conclusions of fact to be drawn from what was necessarily unsatisfactory evidence. He clearly took the view that Mrs. Martin, the partner in Ward & Co., who was concerned in the business, was entitled to accept what was said to her as being an authorisation, not merely to agree the single term of price, but also to enter into a binding contract on behalf of the defendant. We find no ground for differing from this conclusion of the learned judge.
- It is, moreover, in our view, the only conclusion consistent with the subsequent attitude of the defendant himself. It was not until late in the history of the dispute that the point of lack of authority was taken on behalf of the defendant. Previously to this his only complaint was, not that Ward & Co. had purported to bind him by a contract when he had never authorised them to make a contract on his behalf, but that the contract which they had made did not contain what he thought of as a condition to be inserted in the contract, namely, that the plaintiff would continue to reside in the house at Norwich. We may say in passing that the learned judge found that the instructions given to Mrs. Martin meant and were understood by her to mean not that such a condition should be inserted in the contract, but that she should obtain from the plaintiff an assurance as to his intention. The allegation that such an assurance was given was the foundation of that branch of the defendant's case which was based on misrepresentation. The view taken by the learned judge obtains further confirmation from the letter of Aug. 2, 1946, from Messrs. Hatch & Hatch to Messrs. Mills & Reeve. As to this letter Mr. Hatch said : " No doubt I had his instructions or authorisation to write this letter, so far as I know." Later answers by him may, no doubt, be read as intended to modify this particular answer, but assuming that Mr. Hatch did not adopt the natural and proper course of taking specific instructions from his client, it seems clear that, as a result of long usage, he regarded the fact as immaterial. The letter, be it observed, does not dispute, on the contrary it asserts, that a contract had been made, and the sole ground suggested for impugning its binding character lay in the alleged misrepresentation.
- While accepting the learned judge's conclusion upon the particular facts of this case, we must not be understood as suggesting that when a vendor merely authorises a house agent to " sell " at a stated price he must be taken to be authorising the agent to do more than agree with an intending purchaser the essential (and, generally, the most essential) term, *i.e.*, the price. The making of a contract is no part of an estate agent's business, and, although, on the facts of an individual case, the person who employs him may authorise him to make a contract, such an authorisation is not lightly to be inferred from vague or ambiguous language. But there remains the question whether or not Ward & Co. were authorised (or, what in law is the same thing, reasonably understood themselves to be authorised) to make this particular contract. It was held by RUSSELL, J., in *Keen v. Mear* (1) that, on the facts of that case, the only authority given to the agent was to make an open contract. In the present case, the learned judge understood that decision as not excluding the making

of a contract containing terms not less favourable to the vendor than those of an open contract. It is not, in our view, necessary to express a concluded opinion upon this question. We may, however, point out (i) that the words of RUSSELL, J. ([1920] 2 Ch. 579):

"But had he authority to sign the particular contract here in question? I think not. It contains a special condition as to title, which might or might not be less favourable to a vendor than the title required under an open contract"

suggests to our minds that he meant to limit the authorisation in such a case to an authorisation to make an open contract and to exclude a consideration whether a term inappropriate to an open contract was or was not more beneficial to the vendor; (ii) that an open contract is a thing certain, whereas the question whether or not a particular stipulation is more or less beneficial to the vendor may, in the complications of English conveyancing, be a question of great difficulty which could only be resolved by litigation; and (iii) we are not clear that the special provision as to the date of completion was, in fact, more beneficial to the vendor than would have been the corresponding provision under an open contract. To say that a simple authority to make a contract allows a house agent to insert any terms he pleases provided they are ultimately held to be more beneficial to the vendor appears to us to be a proposition which requires careful examination.

In the present case, we do not think it necessary to decide this matter. It appears to us that the proper inference from all the facts of the case is that the defendant was satisfied to allow his agents to make whatever contract they thought best and relied on them to protect his interests provided, and provided only, that they obtained the desired statement from the plaintiff as to his intention to remain in the house. Mrs. Martin so interpreted her instructions. The action which she took did not appear to Mr. Hatch himself as being in the least unusual or improper, but what appears to us to be most important is that the defendant not only did not question the authority of Ward & Co. to make a contract for him, but his solicitor either was or conceived himself to be authorised to write the letter of Aug. 3 in which he expressly asserted the making of a contract. It may be perfectly true that the defendant had not seen the contract and was ignorant as to its terms, but this appears to us to be immaterial on the facts of this case. If, as we think, he must be taken to have left it to his agents to make such a contract as they thought proper in his interests, the fact that he did not see the contract would be immaterial. Moreover, the fact that before Mr. Hatch wrote the letter of Aug. 2 the defendant, though plainly aware that a contract had been made, did not ask to see the contract, appears to us to be consistent only with the view that he was not interested in its contents save as regarded the question of the plaintiff's intentions on the matter of residence. That this would have been a reasonable attitude on the defendant's part appears to us to be confirmed by the fact that Mr. Hatch saw nothing unreasonable in it and did not even show the contract to the defendant but assumed that it had been authorised.

In the view which we take it is, therefore, unnecessary to consider whether, if the making of the contract by Ward & Co. was in fact unauthorised, the defendant must be taken to have authorised Mr. Hatch to ratify the agency which Ward & Co. assumed. The appeal is dismissed.

Appeal dismissed with costs.

Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *Mills & Reeve*, Norwich (for the plaintiff); *McKenna & Co.*, agents for *Hatch & Hatch*, Norwich (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re ROSE (deceased). MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. v. ROSE AND OTHERS.

[CHANCERY DIVISION (Jenkins, J.), November 3, 4, 1948.]

Will—Legacy—General or specific—Shares in private companies—Number of shares bequeathed amounting to exact number held by testator—No words indicating testator's ownership of shares bequeathed.

Will—Ademption—Gift of shares—Option to purchase granted by testator after date of will—Exercise of option after testator's death—Gift inter vivos—Gift of shares in private company if such shares not transferred to legatee "previously to my death"—Transfer executed by testator during his lifetime—Refusal of directors to register transfer until after testator's death.

By his will, dated Dec. 6, 1943, the testator expressed his desire, in cl. 2 (2), that his executors should consult his accountant "as to the best method of realising my shares in H. G. Sanders & Son Ltd.", and, by cl. 3, he gave the following legacies (*inter alia*): "(a) to my niece M.R. 500 preference and 500 ordinary shares in E. P. Rose & Son Ltd. . . . (b) to my nephew Michael R. 500 preference shares and 500 ordinary shares in E. P. Rose & Son Ltd. . . . (g) to E. H. . . . 8,300 ordinary shares in H. G. Sanders & Son Ltd. and I also give him 5,000 preference shares in H. G. Sanders & Son Ltd. if such preference shares have not been transferred to him previously to my death. (h) to W. J. . . . 2,189 ordinary shares, 5,000 preference shares . . . in H. G. Sanders & Son, Ltd." The testator then gave his residuary estate to W. J. At the date of his will, the testator had exactly the number of ordinary and preference shares in the two companies respectively as were disposed of by his will. Both the companies were private limited companies. In August, 1944, the testator executed in E. H.'s favour a transfer of 5,000 preference shares in H. G. Sanders & Son, Ltd., and handed it to E. H. together with the relevant certificates, but, as the company was a private one, the right to claim registration of transfers was subject to the consent of the directors. During the testator's lifetime the directors refused to register the transfer, but they registered it after his death, which took place on Jan. 7, 1946. Shortly before his death, the testator sold his ordinary shares in E. P. Rose & Son, Ltd., and granted an option, which was exercised after his death, to purchase the preference shares in that company. The questions to be determined were (*inter alia*) whether the gifts of shares in cl. 3 (a), (b), (g) and (h) were specific or general gifts, and, if they were specific, whether, in the events that had happened, there had been an ademption of the preference shares given in cl. 3 (a), (b) and (g):—

HELD: (i) the gift of the preference shares in H. G. Sanders & Son, Ltd. to E. H., in cl. 3 (g), was clearly a specific gift, notwithstanding the fact that the testator did not use the possessive pronoun in disposing of the shares, and, accordingly, the gifts of the other shares in that company, in cl. 3 (g) and (h), were also specific.

(ii) on the true construction of the will there were sufficient indications therein that the testator was intending in cl. 3 (a) and (b) to dispose specifically of the shares which he actually owned at the date of the will in E. P. Rose & Son, Ltd., and, therefore, the gifts in cl. 3 (a) and (b) were specific gifts.

(iii) in the events that had happened, there was an ademption of the preference shares in E. P. Rose & Son, Ltd., given by cl. 3 (a) and (b).

Re Carrington, Ralphs v. Swithenbank ([1932] 1 Ch. 1; 145 L.T. 284), followed.

(iv) since the testator had done everything in his power to divest himself of the preference shares in H. G. Sanders & Son, Ltd., in favour of E. H.,

the shares had been transferred to E. H. previously to the testator's death within the meaning of cl. 3 (g) of the will, and, as E. H.'s title under the transfer was perfected by registration after the testator's death, E. H. took the shares as a gift *inter vivos*, and the gift of those shares in cl. 3 (g) of the will was wholly adeemed by the gift *inter vivos*.

Milroy v. Lord (1862) (4 De G.F. & J. 264; 7 L.T. 178) and *Re Fry, Chase National Executors & Trustees Corp'n. v. Fry* ([1946] 2 All E.R. 106; [1946] Ch. 312; 175 L.T. 392), *distinguished*.

[AS TO ADEEMPTION OF SPECIFIC GIFTS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 127-130, paras. 164, 165; and FOR CASES, see DIGEST, Vol. 44, pp. 403-414, Nos. 2355-2448, and Vol. 20, pp. 356-358, Nos. 951-966.]

Cases referred to:

- (1) *Robinson v. Addison*, (1840), 2 Beav. 515; 9 L.J.Ch. 369; 44 Digest 298, 1299.
- (2) *Macdonald v. Irvine*, (1878), 8 Ch.D. 101; 47 L.J.Ch. 494; 38 L.T. 155; 44 Digest 198, 274.
- (3) *Re Willcocks, Warwick v. Willcocks*, [1921] 2 Ch. 327; 91 L.J.Ch. 27; 126 L.T. 86; 44 Digest 296, 1276.
- (4) *Re Gage, Crozier v. Gutheridge*, [1934] Ch. 536; 103 L.J.Ch. 241; 151 L.T. 240; Digest Supp.
- (5) *Re O'Connor, Westminster Bank, Ltd. v. O'Connor*, [1948] 2 All E.R. 270; [1948] Ch. 628; [1948] L.J.R. 1606.
- (6) *Re Pratt, Pratt v. Pratt*, [1894] 1 Ch. 491; 63 L.J.Ch. 484; 70 L.T. 489; 23 Digest 424, 4952.
- (7) *Re Nottage, Jones v. Palmer* (No. 2), [1895] 2 Ch. 657; 64 L.J.Ch. 695; *sub nom. Re Nottage, Nottage v. Palmer* (No. 1), 73 L.T. 265; 44 Digest 705, 5480.
- (8) *Re Carrington, Ralphs v. Swithenbank*, [1932] 1 Ch. 1; 100 L.J.Ch. 299; 145 L.T. 284; Digest Supp.
- (9) *Milroy v. Lord*, (1862), 4 De G.F. & J. 264; 31 L.J.Ch. 798; 7 L.T. 178; 25 Digest 530, 206.
- (10) *Re Fry, Chase National Executors & Trustees Corp'n. v. Fry*, [1946] 2 All E.R. 106; [1946] Ch. 312; 115 L.J.Ch. 225; 175 L.T. 392; 2nd Digest Supp.

ADJOURNED SUMMONS to determine, *inter alia*, whether, on the true construction of the testator's will, certain gifts of shares were general or specific gifts, and, if they were specific, whether, in the events that had happened, some of these gifts had been adeemed. The facts and the relevant provisions of the will appear in the judgment.

R. J. S. Thompson (G. Maddocks with him) for the plaintiffs (the executors).

F. G. King for the first defendant, Margaret Rose.

Tonge for the second defendant, Michael Rose.

Sir Andrew Clark, K.C., and *Guest Mathews* for the third defendant, E. E. Hook.

F. B. Alcock for the fourth defendant, Winifred Rose.

JENKINS, J.: The first question which I have to decide is whether certain gifts of shares made by the testator are specific gifts or are in the nature of general legacies. The testator's will is dated Dec. 6, 1943. There was a codicil dated July 4, 1944, on which nothing turns, and he died on Jan. 7, 1946, his will being proved on Dec. 18, 1946. The relevant provisions of the will are these. He revoked all former wills and testamentary dispositions and appointed the Midland Bank Executor and Trustee Co., Ltd., the present plaintiffs, to be executors and trustees of his will. Then he gave this direction by cl. 2 (2) of his will:

"I desire the company [Midland Bank Executor and Trustee Co., Ltd.] to consult Mr. Herbert A. Cox my accountant of Messrs Woodman Cox & Wilkins as to the best method of realising my shares in H. G. Sanders & Son Ltd."

Clause 3 is :

A "I give and bequeath the following legacies all free of estate duty and all other death duties : (a) To my niece Margaret Rose 500 preference and 500 ordinary shares in E. P. Rose & Son, Ltd. of Bedford ; (b) To my nephew Michael Rose 500 preference shares and 500 ordinary shares in E. P. Rose & Son, Ltd. of Bedford ; (c) £250 to each of the following employees of H. G. Sanders & Son, Ltd. [There followed an enumeration of the beneficiaries under that provision] (d) £250 to each of the following [named legatees]".

By paras. (e) and (f) the testator gives pecuniary legacies of £250 to each of two other legatees. Then comes paras. (g) and (h), and cl. 4 :

C "(g) To Ernest E. Hook (now of 280 Norwood Road Southall and at present in the employ of H. G. Sanders & Son Ltd.) 8300 ordinary shares in H. G. Sanders & Son Ltd. and I also give him 5000 preference shares in H. G. Sanders & Son Ltd. if such preference shares have not been transferred to him previously to my death. (h) To Miss Winifred Jameson at present residing at 40 Foley Street London W.1. 2189 ordinary shares 5000 preference shares and £6000 debentures in H. G. Sanders & Son Ltd. 4. As to all the rest residue and remainder of my property both D real and personal of whatsoever kind or nature and wheresoever situate including any property over which I have any general testamentary power of disposition I give devise and bequeath the same (subject to my just debts funeral and testamentary expenses and death duties) to the said Miss Winifred Jameson at present residing at 40 Foley Street London W.1. absolutely and beneficially."

E It appears that at the date of his will and also at the date of the codicil the testator held 1,000 preference shares and 1,000 ordinary shares of £1 each in E. P. Rose & Son, Ltd. At the same dates he held 10,000 6 per cent. preference shares and 10,489 ordinary shares of £1 each, and £2,200 first debentures and £3,800 second debentures in H. G. Sanders & Son, Ltd. The circumstances which make the question I am now considering material (as raising a case of F ademption in the event of the legacies being held specific) need not, I think, be gone into in any detail for the present purpose. Briefly, what happened was that in the testator's lifetime [about October, 1945] Debenhams acquired his ordinary shares in E. P. Rose & Son, Ltd. for £10 a share, and acquired an option, which was exercised after his death, to purchase the preference shares in the same company for 27s. a share. A very material point which G emerges from the evidence is that the gifts by the testator of preference and ordinary shares in E. P. Rose & Son, Ltd. and of preference and ordinary shares and debentures in the other company, H. G. Sanders & Son, Ltd., add up to exactly the numbers of preference shares and ordinary shares and amounts of debentures held by the testator in those companies respectively at the date of his will. A further point of importance appearing from the evidence is that H E. P. Rose & Son, Ltd. is a private limited company, which means that there would be no free market in its shares and that a transfer of its shares would be subject to one or other of the forms of restriction appropriate in the case of private companies. This observation also applies to H. G. Sanders & Son, Ltd.

I turn now to the consideration of the question which is primarily one of the construction of the will, though the numerous authorities bearing on this subject provide guidance as to the rules or principles of construction to be

followed in its solution. One starts with the general proposition that the court leans against specific legacies, and is inclined, if it can, to construe a legacy as general rather than specific, so that, if there is any doubt, it should, on the whole, be resolved in favour of the view that the legacy is general. There are certain other principles to be extracted from the authorities, to which I propose now briefly to refer.

The earliest case in order of date to which I will refer is *Robinson v. Addison* (1). In that case the testator made a gift of 15½ shares of the Leeds and Liverpool Canal. It was held that that gift was general and not specific, even though the testator referred to the exact number of shares which he held and they were shares which were not readily marketable. Those two points were dealt with by LORD LANGDALE, M.R. (2 Beav. 519, 520), and the conclusion to which he came was that those two circumstances were not enough to make the gift specific. It was held in *Macdonald v. Irvine* (2), that a legacy of 500 Egyptian 9 per cent. bonds was not specific, though the testator had such bonds at the time and the will contained other gifts of bonds of the same description in terms which made them clearly specific gifts. The effect of the decision in *Re Willcocks*, *Warwick v. Willcocks* (3) appears from the headnote :

"The bequest of a sum of stock in pounds, shillings and pence, being the exact amount of the stock the testator possesses at the date of his will, is a general legacy unless there is something else on the face of the will to indicate that the testator intended it to be specific."

P. O. LAWRENCE, J., dealt ([1921] 2 Ch. 329) with the question of the gift being in pounds, shillings and pence as opposed to being in round numbers, and (*ibid.*, 330) he dealt with an additional point, *viz.*, the effect of the residuary gift being in the form "the remainder of my real and personal estate." He held that it would be attaching too much importance to the words of the residuary gift to hold that they had the effect of making the legacies which preceded it specific.

Then I was referred to *Re Gage*, *Crozier v. Gutheridge* (4), a decision of CLAUSON, J., in the case of a gift of £1,150 5 per cent. war loan. The question about it arose owing to the conversion of the loan of that particular issue. CLAUSON, J., held ([1934] 1 Ch. 539) :

"It is clear that notwithstanding that the testator at the time he made his will did in fact hold that precise amount of the war loan described in his will, I am bound, in the absence of the possessive pronoun or of some other context indicating that the stock which he intended to give by his will was the very stock of which he was then the holder, to hold that bequest to be a general bequest and not a specific bequest."

Next I should mention *Re O'Connor*, *Westminster Bank, Ltd. v. O'Connor* (5), the most recent case on this subject. The gift under consideration in that case was a bequest to the testator's son of 10,000 preference shares of £1 each fully paid in a named company. The company was a private company in which the testator at his death held only 9,000 preference shares as compared with the 10,000 he purported to give by his will. The will included a residuary gift to trustees on trust for sale with a direction for payment of "the pecuniary legacies hereinbefore bequeathed." ROXBURGH, J., said ([1948] 2 All E.R. 271) :

"... there are two points in favour of either view. In favour of it being a general legacy is the fact that there is nothing in the language of cl. 5 of the will to indicate that the testator is describing specific property of his. For example, the testator does not use the word 'my' or any possessive word . . . The second point, a very strong one, in favour of the legacy being general, is that the testator never had 10,000 preference shares either at the date of his will or at the date of his death, but only 9,000,

and, accordingly, if he did intend by this clause to make a specific disposition of his own property, he must have been misinformed as to the extent of that property. The two points in favour of the legacy being specific are, first, the circumstance that the bequest deals with a private company of which the testator was the manager and governing director, and in which the shares were subject to the restrictions usual in the case of a private company, and, secondly—and this is very important—the testator clearly did not include the disposition in cl. 5 of the preference shares among the dispositions which his executors and trustees were to satisfy out of residue.”

A little later, ROXBURGH, J., said (*ibid.*, 272) :

“In the circumstances, what ought I to hold ? There is no doubt that the court leans strongly in favour of a general legacy. How strongly is apparent from *Re Willcocks* (3). If the testator, instead of referring to 10,000 preference shares, had referred to 9,000 or less preference shares in cl. 5, I should have held that there was sufficient context here to carry me to the other side of the line . . .”

In the result, the learned judge, taking into consideration all the points bearing either way, came to the conclusion that the legacy in that case was a general legacy. Although that was the result in that particular case, it is important to observe the reference by the learned judge to the character of the company and to the number of shares given as compared with the number held by the testator at the date of his will. He indicates that, if the testator had referred to the exact number, he would have thought that there was sufficient context to carry him to the other side of the line. That, of course, must be read in the light of the fact that the will before the learned judge in that case did contain an indication not present here in the special form of residuary bequest.

Those were the cases cited to me on behalf of the parties concerned to show that the legacies in this will are general legacies. On the other side I was referred by counsel for the defendant, Ernest Hook, to *Re Pratt, Pratt v. Pratt* (6) and *Re Nottage, Jones v. Palmer* (No. 2) (7). In *Re Pratt* (6) a legacy of £800 “invested in” 2½ per cent. consols in a will where the context had some bearing on the point was held to be specific and not demonstrative. The judgment of NORTH, J., in that case shows that the question was one in answering which regard must be had to the particular will as a whole, the question being, like any other question of construction of a will, a matter of arriving at the testator’s intention from the language he has used in the context in which he uses it. In *Re Nottage* (7) the circumstance that certain gifts of investments were clearly intended to be specific was held to afford a sufficient indication, in conjunction, of course, with the other features of the will, that other associated gifts, if I may so describe them, of investments in words which, if they had stood alone, might have been consistent with their being general legacies, made gifts of that doubtful character specific. I think, for the present purpose, I can content myself with reading this passage from the end of the judgment of RIGBY, L.J. ([1895] 2 Ch. 665):

“But when a man has different kinds of investments, and by his will deals with them all, dealing with some of them in such a way as to make it absolutely clear that he intended specific gifts, and with regard to all there are expressions in the will which agree better with the hypothesis that the gifts are specific than that they are general, I think we may safely conclude that the gifts of investments of particular descriptions are specific.”

I return to the will. In cl. 2 (2) the testator expresses the desire that the Midland Bank Executor and Trustee Co., Ltd., should consult his accountant “ . . . as to the best method of realising my shares in H. G. Sanders & Son,

Ltd." That carries one this far, that, at any rate, so far as H. G. Sanders & Son, Ltd., are concerned, the testator is making his will with reference to the fact that at the date of the will he is a holder of shares in that company. In cl. 3 come the words of gift which govern all the bequests which follow: "I give and bequeath the following legacies all free of estate duty and all other death duties . . ." The first two gifts are (a) and (b), the gift to Margaret Rose of 500 preference shares and 500 ordinary shares in H. P. Rose & Son, Ltd., and to Michael Rose 500 preference and 500 ordinary shares in the same company. So far, having looked at the surrounding circumstances, one finds that by those two gifts, (a) and (b), the testator is, in fact, disposing of the exact total numbers of preference and ordinary shares in the company in question which he held at the date of his will. Coupled with the fact that the company was a private company, that exactly produces the situation which ROXBURGH, J., thought would have been sufficient in *Re O'Connor* (5) to take the gift to the other side of the line, but one has not here the significant residuary gift in the particular form which was present in *Re O'Connor* (5), and so far, therefore, it is doubtful, in my judgment, whether there is enough in this case to put the gifts in question over the line, though they are very near the line.

After the series of pecuniary legacies in cl. 3 (c) to (f), one gets the gifts of the shares in H. G. Sanders & Son, Ltd.:

"(g) To Ernest E. Hook . . . 8,300 ordinary shares in H. G. Sanders & Son, Ltd. and I also give him 5,000 preference shares in H. G. Sanders & Son, Ltd. if such preference shares have not been transferred to him previously to my death. (h) To Miss Winifred Jameson . . . 2,189 ordinary shares, 5,000 preference shares and £6,000 debentures in H. G. Sanders & Son, Ltd."

When one comes to these gifts, one is struck at once by the fact that, just as in the case of the preference and ordinary shares in E. P. Rose & Son, Ltd., the testator has disposed of the exact numbers or amounts of preference and ordinary shares and debentures possessed by him at the date of the will in H. G. Sanders & Son, Ltd. He has divided them up exactly between the two beneficiaries so as to exhaust the total. I think this fact becomes more significant when one sees such numbers as 8,300 ordinary shares to Mr. Hook and 2,189 ordinary shares to Miss Winifred Jameson (who is now the defendant, Mrs. Winifred Rose [the testator's widow]), making the exact total holding of 10,489 ordinary shares. The matter, however, does not rest there because the language of cl. 3 (g) is such as to make it abundantly plain on the face of the will that the testator's gift of preference shares to Mr. Hook can only be a specific gift:

"I give . . . to Ernest E. Hook . . . 8,300 ordinary shares in H. G. Sanders & Son, Ltd. and I also give him 5,000 preference shares in H. G. Sanders & Son, Ltd. if such preference shares have not been transferred to him previously to my death."

That gift of preference shares to Mr. Hook obviously must be intended by the testator to be a specific gift, but he makes it in the form: "I also give him 5,000 preference shares." He does not introduce the possessive pronoun, although clearly meaning the gift to be specific. I think it follows from that that the gift of 8,300 ordinary shares to the same legatee must also be specific and that when the testator goes on to make to Mrs. Winifred Rose the gift of 2,189 ordinary shares, 5,000 preference shares and £6,000 debentures in H. G. Sanders & Son, Ltd., he is in like manner disposing of specific property, the remainder of his holdings of shares and debentures in H. G. Sanders & Son, Ltd., after providing for the specific gift of part of his holdings of preference and ordinary shares to Mr. Hook.

One then arrives at the conclusion on cl. 3 (g) and (h) that the testator is making what are clearly specific gifts without thinking it necessary to use the possessive pronoun—without thinking it necessary to say, *e.g.*, “my 5,000 preference shares.” One is entitled, having collected that from cl. 3 (g) and (h), to go back and reconsider cl. 3 (a) and (b), where the gifts have so far been left trembling in the balance. If the testator had put “500 of my preference shares and 500 of my ordinary shares,” the case would have been clear beyond argument. He would, in so many words, have made those gifts specific. It is the absence of those words which gives rise to the whole difficulty, but, having looked at cl. 3 as a whole, one finds that the testator does, in fact, in paras. (g) and (h) make what must be specific gifts without the use of the possessive pronoun. One can, therefore, in my judgment, discount its absence in paras. (a) and (b) and, having regard to the other considerations to which I have referred, find that, notwithstanding the leaning of the court against specific legacies, there are sufficient indications in this will, read as a whole in the light of the relevant surrounding circumstances, to constrain the court to hold that here the testator was intending to dispose specifically of the shares he actually owned at the date of his will in E. P. Rose & Son, Ltd., by dividing them in effect equally between his niece, Margaret, and his nephew, Michael.

For these reasons, I propose to declare, in answer to question 1 of the summons, that the gifts in question were specific gifts.

In answer to question 2 of the summons, it seems that I am bound on the authority of *Re Carrington, Ralphs v. Swithenbank* (8), and the long line of authorities there referred to, to hold that in this case there was ademption as to the gifts of preference shares in E. P. Rose & Son, Ltd., which I have held to be specific gifts.

The next question arises on the gift to Mr. Ernest Hook of 5,000 preference shares in H. G. Sanders & Son, Ltd. :

“ . . . if such preference shares have not been transferred to him previously to my death.”

The question I have to decide is whether, on the facts, such preference shares had been transferred to Mr. Hook previously to the testator's death within the meaning of that provision in the will. It appears that in August, 1944, the testator handed to Mr. Hook a transfer executed by himself in Mr. Hook's favour of 5,000 preference shares in H. G. Sanders & Son, Ltd., together with the relevant certificates. That was a voluntary transfer, but it is not disputed that it was intended by the testator to be a transfer by way of gift and not a transfer which, when perfected by registration, would give rise to a resulting trust. The company was a private company, and the right to claim registration of transfers was, therefore, subject to restrictions giving the directors a discretion in the matter. There is evidence from one of the directors of the company, Mr. Richardson, with respect, so far as is material for the present purpose, to the 5,000 preference shares to the effect that the directors, of whom he was one, decided that it was not in the interests of the company to register the transfer to Mr. Hook. He goes on to say :

“ After the death of the testator, seeing that the testator had by his will bequeathed a considerable number of ordinary and of preference shares in the company to the said Ernest Edward Hook, the directors thought it right in fairness to him to pass the two transfers . . . ”

(that is to say, the transfer now in question, and a transfer of ordinary shares with which I am not for the moment concerned). Mr. Richardson goes on to say :

“ This was accordingly done, and the said Mr. Hook became registered as proprietor of . . . ”

so far as is material, the preference shares in question.

It is argued on behalf of the residuary legatee that the testator's transfer of the 5,000 preference shares to Mr. Hook was at the time of the testator's death in the state of being an incomplete or inchoate gift, owing to the fact that the transfer was not registered in the testator's lifetime. I was referred to *Milroy v. Lord* (9) and also to *Re Fry, Chase National Executors & Trustees Corp'n. v. Fry* (10). Those cases, as I understand them, turn on the fact that the deceased donor had not done all in his power, according to the nature of the property given, to vest the legal interest in the property in the donee. In such circumstances it is well settled that there is no equity to complete the imperfect gift. If any act remains to be done by the donor to complete the gift at the date of the donor's death, the court will not compel his personal representatives to do that act and the gift remains incomplete and fails. In *Milroy v. Lord* (9) the imperfection was due to the fact that the wrong form of transfer was used for the purpose of transferring certain bank shares. The document was not the appropriate document to pass any interest in the property at all. In *Re Fry* (10) the flaw in the transaction, which was a transfer or transfers of shares in a certain company, was failure to obtain the consent of the Treasury which, in the circumstances surrounding the transfers in question, was necessary under the Defence (Finance) Regulations, 1939, and it was held that the donor's executors ought not to execute confirmatory transfers. That is, of course, exactly in accordance with the principle that equity will not compel an imperfect gift to be completed. Something had to be done by the donor's executors if the gift was to be completed, and that was the execution of further transfers which were not open to the objection of the absence of Treasury consent.

In this case, as I understand it, the testator had done everything in his power to divest himself of the shares in question in favour of Mr. Hook. He had executed a transfer. It is not suggested that the transfer was not in accordance with the company's regulations. He had handed that transfer together with the certificates to Mr. Hook. There was nothing else the testator could do. It is true that Mr. Hook's legal title would not be perfected until the directors passed the transfer for registration, but that was not an act which the testator had to do; it was an act which depended on the discretion of the directors. Therefore, it seems to me that the present case is not *in pari materia* with the two cases to which I have been referred. The real position, in my judgment, is that the question here is one of construction of the will. The testator says:

"... if such preference shares have not been transferred to him previously to my death."

The position was that, so far as the testator was concerned, they had been so transferred. The testator had executed a proper transfer and had delivered it with the certificates to Mr. Hook. In my judgment, in that state of affairs the shares had been transferred to Mr. Hook previously to the testator's death within the meaning of that provision. It cannot, in my judgment, be held that by using those words the testator intended the efficacy of the provision to depend on whether the act of third parties, namely, the directors, necessary to complete the legal title in Mr. Hook by registration should have been performed before or after his death. That circumstance seems to me to be wholly irrelevant for the purposes of the provision in question.

What actually happened was that the transfer having been executed and the certificates handed over by the testator in his lifetime, Mr. Hook's title under the transfer was in fact completed by registration after the testator's death. In my judgment, therefore, the position is that the shares had been transferred to Mr. Hook previously to the testator's death within the meaning of cl. 3 (g) of the will, and his title under the transfer to him was perfected

after the death by registration, and he takes the shares comprised in the transfer by virtue of the transfer and not under the will. The consequence is, in my judgment, that the shares are taken by Mr. Hook under his *inter vivos* title and in satisfaction of the 5,000 preference shares which I have already held to have been specifically given to him. Therefore, in the events which have happened the gift by the will of the 5,000 preference shares did not take effect, but was wholly adeemed or wholly satisfied by the gift *inter vivos*.

A Declaration accordingly. Costs of all parties as between solicitors and client to be paid in due course of administration out of the estate.

Solicitors: Kenneth Brown, Baker, Baker (for the plaintiffs and the fourth defendant); Thorne, Owles & Neale (for the first defendant); Vandercom, Stanton & Co. (for the second defendant); J. A. Ramsey (for the third defendant).

B [Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re BOWEN (deceased), TREASURY SOLICITOR v. BOWEN.

[CHANCERY DIVISION (WYNN-PARRY, J.), October 26, 27, 1948.]

C Will—Gift over after prior limitation—Particular condition not satisfied—Ultimate gift over on death of prior donee during lifetime of testator's mother—Death of prior donee after death of testator's mother but during lifetime of testator.

D By his will the testator gave his residuary estate to his mother for life and after her death to his uncle, E.B. He then directed: "In the event of my said uncle E.B. dying in my mother's lifetime then I give my said real and personal estate to his children as tenants in common in equal shares." The mother predeceased the testator and the uncle survived the mother but died during the testator's lifetime, leaving children.

E HELD: on the true construction of the will, it was the testator's intention that the uncle's children should take if the uncle was dead at the date of distribution; the rule in *Jones v. Westcomb*, (1711) (Prec. Ch. 316) applied; and, therefore, there was no intestacy, and the residuary estate became divisible on the testator's death equally between the uncle's children.

F *Davies v. Davies* (1882) (47 L.T. 40), *Jones v. Westcomb* (1711) (Prec. Ch. 316), and *Re Fox's Estate* ([1937] 4 All E.R. 664), applied.

Re Graham ([1929] 2 Ch. 127; 141 L.T. 197), distinguished.

[FOR THE RULE IN *Jones v. Westcomb*, see HALSBURY, Hailsham Edn., Vol. 34, p. 376, para. 421; and FOR CASES, see DIGEST, Vol. 44, pp. 1172-1182, Nos. 10148-10218.]

G Cases referred to:

(1) *Jones v. Westcomb*, (1711), Prec. Ch. 316; Gilb. Ch. 74; 1 Eq. Cas. Abr. 245; 44 Digest 1175, 10165.

(2) *Re Fox's Estate*, *Dawes v. Druitt*, *Phoenix Assurance Co., Ltd. v. Fox*, [1937] 4 All E.R. 664; Digest Supp.

(3) *Davies v. Davies*, (1882), 47 L.T. 40; 44 Digest 1159, 10037.

H (4) *Re Graham*, *Graham v. Graham*, [1929] 2 Ch. 127; 98 L.J.Ch. 291; 141 L.T. 197; Digest Supp.

FURTHER CONSIDERATION of a summons taken out by the Treasury Solicitor for the administration of the testator's estate.

By his will, dated Jan. 2, 1931, the testator appointed executors and trustees thereof and gave his real and personal estate, subject to payment of his funeral and testamentary expenses and debts, to his trustees on trust for his mother "during her life and from and after her decease" on trust for Evan Bowen,

subject to and charged with the payment of certain legacies. He then directed "In the event of . . . Evan Bowen dying in my mother's lifetime then I give my said real and personal estate subject to and charged as aforesaid to his children as tenants in common in equal shares." The testator died on Mar. 16, 1941. His mother predeceased him, and Evan Bowen survived the mother but died during the testator's lifetime, leaving children. The question was whether, in the events that had happened, the residuary estate was left undisposed of, and, as the testator left no issue and had no relatives, the Treasury Solicitor claimed that all property as to which the testator died intestate belonged beneficially to the Crown as *bona vacantia*. On the hearing of the originating summons, on Apr. 23, 1945, an order was made for administration of the estate. On July 14, 1948, a summons for further consideration came before the master, but, as no declaration was made in the order of Apr. 23, 1945, to the effect that the Crown was entitled as *bona vacantia* to all property as to which the testator died intestate, the summons was directed to be set down for further consideration under R.S.C., Ord. 36, r. 21. WYNN-PARRY, J., now held that there was no intestacy and that the testator's residuary estate became divisible on his death equally between the children of Evan Bowen.

McMullen (*Danckwerts* with him) for the Treasury Solicitor.

H. E. Francis for the defendant, a child of Evan Bowen.

WYNN-PARRY, J: It is clear that the exact event on which the gift over in favour of the children of Evan Bowen was expressed to take effect, namely, the death of Evan Bowen in the lifetime of the testator's mother, has not happened. In those circumstances it has been contended for the Treasury Solicitor that there is an intestacy, while for the defendant it was argued that the testator must *a fortiori* have intended, in the events which have happened, that the children of Evan Bowen should take.

The argument for the defendant is based on the well-known rule in *Jones v. Westcomb* (1) which was considered by the Court of Appeal in *Re Fox's Estate*, *Daves v. Druitt*, *Phoenix Assurance Co., Ltd. v. Fox* (2). The headnote of the report of the latter case is as follows:

"Testator gave all his 'substance' to his executors upon trust as to one quarter for his daughter F.S. for her separate use, as to one other quarter for his daughter A.C. for her sole use for life, and thereafter for her children if she leave any equally, as to another quarter for the children of his deceased son G.J. equally, and as to the last quarter for W.S. and T.S. The testator declared that the benefits under his will should become vested on the coming of age of the legatee, and that any legacy which by the death of any person should lapse should go to F.S. A.C. survived the testator but died without having ever had any children, and her share lapsed for that reason. The question raised was whether the gift over to F.S. upon lapse by reason of the death of any person took effect in these circumstances:— HELD: (i) the one quarter given to A.C. did not lapse by the death of any person, but for the reason that A.C. had never had any children. (ii) the gift over took effect under the rule in *Jones v. Westcomb* (1) that, by necessary implication, the testator must be taken to have made provision for the event which had happened as well as for the lapse by reason of the death of any person. (iii) 'Lapse' in this will did not refer only to the failure of a gift by reason of the death of a legatee in the testator's lifetime."

In the course of his judgment, ROMER, L.J., said ([1937] 4 All E.R. 668):

"That being so, it appears to me that the principle applied in the case of *Jones v. Westcomb* (1) comes properly into operation. That principle is stated in this way in THEOBALD ON WILLS, 8th ed., p. 739, and I think it is rightly stated there: 'There is, however, a class of case where, though

the exact event upon which the gift over is to take effect does not happen, the gift over must *a fortiori* have been intended to take effect in the event which happens.' The principle is applicable, therefore, only in those cases where the court, looking at all the relevant circumstances of the case, including, of course, the will itself, comes to the conclusion that the testator must *a fortiori* have intended the disposition over to take effect in the event which has actually happened, although it is not the event which he has specified in his will as the one in which the gift over is to take effect. Looking at all the circumstances of this case, can anyone doubt for one moment that, if the testator had been asked what was to happen to this share of Mrs. Perry if she died without ever having had a child at all, the testator would have said: '*A fortiori* the share is to go to my daughter Fanny.' I agree, therefore, that the appeal must succeed."

In applying the principle enunciated in *Jones v. Westcomb* (1) the courts have considered what was the real contingency guarded against, and an example of this is afforded by *Davies v. Davies* (3). In that case:

"A testator, by his will, gave his residuary estate upon trust for his wife for life, providing she should survive him 12 months and remained unmarried, and he gave to his wife power to dispose by will of one-half of the estate, and gave the other half after her decease to his sister J., or, in case of her predecease, to other persons; and he directed that, in case of his wife dying within 12 months from his own decease, his whole estate should go to his said sister, with a gift over as before in case of her predecease, and he made a similar provision with respect to one-half of the estate in the event of his wife omitting to make a will. The testator's wife died in his lifetime, and his sister J. survived him. HELD: that the contingencies against which the testator guarded, and which the court, in construing the will, was bound to regard, were the event of his wife not being alive at the expiration of 12 months from his own decease, and the event of their being no testamentary disposition by her, and that, in the events which had happened, the gift over in favour of the testator's sister took effect."

Fry, J., in the course of his judgment said (47 L.T. 42):

"Coming back again to the two classes of contingencies, the first is undoubtedly expressed in these words: 'In case of my wife Frances Mary Davies dying within twelve months of my decease.' That undoubtedly, in my judgment, contemplates two things, first, the wife surviving the testator, and, secondly, her dying within the twelve months. I come to that conclusion because, according to my understanding of the words, a person dying within the twelve months does not literally mean a person dying before the end of the twelve months, but it means being alive at the beginning and dead at the end of the period. That observation does not conclude the matter, because in all these cases the court has to inquire what is the real meaning and object of the clause. What, as has been said in several cases, is the contingency guarded against? Now what, I ask myself, is the contingency guarded against here? Is it the contingency of the wife living after the testator, and then dying within that period; or is it the contingency of the wife not being alive at the expiration of that period? I have already stated that, according to my view of the general scope of the will, it is the latter and not the former, and it is difficult to frame to oneself any reason why survivorship of the wife for a day should be essential for the sister taking the entire interest in this property. The contingency that the testator contemplated was the wife's living or her having died at the expiration of the twelve months, and, if

the court comes to that conclusion, there is no difficulty whatever in giving effect to the obvious intention of the testator."

It becomes necessary, therefore, to consider in the light of the will and the relevant circumstances what was the real contingency which this testator contemplated when making the gift to the children of Evan Bowen. In the present case the relevant circumstances are these. The testator's only next of kin was his mother, and, apart from her, it appears that his nearest natural relations were his uncle, Evan Bowen, and his uncle's children. He appointed two of these children, including the defendant, to be executors of his will. By his will he gave a life interest only to his mother, and after her death he gave his estate (charged with the payment of certain legacies) to his uncle. The gift to the uncle was not conditional. He then proceeds as follows :

"In the event of my said uncle Evan Bowen dying in my mother's lifetime then I give my said real and personal estate subject to and charged as aforesaid to his children as tenants in common in equal shares."

It was contended for the defendant that the words "in my mother's lifetime" were introduced simply as a measure of the life interest of the mother, and that the plain intention of the testator was that the uncle's children should take if the uncle was dead at the date of distribution.

Putting aside for the moment *Re Graham*, *Graham v. Graham* (4) which is relied on by the plaintiff, I feel no difficulty in applying in the present case the test adopted by ROMER, L.J., in *Re Fox's Estate* (2). If the testator had been asked what was to happen to his residuary estate if the uncle was alive at the death of the mother, but had died in the testator's lifetime, I think he would unhesitatingly have said : "Then, of course, the children are to take." It seems to me, therefore, that *prima facie* this case, when properly examined, falls within the principle of *Jones v. Westcomb* (1). It remains to consider *Re Graham* (4). The headnote is as follows :

"By her will, after giving life interests to her parents, a testatrix devised and bequeathed her real and personal estate to her husband, but if he should have predeceased both her parents, then to her husband's children, whether by herself or his first wife. The husband survived both the parents, but predeceased the testatrix. The testatrix left no issue of her own, but at her death there were six children of her husband's first marriage living :— HELD : there was no implication of a gift over to those children on failure of the gift to the husband by lapse in any event, and therefore the residuary estate of the testatrix was undisposed of and passed to her next of kin."

It appears from the judgment that EVE, J., treated the gift to the husband in that case as conditional, because he said ([1929] 2 Ch. 130) :

"The husband had satisfied the condition of the gift in the lifetime of the testatrix . . ."

In the case now before me it appears to me, on the true construction of this will, that the gift to the uncle was not conditional. I think that the case of *Re Graham* (4) is distinguishable, and I feel free to apply the test indicated by ROMER, L.J., in *Re Fox's Estate* (2).

In my judgment, therefore, the principle of *Jones v. Westcomb* (1) applies here and I hold that, on the true construction of this testator's will, there is no intestacy and that his residuary estate became divisible equally between the children of Evan Bowen.

Declaration accordingly.

Solicitors : *Treasury Solicitor* ; *T. D. Jones & Co.*, agents for *Jean J. Luke*, Newcastle Emlyn (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

MUNRO v. WILLMOTT.

[KING'S BENCH DIVISION (Lynskey, J.), November 4, 5, 8, 1948.]

Agency—Agency of necessity—Gratuitous bailee—Sale of bailed goods—Owner's instructions unobtainable.

Detinue—Conversion—Damages—Gratuitous bailee—Instructions of owner of goods unobtainable—Sale without instructions—Date at which damages assessable—Expenditure by bailee on goods.

By permission of the licensee the owner of a motor car left it for nearly three years in the yard of an inn. The licensee found that it was causing difficulty to drivers of vehicles using the yard, particularly ambulances of the St. John's Ambulance Corps, to whom a garage on the premises was let. Being unable to trace the owner, he had repairs carried out on the car at a cost of £85, and then had it sold by auction for £105, less commission amounting to £5. The value of the car was £120 at the date of judgment.

HELD : (i) the doctrine of agency of necessity could be applied to goods stored in premises, if at all, only in a case of emergency necessitating the disposal of the goods which did not exist here, and, accordingly, the licensee was liable to the owner for detinue and conversion of the car.

(ii) the measure of damages for the conversion and in detinue was the value of the car at the date of judgment less any increase in value attributable to the expenditure of money on it by the licensee, and judgment would, therefore, be given for the plaintiff for £35.

Rosenthal v. Alderton & Sons, Ltd. ([1946] 1 All E.R. 583; [1946] K.B. 374; 174 L.T. 214) and *Sachs v. Miklos* ([1948] 1 All E.R. 67; [1948] 2 K.B. 23), *applied*.

[AS TO ACTS AMOUNTING TO CONVERSION, see HALSBURY, Hailsham Edn., Vol. 33, pp. 52-56, paras. 84-90; and FOR CASES, see DIGEST, Vol. 43, pp. 469-485, Nos. 86-222.]

Cases referred to :

- (1) *Sachs v. Miklos*, [1948] 1 All E.R. 67; [1948] 2 K.B. 23; [1948] L.J.R. 1012.
- (2) *Gwilliam v. Twist*, [1895] 2 Q.B. 84; 64 L.J.Q.B. 474; 72 L.T. 579; 59 J.P. 484; 1 Digest 390, 941.
- (3) *Ottoman Bank v. Jebara*, [1928] A.C. 269; 97 L.J.K.B. 502; 139 L.T. 194; *revsq. S.C. sub nom. Jebara v. Ottoman Bank*, [1927] 2 K.B. 254; 43 Digest 481, 188.
- (4) *Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 All E.R. 583; [1946] K.B. 374; 115 L.J.K.B. 215; 174 L.T. 214; 2nd Digest Supp.
- (5) *Reid v. Fairbanks*, (1853), 13 C.B. 692; 1 C.L.R. 787; 21 L.T.O.S. 166; *sub. nom. Read v. Fairbanks*, 22 L.J.C.P. 206; 43 Digest 509, 484.

ACTION for the return of a motor car or for damages for conversion.

The plaintiff, Mrs. Ethel Ada Munro, lived with her stepfather and her mother, Mr. and Mrs. Proctor, in a caravan, from which during the war they worked a haulage business under a contract or sub-contract with George Wimpey & Co., Ltd., in connection with the construction of various aerodromes. In July, 1941, they bought an S.S. Super Swallow 16 h.p. saloon car from a Mr. Fowgies for £80. According to the stepfather's evidence the car was to be a present from him to the plaintiff and it was delivered to her and registered and licensed under the Road Traffic Acts in her name. About December, 1941, the family were ordered to go to Brackley where the defendant, Mr. R. H. Willmott, the licensee and tenant of the Bell Inn, Brackley, for a rent of 5s. a week allowed them to park their caravan, the car and two lorries in the inn

yard. In September, 1942, they were moved by George Wimpey & Co., Ltd., to another site, and, as they had to leave hurriedly, they could not take the car because it was not licensed, the steering gear was defective, and the accumulator was with the local garage. The defendant agreed to allow the car to remain in his yard without charge, and when the plaintiff returned two or three weeks later to say that she could not take the car away and had no idea when she would be able to do so, he said that it was not in his way and that she could leave it there. The car, therefore, remained in the yard. In June or July, 1945, the brewery company owning the Bell Inn, Brackley, converted the outhouses and stables into a garage which they let for the use of the St. John's Ambulance Corps, and, following a communication from one of the directors of the company, the defendant decided that the motor car must be removed. Not knowing the address of the plaintiff or Mr. Proctor, he got in touch with the police at Brackley, the chief constable of Nottingham, and the superintendent of police at Ilkeston in an endeavour to find the whereabouts of Mr. Proctor, but without success. Finding that the car was causing difficulty to the ambulances and other vehicles using the yard, he decided that it must be disposed of. The car had been in the open since its purchase and under a tarpaulin since the plaintiff's departure, and was not roadworthy owing to weather damage, seizing up of various parts, rusting over and the need for renewals. He, therefore, had repairs and renewals carried out at a garage at a cost of £73 5s. 10d., and himself painted the car at a cost of about £12, making a total cost of some £85. On Dec. 10, 1945, he had the car sold by auction by a firm of auctioneers for £105, less agent's commission of £5, leaving him £15 net. On Apr. 10, 1946, the plaintiff called at the inn and, when it transpired that the car had been disposed of, brought proceedings in detinue and conversion. The defendant contended that the plaintiff was not the owner of the car and had not a sufficient interest in it to sue in trover, and that there was no detinue or conversion of the car because he had sold it as an agent of necessity. On this basis he said he was liable only for the proceeds of the sale of the car less expenses necessarily incurred in making it fit for sale, *i.e.*, £100 less £85 or £15. The plaintiff claimed as damages the full value of the car at the date of judgment, which was found to be £120, without any allowance for the expenditure of the defendant on it. The court found for the plaintiff on the issue as to liability, but held that allowance must be made for the expenditure on the car incurred by the defendant in arriving at the amount of damages, and gave judgment for £120 less £85, or £35.

Brassey for the plaintiff.

J. Stirling for the defendant.

LYNSKEY, J.: In this case the plaintiff is claiming from the defendant the return of a 16 h.p. motor car, the property of the plaintiff, which, she says, is worth £200. Her first claim is in detinue, alleging that the defendant has wrongfully detained this car, and her second claim, in the alternative, is for conversion. The defence put forward is threefold. First, it is denied that the plaintiff was the owner of the car. Secondly, it is said that, if she were, there was no detention and no conversion because the defendant sold the car in December, 1945, as an agent of necessity and is willing to account to the plaintiff for the balance of the price of the car after deducting his expenses for making the car saleable and the cost of sale. The third defence is that, in any event, the defendant is entitled to credit for moneys he has spent on the car as against its present day value or its value at the time of conversion, and that the plaintiff is only entitled to recover the value of the car at the date of conversion after deduction of the moneys which the defendant spent on the car and the value of the work and labour he put into the car to make it saleable.

[HIS LORDSHIP reviewed the evidence and found the facts stated above, and continued:] The first point I have to decide is: Was the plaintiff the

owner of this car, or, at any rate, sufficiently entitled to sue in trover? The evidence is that her stepfather bought the car for her, it was registered in her name, and, no doubt, she, together with her stepfather, drove it periodically. The only doubt that is raised about her ownership is the fact that there are three letters written by Mrs. Proctor and signed as if by her husband in which the car is described as his car. One is in answer to an offer of sale by the solicitor, Mr. Lanham, in which the reply written to him is offering the sale of the car. The reply is: "Regarding your letter concerning my S.S. car, I am prepared to take £35 for the same." Mrs. Proctor's evidence is that that letter was really written on behalf of her daughter, although apparently signed by the husband. There are other letters later on when she is making inquiries about the sale of the car. I am satisfied here that the probabilities are, this family living together, that the car was a present by the stepfather to the stepdaughter, but, as so often happens, all three of them more or less regarded the car as the family car, and I am not satisfied it was the stepfather's car in particular. I am satisfied that the car was the daughter's. She was the owner of it, if not in full, at least in part, which would be quite sufficient to entitle her to bring these proceedings, she being entitled to possession of the car.

The second argument is that there was no conversion of the car and there has been no detinue of it because the defendant sold it as agent of necessity for the plaintiff. I have been referred to no case where the doctrine of agent of necessity has been applied to a bailment of this sort. The matter was considered in *Sachs v. Miklos* (1) where, in the course of his judgment, LORD GODDARD, C.J., says, dealing with this question of agent of necessity ([1948] 1 All E.R. 68):

"The question that arises is whether they had any legal right to sell the furniture. The learned judge held that in the circumstances they became agents of necessity and, therefore, had an implied authority to sell. Counsel for the plaintiff has satisfied me that they cannot possibly be held to be agents of necessity. Agents of necessity, until very modern times, were confined to two classes of persons, those who accepted bills of exchange for the honour of the payee and masters of ships who found themselves in foreign parts and unable to get immediate instructions from their owners when they wanted money for unlooked-for expenses and so forth. They then had power to pledge, sell, or hypothecate the ship, and, in some cases, to deal with the cargo as agents of necessity. As recently as 1895 LORD ESHER in *Gwilliam v. Twist* (2) expressed considerable doubt whether it was possible to enlarge the classes of person who could be regarded as agents of necessity, but the courts have not found any difficulty in applying the doctrine where a necessity, which means an emergency, has arisen in the case of carriers by land. When it becomes impossible, or commercially impossible, or extraordinarily difficult (as may happen in the case of a strike or breakdown of communications), for a carrier to communicate with the owner of goods, there is no reason why he should not be entitled to sell or dispose of them in the same way as a master of a ship, subject to this, that I know of no case in which the doctrine of the agency of necessity has been applied to carriers by land except where the goods are perishable or where they are in a somewhat similar category, e.g., livestock, which have to be looked after, fed and watered. I think it is clear from the judgment of SCRUTTON, L.J., in *Jebara v. Ottoman Bank* (3) that the courts should be slow to increase the number of classes of people who can be looked on as agents of necessity. They are selling or disposing of other people's goods without the authority of the owners, and certain it is that they have never been entitled so to act unless there is a real emergency."

I am very doubtful if the doctrine of agent of necessity can be applied to

a case of goods stored in premises, but, if it can, it can only be applied in a case of real emergency which necessitates the disposal of the goods. In this case I am not satisfied there was any emergency. The highest it takes the defendant is that after June or July, 1945, the car became something of an inconvenience, not to himself, but to others who might be using the converted stables as garages for the use of their ambulances. I have had no real evidence which shows there was any necessity for the defendant to dispose of this car. He may have found it inconvenient. He may have found it to some degree a nuisance, but that does not mean an emergency which compels him to dispose of it. It could have been left there. I am satisfied there was no real emergency which, if such a doctrine would apply to this case, would justify the sale of this motor car. That means that the plaintiff is entitled to recover damages for the detention, or, alternatively, the conversion of the car.

The next question that arises is: What is the nature of those damages? The plaintiffs, relying on the decision to which I have just referred of *Sachs v. Miklos* (1) following on the decision of *Rosenthal v. Alderton & Sons, Ltd.* (4), say they are entitled to the value of the motor car as it is today, i.e., the day on which judgment is given in this action, but I should ignore what its value was at the time of conversion or what its value was in the meantime and ignore the fact that the defendant has spent some money on the car for the purpose of making it saleable. My view is that I have to assess the damages, in view of those two authorities, as at today, but the damages I have to assess are the damages which the plaintiff has suffered by reason of the deprivation of her property or the detention of her property, the detention up to date and deprivation by reason of the fact it cannot now be returned. It seems to me that, in assessing that value, I must have regard to what the defendant has spent in making that vehicle saleable, because otherwise I should be taking the saleable value of something which was not merely the plaintiff's property but somebody else's property in the shape of work or material. In my view, the statement of the law in *SALMOND ON TORTS*, 10th ed., p. 309, is correct:

"If, on the other hand, the property increases in value after the date of the conversion, a distinction has to be drawn. If the increase is due to the act of the defendant, the plaintiff has no title to it, and his claim is limited to the original value of the chattel. [The passage refers to *Reid v. Fairbanks* (5) and continues:] If, however, the subsequent increase of value is not due to the act of the defendant, but would have occurred in any case, even had no conversion been committed, the plaintiff is entitled to recover it as special damage resulting from the conversion, in addition to the original value of the property converted: as when goods taken or detained have risen in value by reason of the fluctuation of the market."

That is the measure of damages in conversion.

The measure of damages in detinue, it seems to me, must be similar, if not the same. At any rate, when I am asked to give damages in detinue for the value of a motor car as at today, and I find that a large sum of money has been spent on it for the purpose of making it even saleable, I must take that into account in assessing what is the value of the property the plaintiff has lost. [HIS LORDSHIP considered the evidence as to the value of the car, and continued:] I assess the value of the car today at £120. On that, in my view, the defendant ought to be given credit for producing that result. It is as a result of the £73 he spent in repairs and renewals and as a result of his own expenditure of time, labour and materials in painting and renovating the outside of the car that that price was realisable at all. If he had not spent that money, I am quite satisfied this car would probably have realised today some-

thing in the nature of £20 or £25 as scrap. The result is that the defendant is entitled to credit, not from the point of view of payment for what he has done, but in order to arrive at what is the true value of the property which the plaintiff has lost. In my view, the value of the property which the plaintiff has lost is approximately £35, and there will be judgment for that amount.

Judgment for the plaintiff with costs on county court scale C.

Solicitors: *Gibson & Weldon*, agents for *F. G. & P. M. Robinson*, Ilkeston (for the plaintiff); *Torr & Co.*, agents for *Barnes & Lanham*, Brackley, Northants (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

EVON AND ANOTHER v. NOBLE.

[KING'S BENCH DIVISION (Birkett, J.), November 10, 11, 1948.]

Evidence—Admissibility—Statement in document—"Person interested"—Domestic servant—In charge of employer's child—Injury to child—Action for negligence against person alleged to have caused injury—Evidence Act, 1938 (c. 28), s. 1 (1) (3).

In the absence of her mother a child had been left in charge of a domestic servant. While playing, the child sustained injuries to her mouth, face and right eye which were alleged to be due to the negligence of a chemist leaving acid in a glass container in a yard or wash-house to which the child had access. After the writ in an action for negligence against the chemist had been issued, the servant made a written statement with regard to the accident, and at the date of the hearing she could not be traced.

HELD: the domestic servant being in charge of the child and her reputation for care in minding a child being in issue, she was "a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish" within the meaning of the Evidence Act, 1938, s. 1 (3), and, therefore, the statement was not admissible in evidence.

Dicta of MORTON, J., in *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.* ([1941] 1 All E.R. 314; [1941] Ch. 251; 165 L.T. 120), considered.

[FOR THE EVIDENCE ACT, 1938, see HALSBURY'S STATUTES, Vol. 31, p. 145.]

Cases referred to:

- (1) *Bain v. Moss Hutchison Line, Ltd.*, [1948] 2 All E.R. 294.
- (2) *Plomien Fuel Economiser Co., Ltd. v. National Marketing Co.*, [1941] 1 All E.R. 311; [1941] Ch. 248; 110 L.J.Ch. 180; 165 L.T. 119; 2nd Digest Supp.
- (3) *Holton v. Holton*, [1946] 2 All E.R. 534; 176 L.T. 186; 2nd Digest Supp.
- (4) *Barkaway v. South Wales Transport Co., Ltd.*, [1948] 2 All E.R. 460.

ACTION for damages for negligence.

The second plaintiff was an infant girl suing by her father and next friend, the first plaintiff. The defendant carried on the business of a chemist at 13, Eastern Esplanade, Southend-on-Sea. The plaintiffs alleged that in or about April, 1946, the defendant orally granted a licence to the mother of the infant plaintiff for herself and her family, including the infant plaintiff, to use the defendant's wash-house, that the licence was never revoked, and that the defendant knew that children habitually used the wash-house. It was, further, alleged that the defendant, his servant or agent, negligently left in the wash-

house a glass container filled with acid from the neck of which there hung a rubber tube, and that this constituted a trap for a child of tender years. On May 7, 1946, the infant plaintiff was lawfully in the wash-house and in playing with the rubber tube, caused the escape of a quantity of acid from the container and suffered injuries to her mouth, face and right eye. The defendant did not admit the granting of the licence or that the infant plaintiff was lawfully in the wash-house or communal yard. He denied the allegation that the container was left in the wash-house, and said that it was left in a store at the rear of his shop and that the infant plaintiff's injuries arose from her misconduct in trespassing in the store and unlawfully meddling with the articles stored there. After the writ in the action had been issued, the domestic servant of the first plaintiff, in whose charge, at the time of the accident, the infant plaintiff had been left with instructions "to keep an eye on the children and not to let them cross the road" in the absence of the infant plaintiff's mother, made a written statement with regard to the accident. At the date of the hearing this domestic servant could not be traced, and the plaintiffs sought to put in her written statement under the Evidence Act, 1938, s. 1 (1). BIRKETT, J., rejected the evidence on the ground that the statement was made by a "person interested" within s. 1 (3) of the Act.

T. H. K. Berry for the plaintiffs.

Flowers, K.C., and *J. P. Webber* for the defendant.

BIRKETT, J.: The immediate point is whether the statement which was made by a Miss Dorothy Bush on June 3, 1947, ought to be admitted as evidence in this action. To be admitted it must conform to the provisions of the Evidence Act, 1938. Section 1 (1) provides :

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied . . . (i) if the maker of the statement either—(a) had personal knowledge of the matters dealt with by the statement . . . and (ii) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success."

It is conceded that Miss Bush had personal knowledge of the matters dealt with by the statement, and I hold that all reasonable efforts have been made to find Miss Bush without success.

Sub-section (3) is of importance. It provides :

"Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

It is agreed that the statement which is sought to be admitted was made when proceedings were actually pending. The writ had been issued. The only question, therefore, remaining is whether I ought to hold that this lady was a person interested. The authorities on this matter are beginning to increase, but no comprehensive category of persons interested has been made. It has been said that certain persons are clearly not interested and that certain other persons are. In *Bain v. Moss Hutchison Line, Ltd.* (1) I dealt with the matter on the special facts of that case. In the course of the judgment I referred ([1948] 2 All E.R. 296) to the observations of MORTON, J., in *Plomien Fuel*

Economiser Co., Ltd. v. National Marketing Co. (2). MORTON, J., said ([1941] 1 All E.R. 314):

"It may be that there are circumstances in which it might be said that a servant of the company was not a person interested. As to that, I express no opinion. However, I think that the general intention of the section is that, if a statement is put in as evidence, to which, of course, no cross-examination can be directed, it should be either a statement made at a time when proceedings are not pending or anticipated involving a dispute as to any fact which the statement might tend to establish or a statement made by what I may perhaps conveniently describe as an independent person."

That reasoning commends itself to me, because one of the great advantages of the trials of actions in our courts is cross-examination. If a party in a dispute is to have a statement put in by the other side to which no cross-examination can be directed, obviously that party labours under a great disability, and, therefore, as MORTON, J., has said, it must always be kept in mind that there can be no cross-examination on a statement so admitted, and it is imperative that the statement must be made by an independent person. I suppose that that really means a person who has no temptation to depart from the truth on one side or the other—a person not swayed by personal interest, but completely detached, judicial, and impartial.

In *Holton v. Holton* (3), Mr. Clifford Mortimer made a submission to the learned judge who appears to have adopted it without making any comment on it. Mr. Mortimer submitted that the words "person interested" must mean "a person who has a pecuniary or other material interest in the result of the proceedings—a person whose interest is affected by the result of the proceedings, and, therefore, would have a temptation to pervert the truth to serve his personal or private ends. It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It means an interest in the legal sense, which imports something to be gained or lost." Counsel for the defendant drew my attention to *Barkaway v. South Wales Transport Co., Ltd.* (4). It appears that arising out of a road accident, which, it was said, was caused by a tyre burst, an action was brought for negligence against the appellants, and one Jenkins, a tyre tester and fitter employed by the appellants, gave evidence on their behalf. Subsequently, another action was brought for negligence, but, in the meantime, Jenkins had died. References were made in the second trial to what Jenkins had said in the first, but there was no formal application to use the evidence of Jenkins. When it came to the Court of Appeal it was sought on various grounds to use the transcript of the evidence of Jenkins. In giving judgment on this point, ASQUITH, L.J., said (and SCOTT and BUCKNILL, L.J.J., agreed) that the person who "made" the statement for the purposes of s. 1 (1) of the Evidence Act, 1938, must have been either (a) Jenkins or (b) the person who made the transcript (the reporter). Alternatively (a) was ruled out by s. 1 (4) which provides:

"For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible."

None of the conditions imposed by sub-s. (4) had been fulfilled by Jenkins. The reporter, on the other hand, had made the statement within the definition in sub-s. (4), because he made the transcript with his own hand, but the reporter had to satisfy the condition in sub-s. (1) (b), in other words, he must have made the transcript in performance of a duty to record information supplied to him and Jenkins's evidence was supplied, not to him, but to the

court. Furthermore, ASQUITH, L.J., said the transcript must be rejected under sub-s. (3) since Jenkins was a person interested both because his reputation as a tyre tester was involved and because he was interested, as an employee, in his employers winning the case.

Here it is conceded that Miss Bush was a domestic servant employed by the child's parents. On the day in question she had been expressly charged with the care of this little child. What I have to ask myself is: In all the circumstances of this case was Miss Bush a person interested? She was not financially interested. She may have had the interest of sympathy, but that does not affect me in my decision here. I think, however, that in the true sense of the words she was a person interested. She had been left in charge of the child. The child had come to injury, and her reputation for care in minding a child was in issue, just as Jenkins' reputation as a tyre tester was in issue. It is true that MORTON, J., said in *Plomien Fuel Economiser, Ltd. v. National Marketing Co.* ([1941] 1 All E.R. 314) that it might be that a servant is not a person interested, but in the present case Miss Bush was a "person interested" in that she had been left in charge of this child. The child's safety was her peculiar care, and in that sense her reputation was involved in the result of the action. In all the circumstances, therefore, I shall not admit this statement.

Admission of the statement refused.

Solicitors: *H. Flint & Co.*, agents for *Henry Flint*, Southend-on-Sea (for the plaintiffs); *Sprinz & Sons*, agents for *Thurlow Baker & Nolan*, Southend-on-Sea (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re GILLSON (deceased). ELLIS v. LEADER.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Evershed, L.J.J.)
November 8, 9, 10, 1948.]

Will—"All my bloodstock"—*Inclusion of half share in horse and interest as member of syndicate owning stallion.*

Costs—*Appeal to Court of Appeal*—*Costs of several parties with same interest and same arguments*—*Allowance of only one set of costs.*

By cl. 3 (c) of his will dated Feb. 4, 1943, a testator, who died on Mar. 3, 1944, gave to H. "all my bloodstock." At the date of the will, the testator owned several thoroughbred horses including a colt called Pink Flower. He subsequently sold a half share in Pink Flower to Mrs. H., but the horse remained as part of his stud. The testator was also at the date of the will interested in a stallion called Colombo, which had been purchased on Nov. 1, 1942, by a number of persons including the testator. On Dec. 31, 1942, the purchasers entered into an agreement appointing a committee to act in all matters appertaining to Colombo as agents for the purchasers, and as a result of the agreement the purchasers were entitled to free nominations for mares to be served by Colombo according to the proportion of the purchase price put up. The testator had subscribed one-fortieth share, and was entitled to one free nomination. The testator's stud at all material times included Pink Flower, but never included Colombo.

HELD: on the true construction of the will, the words "all my bloodstock" included the testator's share of Pink Flower, but the testator's interest in Colombo was more in the nature of an investment than an interest in a horse and did not form part of his "bloodstock."

Re Sykes ([1940] 4 All E.R. 10), distinguished.

Per LORD GREENE, M.R.: When an appeal is made to the Court of

Appeal and there are several parties in precisely the same interest with precisely the same arguments who below were separately represented, it is the duty of the solicitors concerned to do everything possible to avoid unnecessary costs in the Court of Appeal. If parties with precisely the same argument come to the Court of Appeal and three separate sets of costs are incurred, the practice is to allow only one set of costs, certainly where costs are being charged on residue or on a fund the persons interested in which either are absent or are infants.

[AS TO DESCRIPTIONS OF PROPERTY, see HALSBURY, Hailsham Edn., pp. 236-239, paras. 291, 292; and FOR CASES, see DIGEST, Vol. 44, pp. 645-649, Nos. 4852-4893.]

Case referred to :

(1) *Re Sykes, Skelton and Dyson v. Sykes*, [1940] 4 All E.R. 10; 2nd Digest Supp.

APPEAL by the defendant, Harvey Leader, from an order of JENKINS, J., dated Apr. 13, 1948, on an originating summons asking whether a half share in a horse and the interest of the testator as a member of a syndicate in a stallion passed under a bequest of "all my bloodstock." JENKINS, J., answered the question in the negative. The Court of Appeal now held that the half share passed, but the interest as a member of a syndicate did not pass. The facts appear in the judgment of SOMERVELL, L.J.

Russell, K.C., and *Sir Norman Touche* for Harvey Leader, a specific legatee. *J. H. A. Sparrow* for the executors.

Geoffrey Cross for Edith Christine Gillson and Maurice Dugdale Gillson, the life tenants.

Dunbar for Rose Lawson, residuary legatee.

Blackett-Ord for Judith Gillson, infant residuary legatee.

LORD GREENE, M.R.: SOMERVELL, L.J., will deliver the first judgment.

SOMERVELL, L.J.: This is an appeal from a decision of JENKINS, J., and it raises a point under a clause of the will of the late Mr. Godfrey Anthony Gillson. The clause which we have to construe and apply is cl. 3 (c), but I will read cl. 3 (b) as well, because that sub-clause contains the first mention of Mr. Harvey Leader, the legatee, and to some extent has been referred to in the argument. Clause 3 provides :

"I bequeath the following specific legacies free of all death duties namely . . . (b) To Lord Willoughby de Broke such one of my foals or yearlings as he shall within three calendar months from my death select and I express the earnest request that he will have the same trained by Mr. Harvey Leader of Denston Hall Newmarket (c) To the said Harvey Leader all my bloodstock (except such foal or yearling if any as shall be selected by Lord Willoughby de Broke) with the request that he will make fitting gifts to his employees and anyone else in the racing world with whom I have been closely associated and who is deserving of such gift but I declare that the foregoing expression of my wishes shall not create any trust or legal obligation even if the same shall be communicated to him in my lifetime."

The will was made on Feb. 4, 1943. At that date the testator was the owner of seven or eight thoroughbred horses, including a bay colt called Pink Flower. The legatee, Mr. Leader, who is a defendant in these proceedings, was at that time, and at all other material times down to the time of the testator's death, in charge of the thoroughbred horses belonging to the testator. After the date of the will, the testator sold a half share in Pink Flower to Mrs. Harvey Leader, the trainer's wife. She sub-sold an eighth part of her share to Mr. Harvey Leader

and I think an eighth to a Major Keylock—the exact fractions do not matter. The testator died on Mar. 3, 1944. Pink Flower is one of the horses with which we are concerned, and we are also concerned with an interest or share which the testator had when he made his will in a stallion called Colombo. I will state shortly the position as to Colombo. On Nov. 1, 1942, that stallion was purchased by a number of persons, of whom the testator was one, from a Mr. Allnatt. On Dec. 31, 1942, an agreement was entered into by those purchasers, Mr. Allnatt, who was the vendor, being a party to this agreement and retaining an interest in the stallion. Under the agreement a committee was appointed who were, in all matters arising out of and in connection with the stallion and the enterprise provided for and contemplated by the agreement, to act as a committee and agents for and on behalf of the subscribers. The broad result of the agreement, when it got working, was that the parties to it obtained free nominations for mares to be served by this stallion according to the extent of the money which they had put up for the purchase price. There were forty shares or interests, and the testator had a fortieth share which entitled him to one free nomination. Some of the other parties to the syndicate had two, three or four, and Mr. Allnatt had as many as ten shares.

It is stated in an affidavit that Pink Flower was added to the testator's stud on Mar. 2, 1943. That is not quite consistent with what I think was told us by counsel for Mr. Leader, that he owned Pink Flower at the time of the will, but it is immaterial. The horse has remained in the stud since that date, but the stud did not at any time include Colombo.

There was evidence of the meaning attached to this word "bloodstock" among those who own thoroughbred horses and in what one might describe as the "racing world," to borrow the expression which is used in the clause in the will which we have to construe. Mr. McElligott, a member of the Royal College of Veterinary Surgeons, who has been for ten years a director of the British Bloodstock Agency, says:

"Part ownership of thoroughbred horses is extremely common. The word 'bloodstock' in connection with its owner is in my experience invariably used and understood as including any share or shares he may own in bloodstock horses, and the word 'bloodstock' by itself as referring equally to a share or shares in a bloodstock horse or horses as to a wholly owned bloodstock horse or horses."

In a further affidavit Mr. Jarvis, a trainer of racehorses at Newmarket, says he has trained, owned and bred racehorses for upwards of thirty years, and adds:

"In my life-long experience I have found that part ownership of horses is extremely common and I have in fact been a party to such partnerships and I say no one concerned in the racing and breeding world in referring generally to the bloodstock of an owner would intend to exclude from that phrase his shares in partly owned horses and similarly a person who only owned part interests in horses would be referred to as an owner of bloodstock."

It will now be convenient to refer to counsel's note which we have of the learned judge's judgment. He says that the question turns on the construction of the clause in this will to which I have referred. He then says that there is nothing to show that the testator was using the word "bloodstock" in any other but its ordinary, primary meaning or that he was using it in an extended sense. He then quotes from the NEW OXFORD DICTIONARY the definition of bloodstock as "thoroughbred or pedigree horses collectively," and he proceeds on the basis that if you read that into the will—"all my thoroughbred horses"—it cannot include a horse in which the testator has only a share. He refers to a decision of BENNETT, J., in *Re Sykes* (1), in which the judge was

construing a bequest of "my horses," and decided that those words did not extend to or include the interest which a testator had as tenant in common of a horse. The present case is different from that in two respects. First, we have not got to construe "my horses." We have to construe the expression "all my bloodstock," and we have the evidence to which I have referred. It is, no doubt, right to say that the primary meaning of words in wills would normally be their proper construction, but, with regard to the word "bloodstock," there is one thing worth noting. It is not disputed that the word has only recently appeared in any dictionary, namely, in the supplement to the NEW OXFORD DICTIONARY. That rather surprised me, as it seemed to me to be a word with which one was reasonably familiar, but that fact has this relevance, that the word clearly is one which has not had a long currency in ordinary usage, and I think it is probably true that it is in the main used by those who are interested in thoroughbred horses. The court, of course, is in no sense bound by a dictionary. In normal cases the court is presumed to know the English language, though it is not unusual to seek assistance from dictionaries. I think myself that the conclusion from the evidence is that among those interested in thoroughbred horses the word "bloodstock," used in connection with an owner, has a meaning which, without being precise, covers, or in many ordinary contexts is used as covering, a share in a horse as distinct from full ownership. That the testator was familiar with that meaning is plain from what appears from the evidence as to his position as the owner of thoroughbred horses, and I think it is also relevant to note that in the sub-clause which we have to construe the owner of thoroughbred horses was making a bequest to a trainer of thoroughbred horses.

The case put forward was that both the testator's share in Pink Flower and his share in Colombo passed under the expression "all my bloodstock." I draw a distinction between the two. The facts in the case of Pink Flower are that he parted with a half share in this horse. The horse remained as part of his stud, trained by his trainer with his other horses. I think, having regard to those facts, the expression "all my bloodstock" covers his share in Pink Flower. I do not, however, think that the evidence goes so far as to make it right for the court to say that the expression "all my bloodstock" must be construed as including any share or interest, whatever its nature, that the testator had in any thoroughbred horse. With regard to Colombo, in the first place, though that might not in itself be conclusive, the horse was not with the testator's horses at his stud nor was the horse in the care of his trainer. I am also influenced by the fact that under this agreement, though it was entered into after the purchase, the parties had rights different from those which arise in the simple case when two people each have, say, a half share in a horse. The rights are of a somewhat complicated kind. The stallion is managed by a committee. The parties to what is called the syndicate contribute to the expenses and they each have this right of free nomination. It is much more in the nature of an investment. The right to nominate can, presumably, be bought and sold, and it is just worth noting that in the copy of SPORTING LIFE, which was exhibited on another point, under the heading "Bloodstock" there is this advertisement: "One share in Colombo syndicate for sale," *i.e.*, it is described as a share in a syndicate rather than a share in a horse *simpliciter*. Having regard to all those facts and giving full and proper weight to the evidence, I cannot come to the conclusion that this share in Colombo is covered by the words which we have to construe, "all my bloodstock." For these reasons, I think the proper order to make will be one by which the share in Pink Flower passes under the bequest but the interest in Colombo does not.

EVERSHED, L.J.: I agree. The question for the decision of the court is the familiar one: What did the testator intend by the words he used in

para. (c) of his will, particularly, the phrase "my bloodstock" ? It is, I think, conceded on all hands that the court, in construing the words, is bound to pay regard to the circumstances as they existed at the testator's death with a view to seeing on what subject-matter the words could operate. It has been said that we ought not to pay regard to other evidence on which counsel for Mr. Leader rely in regard to the use of the word "bloodstock" in those circles which have been referred to by SOMERVELL, L.J., as "the racing world." I do not think that is right. It seems to me that, for the reasons which SOMERVELL, L.J., has fully canvassed, we are here entitled, if not bound, to take that evidence into account. Whatever one might suppose etymologically the word might mean, it is, in fact, only applied to horses, and in that sense the word may well, in many contexts, when used in connection with an owner, be correctly used (that is to say, so as to be understood) to include part shares in horses, it being remembered also that it is proved to be a common feature of "the racing world" that valuable pedigree or thoroughbred horses are owned in shares by more than one person. When all those facts are taken into account and the language used by the testator falls to be construed, it seems to me that there is here a proper distinction to be drawn between the case of Pink Flower and the case of Colombo. JENKINS, J., I think, found that his mind revolted at the conception that this phrase was such as to cover both the interests in Pink Flower and in Colombo. The suggested interpretation of the words which counsel for Mr. Leader put was "all my property, bloodstock in quality." As I read the learned judge's judgment, he felt that, if that were right, it would cover all sorts of interests too far removed from the sense of the language in para. 3 (c). If it were necessary to treat the words either as covering the testator's interests both in Pink Flower and Colombo or as covering neither, I should have followed the learned judge's view, but, as I have indicated, it seems to me that, on the facts, there should be drawn a distinction between the two cases. It appears to me that Major Gillson could properly be said as regards Pink Flower to be a racehorse owner, and in the racing world he, being a part owner of the horse, it would be proper to say, at any rate in some contexts, that his interest in the horse was comprised in the phrase "my bloodstock." When the other facts to which SOMERVELL, L.J., has referred are taken into account, I conclude that the phrase in this will was intended to cover and does cover his interest in that horse. When, however, one regards the facts relating to Colombo, the case seems to me to be different. True, the subject-matter of the syndicate happened to be a racehorse, but that was relatively incidental. In my view, without attempting to define the line between the two, one can say that in the one case the testator remained in truth the owner of a racehorse so as to bring his share in it within the words "my bloodstock," but in the other case he was really a participant in a commercial syndicate, a kind of interest which could not properly be covered by the phrase "my bloodstock." For these reasons I agree that a distinction should be drawn, and to that extent that counsel for Mr. Leader is entitled to succeed.

LORD GREENE, M.R.: I shall not be thought disrespectful to the learned judge if I confine my remarks to one small point, because I am in entire agreement with what has been said by my brethren. The small point which I think is just worth mentioning relates to the case of Colombo. My brethren have said that the Colombo matter must be looked on rather as an investment in a syndicate. I think some further weight is given to that view when the structure of the agreement and the nature of the syndicate are looked at, which is not, I think, without importance. Shares in the syndicate are forty in number. The highest number of services which the stallion is to give under the agreement is the usual number of forty. The agreement does not deal with any other kind of exploitation of the stallion save sharing out those forty

A nominations among the forty shares in the syndicate. Therefore, looking at the substance of the transaction, each person who put his money into this enterprise was getting out of it, in effect, not a share of a racehorse but a right to nominate, and nothing more. It is clear on the face of it that that is the substantial value of such an interest in such a syndicate. That appears to me to add force to the view that my brethren have taken as to the purely investment nature of that particular transaction. The result will be that the order of the learned judge must be varied.

Argument as to costs followed.

B LORD GREENE, M.R.: I think it is right that I should repeat what has been said many times, that when appeals are brought to this court and there are several parties with precisely the same interest and precisely the same arguments who below may have been separately represented, it is the duty of the solicitors concerned to do everything possible to avoid unnecessary costs in this court. In the present case I can see no reason why, with a little good will and with a desire to avoid multiplication of costs, one set of costs only should have been incurred. Parties with precisely the same argument come up to this court and three separate sets of costs are incurred. The practice, C in my experience, always was in such a case to allow only one set of costs, certainly where costs are being charged on residue, for instance, or on a fund the persons interested in which either are absent or are infants and, therefore, are not in a position to consent. In the present case the appeal has succeeded substantially, and we think that it is a proper case for the appellants' costs as between solicitor and client to be paid out of the estate. Similarly, the costs D of the trustees, who are necessary parties in this court, should be paid as between solicitor and client out of the estate. For the other respondents there will be one set of costs only as between solicitor and client which likewise will be paid out of the estate. The way in which that one set of costs will be treated will, of course, be a matter for the taxing master in the usual way.

Appeal allowed. Order of JENKINS, J., varied accordingly.

E Solicitors: *Ward, Bowie & Co.*, agents for *Rustons & Lloyd*, Newmarket (for Mr. Harvey Leader); *Ellis, Peirs & Co.* (for the executors and a residuary legatee); *May, May & Deacon* (for the life tenants); *Lovell, White & King* (for the infant residuary legatee).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

F

Re BIDIE (*deceased*). BIDIE v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Evershed, L.JJ.), November 10, 11, 1948.]

G *Family Provision—Time for application—Lost will—Grant of letters of administration—Will found—Revocation of grant—Grant of probate—Inheritance (Family Provision) Act, 1938 (c. 45), s. 2 (1).*

Husband and Wife—Maintenance—Separation order—Arrears—Recovery—Claim by widow to recover against estate of husband—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), ss. 5 (c), 9.

H

On Dec. 17, 1923, a separation order was made by justices under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*a*), on the ground of the husband's persistent cruelty, and under s. 5 (*c*) the husband was ordered to pay the wife £2 a week. Section 9 of the Act provides that such payment "may be enforced in the same manner as the payment of money is enforced under an order of affiliation," in effect, by distress and committal. The husband made some payments under the order down to 1928, but he then disappeared and the wife received no further payments.

On Jan. 16, 1945, the husband died. The wife claimed against his estate for arrears of maintenance.

HELD: (i) the wife's claim, as a creditor of the husband's estate, to arrears of maintenance under the order of 1923 failed.

(ii) nor could the wife claim against the husband's estate for sums which she ought to have received during his life in respect of his common law liability to maintain her or in respect of any equitable right of her so to be maintained.

Decision of JENKINS, J. ([1948] 1 All E.R. 885; [1948] Ch. 697), *affirmed*.

The Inheritance (Family Provision) Act, 1938, s. 2 (1) provides: "... an order under this Act shall not be made save on an application made within 6 months from the date on which representation in regard to the testator's estate for general purposes is first taken out."

A testator, who made a will dated Feb. 10, 1937, died on Jan. 16, 1945. The will was not found, and on Apr. 13, 1945, on the assumption that the testator had died intestate, a full grant of administration was made to the widow and one of her children. When the will was discovered the grant of administration was revoked, and on Sept. 7, 1946, a grant of probate was made to the executor named in the will, which made no provision for the widow. On Jan. 8, 1947, a summons was issued by the widow claiming that some provision should be made for her under the Act of 1938:—

HELD: the widow's claim could be considered, since her application was made within 6 months from the date of the grant of probate, though more than 6 months from the date of the grant of administration.

Decision of JENKINS, J. ([1948] 1 All E.R. 885; [1948] Ch. 697), *reversed*.

[FOR THE INHERITANCE (FAMILY PROVISION) ACT, 1938, see HALSBURY'S STATUTES, Vol. 31, p. 149.]

Cases referred to:

- (1) *Re Hedderwick*, [1933] Ch. 669; 102 L.J.Ch. 193; 149 L.T. 188; Digest Supp.
- (2) *Re Woolgar*, [1942] 1 All E.R. 583; [1942] Ch. 318; 111 L.J.Ch. 209; 167 L.T. 60; 2nd Digest Supp.

APPEAL by the plaintiff from a decision of JENKINS, J., dated Apr. 19, 1948, and reported [1948] 1 All E.R. 885.

The plaintiff, the widow of the testator, claimed against his estate for arrears of maintenance payable to her under a separation order made by justices. JENKINS, J., held that her claim failed and the Court of Appeal now affirmed his decision on this point. The plaintiff also applied under the Inheritance (Family Provision) Act, 1938, that such provision as the court thought fit should be made for her maintenance out of the testator's estate, on the ground that the will made no provision for her. JENKINS, J., held that her claim was barred under s. 2 (1) of the Act of 1938 as it was not made within 6 months of the date on which representation in regard to the testator's estate for general purposes was first taken out, but an appeal by the plaintiff to the Court of Appeal was now allowed. The facts appear in the judgment of LORD GREENE, M.R.

Pennycuik, K.C., and *Mulligan* for the widow.

B. S. Tatham for the executors.

J. H. A. Sparrow, and *Lodge* for the second and third defendants (residuary legatees).

LORD GREENE, M.R.: The arguments in this case have not led me to think that the learned judge's judgment on the question of arrears of maintenance is in any respect inaccurate. It will be no disrespect to those arguments if I say that I agree with his judgment and am content to

adopt it as my own. There is only one point which requires mentioning, and that is the reference to the Matrimonial Causes Rules, r. 62. It was suggested by counsel for the plaintiff that *Re Hedderwick* (1) and *Re Woolgar* (2) were wrongly decided in view of that rule. It is worth noticing that in neither case was any suggestion made that r. 62 affected the matter at all. In *Re Hedderwick* (1) counsel did not, apparently, think it worth referring to, and in *Re Woolgar* (2) it was referred to, not as governing the case, but on the assumption that it did not govern the case and that its effect had been altered by a later rule, r. 81. I might also say that those rules do not apply to the present case, which has nothing to do with the Matrimonial Causes Rules. As a result, the appeal on this particular point, in my opinion, fails.

SOMERVELL, L.J. : I agree.

EVERSHED, L.J. : I agree.

Appeal on question of arrears of maintenance dismissed.

LORD GREENE, M.R. : The second part of the appeal relates to that part of the application before JENKINS, J., which asked for relief under the Inheritance (Family Provision) Act, 1938. The plaintiff is the widow of the testator, and the learned judge came to the conclusion that, on the true construction of the relevant provisions of the Act, she was excluded from having any right to obtain relief by the operation of what I may call the limitation section in the Act.

The testator died on Jan. 16, 1945. He made a will dated Feb. 10, 1937, leaving his estate to his two natural children, the second and third defendants. The will, therefore, was one which did not make any provision for the maintenance of the widow, and, subject to the widow being able to satisfy the court under s. 1 (1) of the Act that no reasonable provision for her maintenance was made, the court could make an order in her favour directing that such reasonable provision as the court should think fit should be made out of the testator's net estate for her maintenance. If that will had been proved in the ordinary way, the widow unquestionably would have had a *locus standi* to apply for relief, and, subject to her being able to satisfy the court on the relevant matters, would have been entitled to an appropriate order. She is clearly a person who *prima facie* belongs to the class of dependants which the Act was designed to help. The Act is described in its title as "An Act to amend the law relating to testamentary dispositions . . ." It is concerned, and concerned only, with testamentary dispositions. The Act does not seek to amend the law relating to the distribution of intestates' estates. The legislature obviously was of opinion that the class of dependants named in the Act was sufficiently provided for by the existing law in the case of an intestacy. It, therefore, set itself to deal only with the case where, by his testamentary disposition, a testator has displaced the succession which would have taken place if he had died intestate. The Act, as its basis and as the only circumstance in which it can have any operation at all, takes the existence of a will that does not make reasonable provision for the class of dependants named.

When the testator died no one knew that he had made a will, and on that footing the widow would have been entitled to such rights as are given to her by the Administration of Estates Act, 1925. She and one of the children of the testator took out letters of administration on Apr. 13, 1945. Some time after that a will was discovered. It is not suggested that it was anyone's fault that it was not discovered before. As a result probate was granted on Sept. 7, 1946. This summons was taken out on Jan. 8, 1947, *i.e.*, within 6 months from the grant of probate, but after the expiration of about a year and three-quarters from the grant of letters of administration. It is to be observed that it was not competent for the widow to make any application under the Act, and

as a result it was not competent for the court to make any order under the Act, until the will was proved. The will was not proved until after the expiration of 15 months from the grant of the letters of administration. During the whole of that time, therefore, it was not competent for the widow to ask for or to obtain any of the relief which the Act sets out to give.

It is said that the result of the circumstances to which I have referred is to deprive the widow for ever of any opportunity of applying to the court for any kind of relief under the Act. It is to be observed that, if that is the effect of the language used, it is for this court to give effect to it, even though it thinks the result capricious or unjust. The capriciousness or injustice of a particular result is a matter to which the court can pay attention in deciding what is the true construction of the words used, but too much weight must not be given to those matters. It is the right of the legislature, if it so wishes, to be capricious or unjust. Indeed, the legislature may know more than the court knows, and what appears unjust or capricious to the court may not appear capricious or unjust to the legislature which, presumably, has a broader knowledge of the facts. I, therefore, do not attach in this case any particular weight to what might be thought to be injustice or capriciousness. I will confine my remarks to pure matters of construction of the relevant words in their context.

I turn at once to what I have called the limitation section in the Act, s. 2 (1). It is as follows :

“ . . . an order under this Act shall not be made save on an application made within 6 months from the date on which representation in regard to the testator's estate for general purposes is first taken out.”

It is argued on behalf of the defendants, and the learned judge so held, that the word “representation” is to be given its widest meaning as including, not merely the grant of probate, but also the grant of letters of administration. The learned judge found it possible to put that construction on it notwithstanding the fact that, by construing the word “representation” as including a grant of letters of administration, it would be impossible for a widow in the case of an after-discovered will ever to get any relief at all if the letters of administration remained on foot for the period of 6 months. The learned judge arrived at that conclusion with regret. I myself would share his regret if I felt constrained to put on it the same construction as he did.

The first thing one has to do, I venture to think, in construing words in a section of an Act of Parliament is not to take those words *in vacuo*, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of *prima facie* meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question : “In this state, in this context, relating to this subject-matter, what is the true meaning of that word ?” In the present case, if I might respectfully make a criticism of the learned judge's method of approach, I think he attributed too much force to what I may call the abstract or unconditional meaning of the word “representation.” No doubt, in certain contexts, “representation” would be sufficient to cover not merely probate and not merely letters of administration with the will annexed, but administration *simpliciter*. The real question which we have to decide is : What does the word mean in the context in which we find it here, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy ?

Looking at the general context of the Act, I think these observations are

relevant. First, it is limited to the case where there are testamentary dispositions. No order can be made, no order can be applied for, unless a will is produced, and under the rules made to govern the administration of this Act by the courts, production of probate or of letters of administration with the will annexed is compulsory before the court can make an order [R.S.C., Ord. 54F, r. 13 (1)]. Indeed, under the Act itself [s. 3 (3)] any order that the court may make must be transmitted to the Probate Registry that it may be annexed to one or other of those two documents, whichever happens to be the one in the case. That being the general object of the Act, when I find the word "representation" in what I may call the limitation section, I ask myself, broadly in the first instance, what sort of representation must be meant. The relevant "representation" under the general scheme of the Act is that representation, I should have thought, the granting of which gives the court jurisdiction to apply the provisions of the Act. It must be limited to the case of probate or letters of administration with the will annexed, because it is only when there is a will that the court has any power to do anything. That seems to me to be a legitimate way of approaching the word "representation" in s. 2 (1) on broad lines, but there is more in it than that, because, when I come to the immediate context, I find expressions which satisfy me that the word "representation" cannot have been intended by the legislature to extend to anything but what I have called the relevant representation for the purposes of the Act, *i.e.*, a representation under a probate or letters of administration with the will annexed. I will read s. 2 (1) again :

" . . . an order under this Act shall not be made save on an application made within 6 months from the date on which representation in regard to the testator's estate for general purposes is first taken out."

That language appears to me to assume clearly—if, indeed, it does not affirm—that the period of 6 months which is being spoken of is a period during which an application may be made. It is contemplating a period of 6 months during which an application may be made. If that period is allowed to elapse, no application can be made thereafter. I cannot read those words as contemplating that the period of 6 months referred to would be, so to speak, a dead period during which no application could possibly be made.

If I may make one further respectful criticism of the learned judge's approach, he appears to have laid too much emphasis on the bare word "representation" and too little emphasis on the preceding words, "shall not be made save on an application made within 6 months from the date" of the representation. Reading the whole of the sentence, it seems to me it can only be understood as assuming that 6 months is not a dead period but a live period. I suggested to counsel for the second defendant that, if the section had said "application may be made within 6 months from the date on which representation is first taken out," the word "representation" could not possibly have been construed as extending to a mere grant of letters of administration, and I think he agreed—indeed, I think he would have had to agree. Although the section is not actually drafted in that form, it is, as it seems to me, drafted on similar lines. There is another phrase to which the learned judge did not attach any particular importance, but which strikes me as being confirmatory of that view. The representation dealt with by s. 2 (1) is a representation "in regard to the testator's estate." The sub-section assumes, in my view, that during the whole of the 6 months there will be in existence something which during that period can be called a "testator's estate," but while letters of administration are ruling and before they have been displaced by a subsequent grant of probate it seems to me impossible to predicate of the deceased that he is a "testator." The way in which this argument is avoided, or attempted to be avoided, is by saying that the discovery of the subsequent will and the

grant of probate of that will *ex post facto* (so to speak) attached to him the quality of being a testator, and, therefore, the effect of the subsequent grant of probate is that during the whole of the 6 months he was, in fact, a testator because he had left a will. I myself find great difficulty in reading those words in that rather artificial sense. It seems to me that, as the existence of a will and the failure of the testator in that will to make provision for the dependant is the whole basis and *substratum* of the Act, the words assume that during the 6 months limitation period there will be in existence a "testator's estate." During that period here there was not an estate which could in law be described as a "testator's estate"—I say this advisedly, because I do not think any court could describe as a "testator" a person in respect of whom there has been a grant of letters of administration which has not been displaced; he would not be a "testator" and it would not be true to say that during that period he was a "testator" within the meaning of s. 2 (1). I find myself with all respect to the learned judge, in no real difficulty in the construction of these words.

There is one further point of a general nature that I might make. As I have said, the widow *prima facie* falls within the class of person entitled to ask for an order under the Act. The effect of this limitation section is not to take her out of that class of person. It deals with people who are, it is assumed, within that class of person but are excluded from the benefit of the Act if they allow a certain time to elapse. I can well understand the good sense, in an Act of this kind, of putting a limitation section in the Act, but, if this section has the effect contended for by the defendants, it would have what is, I think, the strange effect, in relation to limitation sections, of making the period of limitation run during a time when a person intending to make an application cannot possibly make it. The right to make an application never arose during the 6 months period, and the result of the learned judge's construction would be to construe this limitation section as applying not to a person who has been dilatory in enforcing a right but to a person who never had the chance of enforcing it at all. The legislature may intend such things, of course, and I give full weight to the sort of broad suggestion that certainty is a desirable thing and that it is not really fair to disturb people who have mapped out their lives, possibly, on a particular basis, but, giving full effect to that, it appears to me that one must remember that, talking of hardship, the whole Act is on the footing that a particular limited class of dependant has suffered hardship because a testator has not made the provision which the legislature thinks ought reasonably to be made. It is, therefore, dealing with people who suffer a hardship, and the effect of this limitation section would be to deprive such people of a remedy, notwithstanding the fact that they never had any chance of applying for it.

The learned judge found ([1948] 1 All E.R. 891) that the construction argued for by counsel for the widow lacked logic. He visualised the case where there was a will and probate and then more than 6 months afterwards another will was found and the probate of the first will was revoked, and he asked what happened to the 6 months limitation period in such a case. He formed the view, apparently, that in such a case the limitation period would run from the representation granted in respect of the first will, and he thought it illogical to say that where the earliest representation is not a will but letters of administration a similar result would not follow. With all respect to the learned judge, I do not agree with this reasoning. The case of the two wills was not the case before him. Different considerations may or may not apply to the case of two wills, and it will be time to deal with that problem if and when it arises. There is a fundamental difference between the two cases, and I must not be taken to be suggesting anything one way or the other as to what I would think the proper way of dealing with the case of the two wills. I am merely

pointing out a difference between that case and this case. It is this. In the case of letters of administration there is no possibility whatsoever of making an application under the Act. Where there has been probate, there is a possibility of making an application so long as the will stands. Different considerations, therefore, may well apply. I say nothing more about that. I propose to decide this case on the exact question raised before us and the considerations which appear to me to be relevant to this question.

Another matter to which I wish to refer was a point made by the learned judge ([1948] 1 All E.R. 892) on s. 3 (3). That is a procedural section, and it reads as follows :

“ An office copy of every order made under this Act shall be sent to the Principal Probate Registry for entry and filing, and a memorandum of the order shall be indorsed on, or permanently annexed to, the probate of the will of the testator or the letters of administration with the will annexed, as the case may be.”

I am bound to say that, when I first read that sub-section, I thought it supported the argument of the widow. The learned judge read it in the opposite way. He found that it confirmed the view that he himself had formed, and this, I think, was his reason. He said :

“ In s. 2 (1) the legislature has used the general phrase ‘ representation.’ It could have said ‘ probate ’ or ‘ letters of administration with the will annexed.’ It did not do so, but when it wishes to refer to those documents, it does so in terms, as you find it doing in s. 3 (3).”

With all respect to the learned judge, I cannot attach the weight that he did to the circumstance that the two documents are mentioned in s. 3 (3). The scope of s. 2 (1) and that of s. 3 (3) are quite different. Section 3 (3) is a procedural section, directing that any order made under the Act is to be annexed to something. Obviously, it has to go on to say to what it is to be annexed. It was to be annexed, not to the office chair or to some other document in the office, but to whichever of the relevant documents was the one material in the case, which would be probate in the one case, or letters of administration with the will annexed in the other. Therefore, the legislature could not help referring to those two documents in that sub-section. Nothing of the kind was necessary in s. 2 (1), and, therefore, the fact that the legislature in s. 3 (3) did refer to those documents does not appear to me really to carry the weight which the learned judge attaches to it.

I think I have dealt with all the points, and, with the utmost deference to the contrary view of the learned judge, I am of opinion that the appeal should be allowed. The point was taken, I may say, as a preliminary point, and the learned judge, accordingly, did not deal with the substance of the application, and the case will have to go back to the Chancery Division in order that it may be dealt with.

SOMERVELL, L.J. : I agree that this appeal should be allowed, and I desire to add nothing to what the MASTER OF THE ROLLS has already said with regard to the general principles of construction which should guide the courts in dealing with a question of this kind. I would, however, like to state quite briefly the process of reasoning and my effort to apply those principles to this particular subject-matter, which have led me to the conclusion to which I have come.

The general scheme of this Act can be very shortly stated. It assumes that a person has died, having made a will which does not make reasonable provision for the wife or husband or other dependants as set out in the Act. In those circumstances it entitles any one of those persons to apply to the court, and it gives the court jurisdiction to make an order directing such reasonable provision as the court thinks fit to be made out of the testator's net estate.

It is in the context of that scheme that the court has to construe the words of s. 2 (1). The controversy turns round the word "representation." As it seems to me, having regard to the subject-matter of that sub-section, which is in the nature of a limitation on the period during which an application can be made, the "representation" which is there referred to is the representation in respect of the will (which must necessarily have been proved) which the applicant is seeking to attack, or, in other words, a representation in respect of the will the proof of which is the condition precedent for the court's jurisdiction to make the order which is being applied for. If that is right, I base my conclusion less on the fact that when the letters of administration were taken out there was no will known to be in existence and the court was proceeding on the basis that the husband had died intestate—less on the absence of the will at that initial date—than on the fact that that date was not the date of first representation in respect of the will which the applicant in question is seeking to attack. I agree with what the MASTER OF THE ROLLS has said that the case with which we have to deal is not that of two wills, and I also agree that the present case has features which would not exist if and when a case of two wills comes up, but I think, though it is not necessary to decide it, that the construction of this Act and the reasons which have led me to my conclusion would probably cover the case of the two wills. For these reasons I agree that the appeal should be allowed.

EVERSHED, L.J.: I also have come to the same conclusion, though I confess I have reached it by steps more uncertain than those of the MASTER OF THE ROLLS and SOMERVELL, L.J. The difficulty which has impressed itself on my mind is this. The question posed by s. 2 (1) is this. Assuming, as the sub-section does, that there is an application before the court, can the court make an order on that particular application? Since there is to be assumed an application before the court, it necessarily follows that at that date there must be a testator, because, unless there was a testator, there could be nobody capable of making an application. The question as regards the presumed application then is: Was it made "within 6 months from the date on which representation in regard to the testator's estate" (that is to say, to the estate of the particular individual who, having been domiciled in England, died leaving any of the classes of person set out in s. 1 and leaving a will) "for general purposes" was first taken out? Without more, it seems to me, particularly having regard to the last seven words, that there is great force in the argument of counsel for the second defendant that those words, according to their ordinary meaning, as read in their context, and having regard to the purpose of that sub-section, lead in the present case to a negative answer, because representation to this testator's estate was first taken out too long ago.

For my part, and for the reasons already indicated, I cannot attach to the two words "testator's estate" a sufficient significance to qualify what seems to me to be the natural meaning of the word "representation," nor should I find sufficient significance alone in the circumstance that this Act is concerned only with testate persons. I have, however, been persuaded to a conclusion in conformity with the conclusions already expressed by the opening words in s. 2 (1):

"... an order ... shall not be made save on an application made within 6 months ..."

As has been pointed out, that sub-section is in its nature a limitation of some right in the widow, laid down in general terms, and its form is remarkable. It does not state, as the side-note would appear to indicate, that an application shall be made within a certain time. It limits the powers of the court to make orders save on certain applications. I have been persuaded that that must necessarily assume that there is a number of applications capable of being

dealt with by the courts, but that only on some of them can orders be made, and, in turn, that seems to postulate that during the 6 months referred to it must have been possible to make an application. Once that stage is reached, it seems then to follow that the "representation in regard to the testator's estate" referred to is a representation, as counsel for the widow put it, under the will or under the relevant will.

A I have listened attentively to what SOMERVELL, L.J., has said. Counsel for the second defendant made the point that, in answering this question, inferentially we might have to answer the question: "What about two wills, one superseding the other?" I feel that there is much force in that, because, if it is said that this phrase does not mean what the learned judge felt compelled to hold it did mean, one ought, *prima facie* at least to have a clear idea in one's mind what it does mean, and, if the right gloss (for it seems to me that there is no escape from the conclusion that we are putting a gloss) on these words is, "under the relevant will," that will cover or comprehend the case of two wills. That case is not before us, and I think it would be wrong, as the MASTER OF THE ROLLS has pointed out, to express a concluded opinion on it, but I follow SOMERVELL, L.J., in saying that it seems to me, as at present advised, that the gloss that one would put would quite likely be found to cover some cases where there were two wills.

C And I have for my part felt the force of the argument that the question of two wills is relevant on the general matter of considering what was the intention of this Act as one observes it from the whole of its terms. I am not sure, if I may say so, that I accept the argument that the learned judge first reached a conclusion on a point which was not before him and then fell back by way of conclusion on the point in the present case. It seems to me that the learned judge was considering what type of case these words were apt to cover, and that it was relevant to consider the two wills case as well as the case of the intestacy plus the will. However that may be, I have, for the reasons which I have briefly given, reached the conclusion that we are able to give effect to the proposition which the learned judge confessed he would like to accede to, though, as I have said, I feel we have added, as we must necessarily, some gloss on these words, and to that extent have embarked, perhaps, upon judicial legislation. I agree in the circumstances that the appeal on this point should succeed.

E *Appeal on the question under the Inheritance (Family Provisions) Act, 1938, allowed. Order below reversed. Matter remitted to Chancery Division. Appellant to have one-half of the costs (as between solicitor and client) of the appeal, out of that part of the estate not affected by any order which may be subsequently made. Costs of the first hearing to be in discretion of the judge to whom the matter is remitted. Infant respondents' costs as between solicitor and client so far as available to be paid out of any residue remaining unaffected by any order the court may make. Executors' costs here and below to be paid as between solicitor and client out of the estate as a whole before any order is made.*

G Solicitors: F. Duke & Sons (for the widow); Henry Boustred & Sons (for the executors); A. J. Adams & Adams, agents for R. L. Frank & Co., Truro (for the second defendant); W. R. Perkins, agent for Nelson L. Mitchell, Southend-on-Sea (for the third defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re GEORGE'S WILL TRUSTS. BARCLAYS BANK LTD.
v. GEORGE.

[CHANCERY DIVISION (Jenkins, J.), October 28, November 11, 1948.]

Ademption—Portion—Double portions—Rebuttal of presumption—Difference in character of gifts—Liabilities undertaken by donee at time of gift inter vivos—Quid pro quo for liabilities—Donor compelled to make gift.

The testator, a farmer, by his will, dated July 22, 1940, after making certain pecuniary and specific bequests and devises, gave his residuary estate to trustees on trust for sale and conversion and to pay the net proceeds as to one-third thereof to his son Robert and as to two-thirds to his son Ernest absolutely. By cl. 7 he provided: "If [Ernest] shall within one month from the date of my death give notice to my trustees in writing that he desires to carry on my farm at F. then I direct my trustees to cause a valuation to be taken of my residuary estate and I direct that one-third of such valuation shall be deemed to constitute the share of [Robert] in my residuary estate and that two-thirds of such valuation shall be deemed to constitute the share of [Ernest] in my residuary estate and I further direct that in the event of [Ernest] carrying on my said farm . . . then [Robert] shall allow his one-third share of my residuary estate to remain invested in my said farm for the benefit of [Ernest] and such one-third share shall be secured to the said [Robert] by means of a suitable charge on the farm stock or otherwise . . ." There followed provisions for the payment off of the charge. The testator worked two farms at F., Glebe Farm, which was his freehold, and Laurels Farm, which was held under a tenancy agreement in the joint names of the testator and Ernest. In 1941, the county war agricultural committee served notices requiring the testator to vacate both farms owing to their poor condition, and, in consequence, a scheme was drawn up under which (i) the testator gave all the live and dead farming stock on the two farms to Ernest; (ii) the testator was to assign to Ernest his share in the tenancy of Laurels Farm; (iii) the testator was to grant Ernest a tenancy of Glebe Farm at a rent to be agreed; and (iv) the testator was to arrange with his bank to secure to Ernest adequate financial resources to run the farms. The agricultural committee approved the scheme. On Mar. 25, 1941, Ernest, who had been employed on the farms all his working life, took control accordingly, and at that date the live and dead farming stock was valued at £2,060 17s. 3d. On Sept. 4, 1942, the testator died. Ernest gave notice under cl. 7 of the will, and surrendered his tenancy of Laurels Farm.

HELD: (i) the gift *inter vivos* of the farming stock to Ernest was sufficiently *ejusdem generis* with the testamentary provision to prevent the exclusion or rebuttal of the presumption against double portions by reason of the difference in character of the two gifts, but, if that were not so, the difference in character was rendered immaterial by the circumstance that the live and dead stock was valued at the time of the gift *inter vivos* at £2,060 17s. 3d., and, could, therefore, be regarded as a gift of money.

Re Jacques ([1903] 1 Ch. 267; 88 L.T. 210), *applied*.

(ii) the fact that Ernest undertook certain liabilities at the time of the gift *inter vivos* did not prevent the gift from being a portion. He had, in fact, received a fair *quid pro quo* for the liabilities which he undertook, and, in any event, a liability attaching to a gift was only a matter to be considered in evaluating the gift, and did not change its character as such.

Dictum of NORTH, J., in *Re Vickers* (1888) (37 Ch.D. 535; 58 L.T. 922), *applied*.

(iii) although the testator would not have made the gift *inter vivos* to Ernest but for the attitude of the agricultural committee, the gift was none the less in the nature of a portion because the testator had, in effect, simply anticipated the testamentary gift.

Re Vaux ([1938] 4 All E.R. 703; [1939] Ch. 465; 160 L.T. 74), *considered*.

A [AS TO SATISFACTION, see HALSBURY, Hailsham Edn., Vol. 13, pp. 161-175, paras. 147-160; and FOR CASES, see DIGEST, Vol. 20, pp. 449-463, Nos. 1743-1889.]

Cases referred to :

- (1) *Re Vaux*, [1938] 4 All E.R. 297, 703; [1939] Ch. 465; 108 L.J.Ch. 60, 211; 160 L.T. 65, 74; Digest Supp.
- B (2) *Re Lacon*, [1891] 2 Ch. 482; 60 L.J.Ch. 403; 64 L.T. 429; 20 Digest 453, 1770.
- (3) *Taylor v. Taylor*, (1875), L.R. 20 Eq. 155; 44 L.J.Ch. 718; 20 Digest 458, 1825.
- (4) *Re Tussaud's Estate*, (1878), 9 Ch.D. 363; 47 L.J.Ch. 849; 39 L.T. 113; 20 Digest 475, 2016.
- C (5) *Re Jaques*, [1903] 1 Ch. 267; 72 L.J.Ch. 197; 88 L.T. 210; 20 Digest 472, 1982.
- (6) *Re Vickers*, (1888), 37 Ch.D. 525; 57 L.J.Ch. 738; 58 L.T. 920; 20 Digest 472, 1981.
- (7) *Re Scott*, [1903] 1 Ch. 1; 72 L.J.Ch. 20; 87 L.T. 574; 20 Digest 459, 1840.

D ADJOURNED SUMMONS to determine whether a gift *inter vivos* of farm stock adeemed *pro tanto* a gift by will of a share of the proceeds of sale of the donor's residuary estate with an option to carry on the donor's farm. JENKINS, J., held that the testamentary gift was so adeemed.

Lightman for the plaintiffs, trustees of the will.

E *Plowman* for the first defendant, Ernest.

Ian Campbell for the second defendant, Robert.

Cur. adv. vult.

Nov. 11. JENKINS, J., read the following judgment. The testator in this case was a farmer. He had two sons, the defendants, Augustine Ernest Maltus George and Robert Ormuz George, whom I will call "Ernest" and

F "Robert" respectively. At the date of his will, the testator was farming two properties at Farthinghoe in Northamptonshire, namely, the Glebe Farm, which was his own freehold, and the Laurels Farm, which was held under a tenancy agreement in the joint names of himself and Ernest. It appears that Ernest had all his working life been employed in the testator's farming business, while Robert had for many years been employed at a branch of Barclays Bank,

G Ltd. The question which I have to decide is in substance whether a gift of the live and dead stock on the two farms made by the testator to Ernest after the date of his will should be brought into account by Ernest in the division of the testator's residuary estate between Ernest and Robert under the rule commonly called the rule against double portions.

By his will dated July 22, 1940 (so far as material for the present purpose)

H the testator appointed the plaintiffs, Barclays Bank, Ltd., and James Black, to be executors and trustees thereof and after making various pecuniary and specific gifts, including a gift of two cottages to Robert subject to a stipulation to the effect that Gladys Laura Russell (who had been the testator's housekeeper for many years) was to be allowed to occupy one of them rent free for a period of five years to be computed from the end of the period of three months thereinafter mentioned, by cl. 6 devised and bequeathed his residuary real and personal estate to his trustees on trusts of the usual character for sale, calling

in and conversion, and payment of his funeral and testamentary expenses and debts, and to stand possessed of the net residue to pay one-third thereof to Robert for his sole use and benefit absolutely, and to pay the other two-thirds thereof to Ernest for his sole use and benefit absolutely, with a proviso entitling the said Gladys Laura Russell if she so desired to live at the Laurels free of all expense for a period of three months from the date of his death. By cl. 7 the testator gave the following directions which I think I should read in full :

" If the said Augustine Ernest Maltus George shall within one month from the date of my death give notice to my trustees in writing that he desires to carry on my farm at Farthinghoe aforesaid then I direct my trustees to cause a valuation to be taken of my residuary estate and I direct that one-third of such valuation shall be deemed to constitute the share of the said Robert Ormuz George in my residuary estate and that two-thirds of such valuation shall be deemed to constitute the share of the said Augustine Ernest Maltus George in my residuary estate and I further direct that in the event of the said Augustine Ernest Maltus George carrying on my said farm under the provisions of this clause then the said Robert Ormuz George shall allow his one-third share of my residuary estate to remain invested in my said farm for the benefit of the said Augustine Ernest Maltus George and such one-third share shall be secured to the said Robert Ormuz George by means of a suitable charge on the farm stock or otherwise and the said Augustine Ernest Maltus George shall pay the said Robert Ormuz George interest at five per cent. per annum on the value of the one-third share of the said Robert Ormuz George in my residuary estate And I further direct that the said Robert Ormuz George shall allow his one-third share to remain invested in the said farm for a minimum period of three years computed from the date of my death and that after the expiration of such period of three years the said Robert Ormuz George shall be at liberty at any time thereafter to demand repayment to him by the said Augustine Ernest Maltus George of the value of such one-third share and such value shall be reckoned as the value of such one-third share as at the date of the valuation taken by my trustees as aforesaid Provided always that the said Augustine Ernest Maltus George shall be at liberty at any time during the period of three years hereinbefore mentioned to pay to the said Robert Ormuz George the value of such one-third share reckoned as set out above together with interest to the date of such payment and in such event the said Augustine Ernest Maltus George shall be entitled to have such charge or such other security hereinbefore mentioned duly discharged And I direct that in the event of the operation of this clause coming into effect the said Augustine Ernest Maltus George shall allow the said Gladys Laura Russell to live at the Laurels Farthinghoe aforesaid for the period of three months and on the conditions set out in cl. 6 hereof."

The testator died on Sept. 4, 1942, aged 83, and his will was duly proved by the plaintiffs on Apr. 23, 1943. The circumstances in which the testator between the date of his will and the date of his death made the gift to Ernest to which the question now before me relates are fully stated in the affidavit of the plaintiff, James Black. The substance of his evidence is that by the end of 1940 the two farms were in very poor condition primarily owing to the testator's determination, notwithstanding his age, to keep the management of them in his own hands, which made it impossible for Ernest to do anything effective to improve the position ; that, owing to the unsatisfactory state of the farms, the county war agricultural committee in 1940 threatened the testator with ejection from them under the powers conferred on the committee by the emergency legislation then in force, and early in 1941 actually caused notices to be served on him requiring him to vacate both farms ; that, after

the service of these notices, the testator and Ernest had an interview with the secretary to the committee, who told them that, unless the farms were thoroughly reorganised, the notices would be enforced; and that at this interview the suggestion was made (Mr. Black does not say by whom, but I infer it was made by the secretary) that it was time the testator retired from active farming and handed over control of the farms to Ernest. Mr. Black goes on to relate how, after the interview with the secretary of the war agricultural committee, the testator consulted his solicitors, Messrs. Barnes and Lanham, and how after a conference between Mr. Lanham of that firm, the testator, Ernest, and the late Mr. Harry Percy Stace, a valuer employed by the testator, the following scheme was drawn up for the purpose of satisfying the committee that there was to be a complete change in the control of the farms and of persuading the committee to withdraw their notices:—(i) The testator was to make a gift of all the live and dead stock on the two farms to Ernest, such gift to be evidenced by a formal deed of gift. (ii) The testator was to assign to Ernest his share in the tenancy of the Laurels Farm. (iii) The testator was to grant to Ernest a tenancy of the Glebe Farm at a rent to be agreed between them and their valuer as a fair rent. (iv) The testator was to make arrangements with his bank to secure adequate financial resources to enable Ernest to finance the farms until such time as he could do without this assistance. This scheme met with the approval of the war agricultural committee, whose concern was to see that the farms were effectively placed under Ernest's management in the interests of efficiency, and documents to carry it out were in due course prepared, with a view to Ernest's assuming control of the farms on Mar. 25, 1941. Ernest did, in fact, take control of the farms and possession of the live and dead stock on or about that date, but, largely owing to delays on the part of the testator, the documents, namely, the assignment to Ernest of the testator's interest in the tenancy of the Laurels Farm, the tenancy agreement by which the Glebe Farm was let to Ernest, and the deed of gift, were not executed until Aug. 25, 1941. The deed of gift was, it appears, never stamped, the original was not produced, and no admissible evidence of it was adduced before me, the copy exhibited to Mr. Black's affidavit being clearly inadmissible as the original was not shown to have been lost or destroyed. However, it was not in dispute that the gift of the live and dead stock was, in fact, made, and that Ernest had assumed possession under such gift some five months before the date on which the deed of gift is said to have been executed.

The live and dead stock was valued at the time of the gift by Mr. Stace at £2,060 17s. 3d., his valuation being dated Mar. 28, 1941. The rent reserved to the testator on the letting of Glebe Farm to Ernest was £172 per annum. It was not suggested before me that this was anything more or less than a fair rent for the property let. Indeed, I assume it to have been the fair rent fixed in consultation with the valuer as contemplated by the scheme. The testator's bank account was overdrawn on Mar. 25, 1941, to the extent of £151 17s. 3d. This account was continued for the purposes of the farms with the result that the overdraft had by August, 1942, been converted into a credit balance of £529 3s. 7d. It was not disputed before me that the payments-in which produced this result could be regarded as wholly attributable to Ernest's farming operations. On Aug. 21, 1942, the credit balance of £529 3s. 7d. was transferred by the testator to an account in Ernest's name.

It appears that after the testator's death Ernest duly gave notice to the testator's trustees of his desire to carry on the testator's farm at Farthinghoe pursuant to cl. 7 of the will, thus bringing the provisions of that clause into operation. It further appears that after the testator's death Ernest, on Apr. 6, 1943, surrendered his tenancy of the Laurels Farm, and on so doing became liable to a claim of £545 or thereabouts for dilapidations as against which he

had a claim of £500 or thereabouts for the tenant right. I do not think this surrender and its financial consequences to Ernest have any bearing on the question I have to decide.

In addition to Mr. Black's evidence there are an affidavit by Robert and two affidavits by Ernest. Robert's affidavit and Ernest's first affidavit refer to certain statements alleged to have been made by the testator, which are relied on as direct evidence of the testator's intention that the gift of the live and dead stock to Ernest should (according to Robert) or should not (according to Ernest) be brought into account in the division of the testator's estate. The statements attributed to the testator in these affidavits are in themselves not free from ambiguity, and so far as they can be regarded as tending one way or the other seem to me to cancel each other out, leaving the question at issue to be decided simply by reference to the character of the provision made for the two sons by the testator's will, the character of the gift *inter vivos* to Ernest, and the circumstances in which that gift was made. Ernest's second affidavit alleges a partnership between himself and the testator, but his counsel agreed before me that this allegation, which is wholly at variance with Mr. Black's evidence, could for the present purpose be disregarded.

I may now proceed to consider whether, on the facts and in the circumstances which I have stated, the rule against double portions applies to the gift of live and dead stock to Ernest, or, perhaps more accurately, whether there is anything in those facts and circumstances to exclude the application of the rule. The principles on which the rule is based and applied are succinctly stated by the present MASTER OF THE ROLLS in *Re Vaux* (1) ([1939] Ch. 481) where he says :

"The rule against double portions rests upon two hypotheses : first of all, that under the will the testator has provided a portion and, secondly, that by the gift *inter vivos* which is said to operate in ademption of that portion either wholly or *pro tanto*, he has again conferred a portion. The conception is that the testator having in his will given to his children that portion of the estate which he decides to give to them, when after making his will he confers upon a child a gift of such a nature as to amount to a portion, then he is not to be presumed to have intended that that child should have both, the gift *inter vivos* being taken as being on account of the portion given by the will. When the word 'portion' is used in reference to the gift *inter vivos*, it has a qualitative significance, in this sense, that it is not every gift *inter vivos* that will cause the rule to come into operation. If a testator gives to a child as pure bounty and by way merely of a present a sum of money, that will not have the character to cause the rule to come into operation. Similarly there may be various reasons why the testator should give property to a child. He may wish to free him from some embarrassment, or something of that kind. In cases of that sort upon the facts a gift may not be a portion at all, in which case, of course, the rule does not apply."

As appears from that passage, and also from *Re Lacon* (2) (particularly in the judgment of BOWEN, L.J., ([1891] 2 Ch. 497, 498)), the first matter which must be made out is that both the gift by will and the gift *inter vivos* made by the testator to his child are gifts in the nature of portions. Once that essential condition is established, a presumption arises that the testator intended the provision *inter vivos* to be on account of the provision by will, but the presumption may be rebutted if the circumstances in which the gift *inter vivos* was made are such as to show that the testator did not intend the provision *inter vivos* to be on account of the provision by will.

It was not disputed before me that the provision made for Ernest by the testator's will in the present case was in the nature of a portion. It was, however, contended on his behalf that, having regard to its character and the

circumstances in which it was made, the testator's gift *inter vivos* of the farming stock to Ernest was not in the nature of a portion at all, and, alternatively, that, if this gift was in itself in the nature of a portion, its character and the circumstances in which it was made were sufficient to rebut the presumption. The question of portion or no portion being necessarily to a great extent a question of the testator's intention, it is hardly possible to distinguish circumstances relied on as tending to show that the gift *inter vivos* was not in the nature of a portion at all from circumstances relied on as tending to rebut the presumption on the footing that it was in itself in the nature of a portion, and I do not propose to do so.

First, as to the character of the gift of live and dead stock. I have no doubt that a gift by a farmer to his son of live and dead stock with which to set up in business as a farmer may be in the nature of a portion, and, in the absence of circumstances tending to show the contrary, would generally be regarded as such. In *Taylor v. Taylor* (3), SIR G. JESSEL, M.R., mentioned (L.R. 20 Eq. 158) the buying of the goodwill of a business for a son and giving him stock in trade as a typical instance of a portion. It was, however, contended that the difference in the character of the gift of live and dead stock from the provision made for Ernest in the present case was such as to rebut the presumption against double portions even if the circumstances were otherwise such as to raise it at all. Reference was made in this connection to *Re Tussaud's Estate* (4) and *Re Jaques* (5). The latter case is, no doubt, clear authority for the proposition stated in the headnote ([1903] 1 Ch. 267) "that the presumption against double portions will not prevail where the testamentary portion and subsequent advancement are not *ejusdem generis*," but the judgments of the Court of Appeal, as I understand them, further show that the proposition thus stated has no application where the "subsequent advancement," though not *ejusdem generis* with the testamentary provision, is one on which a money value was set at the time it was made. In the present case I think that, having regard to the fact that the testator's live and dead stock formed part of the assets which Ernest was to take *in specie* under the will in the event of his exercising the option under cl. 7, the gift *inter vivos* here was sufficiently *ejusdem generis* with the testamentary provision to prevent the exclusion or rebuttal of the presumption by reason of the difference in character between the two gifts. If I am wrong in that view, I think that in any case the difference in character is rendered immaterial by the circumstance that the live and dead stock was valued at the time of the gift *inter vivos* at £2,060 17s. 3d., and can, therefore, be regarded for the present purpose as a gift of so much money.

Next, it was said that, if the transaction of which the gift of the live and dead stock formed part were viewed as a whole, it would be found in truth to be no gift at all, but simply part of a transaction under which Ernest took over certain assets and assumed certain liabilities in the form of (i) the testator's share of the rent and other liabilities under the tenancy of the Laurels Farm, (ii) the rent payable and other liabilities incurred to the testator under the tenancy granted to Ernest of the Glebe Farm, and (iii) the overdraft of £151 17s. 3d. I cannot accept this argument. I think Ernest must be regarded as receiving a fair *quid pro quo*, in the form of the testator's share of the Laurels tenancy and the tenancy of the Glebe Farm granted to him by the testator, for the liabilities in respect of rent and so forth which he undertook, and this is certainly the effect of Mr. Black's evidence. That leaves the whole of the £2,060 worth of live and dead stock as pure gift, subject only to the question of the overdraft with which I will deal in a moment. It would, to my mind, be very strange if, in a case where a father gave his son valuable live and dead stock, granting him at the same time a tenancy at a fair rent of a farm on which to set up in business as a farmer, the son's liability for the rent would prevent the gift of the stock from being a gift, and, *prima facie*, a gift by way of portion.

Further, I do not think the fact that a gift has an element of liability attached to it in itself prevents the gift from being a portion. It is rather "a matter to be taken into consideration in considering what the value of the gift was": see *per* NORTH, J., in *Re Vickers* (6) (37 Ch.D. 535), a passage in his judgment which was not, I think, included in the disapproval expressed by the Court of Appeal in *Re Jaques* (5).

Finally, it was urged that the testator's sole object here was not to benefit Ernest, but simply to placate the war agricultural committee. The testator did not want to make the farms over to Ernest or anyone else, but, on the contrary, was extremely reluctant to do so. He was forced to resign their management to somebody on pain of eviction, and entered into this transaction with Ernest merely to extricate himself from the difficulty in which he was placed and procure the withdrawal of the notices. Therefore, it is contended, the case is not one of portion at all, any more than a payment to meet a son's pressing debts is a portion (as to which see *Re Scott* (7)). I think this argument is a *non sequitur*. I am quite prepared to accept the assumption that, but for the intervention of the committee, the testator would have retained the farms with the live and dead stock on them until he died, and that he only got rid of the farms and the stock under, in effect, the compulsion of the notices and the committee's insistence on them. But why did he select Ernest as the recipient? Ernest was under no pressing financial difficulties for extraordinary assistance such as would not on the authorities be regarded as in the nature of a portion, but Ernest was the testator's farmer son for whom the testator had made provision to the extent of two-thirds of his residuary estate with the option of taking the residue *in specie*, subject to a charge for Robert's one-third share to be quantified by means of a valuation of the whole if he desired to carry on the testator's farm as (it is reasonable to suppose) the testator contemplated Ernest would in all probability wish to do. This is, I think, quite plainly the reason why Ernest was selected to take over the farms and receive the live and dead stock. Viewed in this light, I think the circumstances tend to reinforce rather than rebut the presumption. The testator being compelled to go out of farming and make provision for the future management of the farms to the satisfaction of the committee, did so by, as it were, anticipating his demise, and putting Ernest in immediate beneficial possession of part of what he would in due course have taken under the testator's will. The attitude of the committee, so far as I can see, afforded no ground at all for increasing Ernest's provision at the expense of Robert, though it, no doubt, did afford good ground for putting Ernest into immediate possession of this part of the testamentary portion designed for him. For these reasons I am of opinion that this is a case to which the rule against double portions applies with respect to the gift to Ernest of the live and dead stock.

It remains to consider the question of the overdraft. A claim originally made that the credit balance in the bank account at the date of its transfer to Ernest should be treated as a gift additional to the live and dead stock for the purposes of the rule was rightly abandoned, on the ground that the balance was made up of farming receipts subsequent to the gift of the live and dead stock, or in other words simply represented the fruits of the gift. The overdraft of £151 17s. 3d. which existed at the date of the gift was discharged from the same source, and the value of the gift to Ernest was, therefore, *pro tanto* diminished. The precise arrangement (if any) come to about the overdraft at the time of the gift is not clear from the evidence, but there is no doubt it was in fact discharged in this way. I am, therefore, I think, justified in holding (and counsel for Robert did not press the contrary view) that the overdraft should be treated as a liability subject to which Ernest took the gift of the live and dead stock and the tenancies of the farms. In the result, therefore, I hold that the sum of £2,060 17s. 3d. (being the value of the live

and dead stock at the date of the gift) less £151 17s. 3d. (being the amount of the overdraft at the same date) should be brought into account by Ernest in the ascertainment of the shares of the two sons in the testator's residuary estate. The costs of all parties as between solicitor and client will be borne by the testator's estate in due course of administration.

Declaration accordingly.

A Solicitors: *Torr & Co.*, agents for *Barnes & Lanham*, Brackley (for the trustees); *Preston, Lane-Claypon & O'Kelly*, agents for *Walter R. J. Law*, Buckingham (for the first defendant); *Preston, Lane-Claypon & O'Kelly*, agents for *Darby & Son*, Oxford (for the second defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Affirmed. C.A. [1949] 1 All E.R. 344.

BERNBAUM v. BERNBAUM.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), July 26, November 15, 1948.]

C *Divorce—Practice—Order of registrar under Married Women's Property Act, 1882, s. 17—Appeal to judge in chambers—R.S.C., Ord. 54, r. 22A (1) (a), (2)—Matrimonial Causes Rules, 1947 (S.R. & O., 1947, No. 523), rr. 59, 81, 82.*

Where a husband and a wife are parties to a matrimonial suit, an appeal from an order of a registrar on an application under the Married Women's Property Act, 1882, s. 17, lies to a judge in chambers under the Matrimonial Causes Rules, 1947, r. 59, notwithstanding the fact that, by r. 82 of those rules, the master has the jurisdiction and powers of a judge under s. 17 of the Act of 1882.

[AS TO APPEAL FROM REGISTRAR, see HALSBURY, Hailsham Edn., Vol. 10, p. 777, para. 1231, and 1948 Supplement.

E FOR THE MATRIMONIAL CAUSES RULES, 1947, see RAYDEN ON DIVORCE, 4th Edn., Special Supplement.]

Case referred to :

(1) *Peduzzi v. Peduzzi* (unreported).

SUMMONS, adjourned into open court, appealing from an order of the registrar under the Married Women's Property Act, 1882, s. 17.

F At the hearing of the summons, which was taken out by the wife (who had obtained a decree of judicial separation from the husband), the husband took the preliminary point that the appeal lay to a Divisional Court and the judge in chambers had no jurisdiction to hear it. BARNARD, J., held that the summons was governed by the Matrimonial Causes Rules, 1947, r. 59, and the appeal lay to a judge in chambers.

G *John Ritchie* for the wife.
Seuffert for the husband.

Cur. adv. vult.

H Nov. 15. BARNARD, J., read the following judgment. This appeal raises a question of the practice applicable to appeals from orders made under s. 17 of the Married Women's Property Act, 1882, in the Divorce Division. The wife is Rebecca Bernbaum, and she is appealing from an order of the registrar made on Apr. 20, 1948, under the aforementioned Act. She obtained a decree of judicial separation from her husband, Henry Bernbaum, on Oct. 14, 1947. Counsel on behalf of the husband contends that I have no jurisdiction to hear this appeal, and that the appeal lies to a Divisional Court.

The former practice is concisely set out in RAYDEN ON DIVORCE, 4th ed., p. 246 :

"To decide a dispute as to the ownership of property between a husband

and wife who are parties to a matrimonial suit, a summons is taken out under s. 17 of the Married Women's Property Act, 1882, before a judge of the Divorce Division, who, if necessary, will refer the matter to one of the registrars to inquire and report: the solicitor then fills up a form of application for an appointment before the registrar, who, after hearing the evidence tendered by the parties, draws his report. This is formally filed by the applicant and the original summons restored to the judge's list."

The practice, however, is now governed by the Matrimonial Causes Rules, 1947, r. 82, which is:

"Without prejudice to the exercise of any jurisdiction and powers conferred on him by virtue of R.S.C., Ord. 54, r. 12, a registrar may exercise all the jurisdiction and powers conferred upon a judge of the Supreme Court by the Married Women's Property Act, 1882, s. 17."

This rule brought the divorce practice into line with the practice in the King's Bench Division and reproduces, so far as s. 17 of the Married Women's Property Act, 1882, is concerned, R.S.C., Ord. 54, r. 12A, with the substitution of the word "registrar" for "master." Appeals from a master of the King's Bench Division are governed by R.S.C., Ord. 54, rr. 21 and 22A. For the purpose of this appeal, I need only refer to r. 22A (1) (a) and (2), which read as follows:

"(1) There shall be a right of appeal from any finding decision order or judgment arrived at made given directed or entered by any master of the King's Bench Division on the hearing or determination by him of (a) Any trial or reference of any action cause issue or matter (including trials directed under Ord. 14, r. 7) (but excluding any application under s. 17 of the Married Women's Property Act, 1882), or any assessment of damages and whether by consent or otherwise . . . (2) Such appeal shall be to a Divisional Court by notice of motion."

In THE ANNUAL PRACTICE, 1946-47, p. 1107, there is a footnote (headed "Appeal from Master") to r. 22A to this effect:

"From an order directing an issue under the Married Women's Property Act, 1882, appeal lies to a judge in chambers, but where a master tries an issue an appeal from his judgment thereon lies to a Divisional Court."

There is no such equivalent rule in the Matrimonial Causes Rules, 1947, but I am asked to apply that rule by virtue of the Matrimonial Causes Rules, 1947, r. 81:

"Subject to the provisions of these rules and of any statute, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any matrimonial cause or matter to which these rules relate."

I am also asked to interpret the same rule as meaning that such an appeal lies to a Divisional Court. It is to be noted that the Rules of the Supreme Court only apply in divorce subject to the Matrimonial Causes Rules. Counsel for the wife has referred me to the Matrimonial Causes Rules, 1947, r. 59. That rule deals with appeals from a registrar, and is as follows:

"A party may appeal from an order or decision of a registrar to a judge in chambers by summons to be issued . . ."

Counsel for the wife contended that that rule governs this appeal. It might be argued that the language of the Matrimonial Causes Rules, 1947, r. 82, constitutes the registrar a judge for settling disputes under s. 17 of the Married Women's Property Act, 1882:

"... a registrar may exercise all the jurisdiction and powers conferred upon a judge ..."

I reject that point of view. The present order is headed: "Before Mr. Registrar Long," and the registrar, although armed with the jurisdiction and powers of a judge under this section, still remains a registrar, and, therefore, I think an appeal from him is governed by the Matrimonial Causes Rules, 1947, r. 59, and lies to a judge in chambers. Quite recently, on Oct. 25 and 26, 1948, in *Peduzzi v. Peduzzi* (1), an appeal from WALLINGTON, J., who had dismissed an appeal from the registrar's order under the Married Women's Property Act, 1882, s. 17, was heard by the Court of Appeal, and, although this point as to jurisdiction was never raised, neither WALLINGTON, J., nor the Court of Appeal seemed to doubt his jurisdiction to hear the appeal. I, therefore, decide that the summons taken out by the wife appealing from the order of Apr. 20, 1948, to a judge in chambers is in order, and that the judge in chambers has jurisdiction to hear the appeal.

Judgment for the wife on the preliminary issue. Costs to be dealt with on hearing of appeal.

Solicitors: J. C. Clifford Watts (for the wife); Ferris, Roberts, Thomas & Co. (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

HASTINGS AND FOLKESTONE GLASSWORKS, LTD.

v. KALSON.

[COURT OF APPEAL (Tucker and Asquith, L.JJ., and Harman, J.), November 12, 23, 1948.]

Company—Director—Vacation of office—Conviction of "indictable offence"—Offence triable summarily or on indictment—Summary conviction—Unauthorised dealing in gold—Breach of Defence Regulations.

A company's articles provided that a director "convicted of an indictable offence" should vacate his office. The defendant, a director of the company, pleaded Guilty before a court of summary jurisdiction to a charge of unauthorised dealing in gold, contrary to the Defence (Finance) Regulations, 1939, reg. 4, and was convicted and fined. By reg. 9 (1) the offence was punishable under the Defence (General) Regulations, 1939, reg. 92 (1), which provides that a person contravening or failing to comply with any of the regulations shall "(a) on summary conviction, be liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding £100, or to both such imprisonment and such fine, or (b) on conviction on indictment, be liable to imprisonment for a term not exceeding 2 years or to a fine not exceeding £500, or to both such imprisonment and such fine." The company claimed a declaration that the defendant was disqualified from acting as a director.

HELD: whether or not an offence was "indictable" within the meaning of the company's articles depended on the nature and quality of the offence when committed, irrespective of the procedural manner in which it might subsequently be dealt with, and, therefore, as the offence of which the defendant was convicted was one which could be dealt with on indictment, he was "convicted of an indictable offence" within the meaning of the articles, and the company was entitled to the declaration asked for.

Decision of OLIVER, J. ([1948] 1 All E.R. 711), reversed.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 92 (1), see HALSBURY'S STATUTES, Vol. 40, p. 1454.]

APPEAL by the plaintiff company from a decision of OLIVER, J., dated Mar. 22, 1948, and reported ([1948] 1 All E.R. 711).

The company brought an action for a declaration that the defendant was disqualified from acting as a director of the company and that his employment as co-manager had determined on the ground that he had been "convicted of an indictable offence." The defendant had been convicted by a court of summary jurisdiction of an offence against the Defence (Finance) Regulations, 1939, reg. 4, which was triable summarily or on indictment. The declaration was refused by OLIVER, J., but the appeal by the plaintiff company from his decision was now allowed by the Court of Appeal. The facts appear in the judgment of TUCKER, L.J.

Sir Valentine Holmes, K.C., and *G. Pollock* for the plaintiff company.
Thesiger, K.C., and *A. M. S. Neave* for the defendant.

Cur. adv. vult.

Nov. 23. The following judgments were read.

TUCKER, L.J.: On Oct. 15, 1947, the defendant was a director of the plaintiff company. Article 26 of the articles of association of the plaintiff company is as follows:

"The office of a director shall be vacated . . . (c) if he be convicted of an indictable offence not being an offence under the Road Traffic Act, 1930, or any statutory provision in lieu or modification thereof."

On Oct. 15, 1947, the defendant was convicted by a court of summary jurisdiction at Bow Street of an offence against the Defence (Finance) Regulations, 1939, reg. 4, *viz.*, that he, between Jan. 1 and Apr. 30, 1947, being in the United Kingdom and being entitled to sell gold, to wit 150 sovereigns, did fail to offer that gold for sale to H.M. Treasury or to a person designated by H.M. Treasury. He pleaded Guilty and was fined £200 and ordered to pay £20 costs, and an order was made for the confiscation of 120 sovereigns which had been recovered. By the Defence (Finance) Regulations, 1939, reg. 9 (1), the provisions of Pt. V of the Defence (General) Regulations, 1939, are made applicable for the purpose of enforcement of the Defence (Finance) Regulations, 1939. By reg. 92 (1) in Pt. V of the Defence (General) Regulations, 1939, it is provided as follows:

"If any person contravenes or fails to comply with any of these regulations . . . he shall [save as otherwise expressly provided by or under that regulation] be guilty of an offence against that regulation; and, subject to any special provisions contained in these regulations, a person guilty of an offence against any of these regulations shall—(a) on summary conviction, be liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding £100, or to both such imprisonment and such fine, or (b) on conviction on indictment, be liable to imprisonment for a term not exceeding 2 years or to a fine not exceeding £500, or to both such imprisonment and such fine."

Consequent on the defendant's conviction the plaintiff company brought an action claiming a declaration that, by reason of the conviction, the defendant was disqualified from acting as a director of the plaintiff company and that his office was vacated and his employment as co-manager determined. If his office as director was vacated, it would follow from the terms of his contract with the company that his employment as co-manager would *ipso facto* determine. The learned trial judge dismissed the plaintiff company's action.

The short question in this appeal is, accordingly, whether the defendant was "convicted of an indictable offence." As to the nature of the offence with which he was charged there is no question, and as to the fact that he was convicted there is equally no question. It is submitted on behalf of the plaintiff

company that the only remaining question is, therefore, whether the offence was "indictable." It is said that this means "capable of being dealt with on indictment," and that this was an offence which, when committed, was capable of being dealt with on indictment, notwithstanding that the prosecution, in fact, subsequently elected to deal with it, as they were entitled to do, as a summary offence. Counsel for the defendant, in an admirable argument, contended that the matter must be looked at as at the moment when the defendant pleaded guilty, and that at that moment, by the election of the prosecution, the offence had, in fact, become a summary one, notwithstanding that, when committed, it was indictable. Counsel for the defendant argued that "convicted of an indictable offence" means either convicted on indictment or convicted summarily of an indictable offence triable summarily, being one of the offences enumerated in sched. II to the Criminal Justice Act, 1925. He says that an offence is not indictable within the meaning of art. 26 of the company's articles unless the accused was at the commencement of the proceedings in peril of being committed for trial on indictment, or unless the case is one in which he can elect to go to trial and he has, in fact, so elected, from which moment it is deemed to be an indictable offence and is treated accordingly. This test is, in effect, procedural and dependent on the election of the prosecution, subject to the approval of the court, or, in certain cases, on the election of the accused. On the other hand, the test contended for by the plaintiff company depends on the nature and quality of the offence when committed, irrespective of the procedural manner in which it may subsequently be dealt with.

I have come to the conclusion that the contention of the plaintiff company is to be preferred to that of the defendant which was accepted by OLIVER, J. I think the reference in the article to the Road Traffic Act, 1930, tends to support this view. There are five instances in this Act of cases where offences created by the Act may be dealt with either summarily or on indictment. They are to be found in ss. 8 (4), 11, 15, 28 and 112. I think the object of referring to that Act was to free the director from liability to loss of office on conviction of any one of these offences, irrespective of whether he happened to have been convicted by a court of summary jurisdiction or on indictment, on the basis that the offences created by the Act were by their nature indictable, and, therefore, within the article unless expressly excluded. I realise, however, that on the defendant's interpretation summary convictions under these sections would be excluded in any event and that it is said that the reference to the Act was merely to exclude convictions on indictment for the same offences. It would have been easy to say "convicted on indictment" if that was what was really intended, and I think that for this reason counsel for the defendant was compelled to concede that summary convictions for indictable offences triable summarily under the Criminal Justice Act, 1925, would be covered by the words "convicted of an indictable offence." For these reasons, I would allow this appeal.

ASQUITH, L.J.: Counsel for the plaintiff company, in opening this appeal, stated that it involved a very short point: What is meant by an "indictable offence" in art. 26 of the company's articles? Strictly speaking, I think counsel for the defendant defined the issue with exact precision when he said "What is meant by 'convicted of an indictable offence' " since, theoretically, at least, the meaning of "indictable offence" might have been affected (as, indeed, according to his argument it was affected) by the antecedent words, "convicted of." It may, however, be convenient to inquire, first, what "indictable offence" means without any antecedent words which might have a qualifying effect, and, secondly, whether the antecedent words make any difference.

Criminal offences or offences against public law—for such alone are here

in question—fall into three categories for the present purpose :—(i) offences in respect of which proceedings by indictment alone will lie ; (ii) offences in respect of which summary proceedings alone will lie ; (iii) offences which can be proceeded against in either way according to the circumstances of the case—that is, the decision of the court with the consent of the accused, the election of the accused himself, or the election of the prosecution. If categories (i) and (ii) alone existed, the case would present no difficulty. The difficulty only arises from the existence of category (iii) within which the present case falls. What offences fall within that third category ? Here a sub-classification is necessary. The category splits into three sub-categories. (A) In some cases a statute or regulation with statutory force provides (in effect) that an offence may be proceeded against either summarily or by indictment, at the election presumably of the prosecution. The Merchandise Marks Act, 1887, s. 2 (3), and the Dentists' Acts, 1878-1923, afford examples of such offences. (B) The second sub-category consists of cases falling within the Summary Jurisdiction Act, 1879, s. 17, which provides that, where the offence is such that the offender is liable on summary conviction to be imprisoned for more than 3 months, he may, before the charge has been gone into, claim to be tried by a jury on indictment, and that in that event the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence, and that the offence "shall be deemed to be" an indictable offence. (C) The third sub-category consists of offences specified in sched. II to the Criminal Justice Act, 1925, and provided for by s. 24 thereof. These are offences which before that statute could be tried by indictment only. By s. 24 of that Act a person charged with such an offence may be dealt with summarily, provided (i) that the court thinks this "expedient," and (ii) that the person charged, after being informed of his right to be tried by a jury, on indictment, consents to be tried summarily. The side note of this section is "Summary trial of indictable offences," and there is more than one reference in its substantive provisions to "indictable offences which are triable summarily." Schedule II uses similar language. The offence in the present case does not fall within sub-category (C). It is not in sched. II to the Act of 1925. It was not, before the Act of 1925, triable on indictment only. Indeed, it only came into existence in 1939. Nor, again, does it fall within sub-category (B), for it is not an offence which carries with it liability on summary conviction to a term of imprisonment for a period exceeding 3 months. It falls, in fact, within sub-category (A).

If the words "convicted of" were absent from art. 26 of the company's articles of association, it would, in my view, be quite clear as a matter of plain grammar and English that the offence was an "indictable offence." An "indictable offence" without any qualifying context can mean nothing else but an offence in respect of which an indictment would lie, and the prosecution could clearly have had this particular offence tried by indictment, if it had chosen. It is none the less "indictable" because, if the prosecution chooses, it can proceed in respect of it summarily. Neither the accused nor the bench, in such a case, has any option or election. This rests solely with the prosecution. The substantial question is whether this position is affected by the antecedent words "convicted of." Do these words compel this court to place itself, when inquiring whether the offence is "indictable," not at the point in time when the offence is committed, and when, accordingly, indictment is a possible way of proceeding in respect of it, but at a point of time when the prosecution have elected to proceed summarily, securing a conviction by that procedure. If as to the material time the latter alternative is right, then clearly at that time the offence has ceased to be, and is not, indictable, whatever it may have been earlier.

In my view, the material time is the time when the offence was committed,

and before the prosecution has elected to proceed summarily or secured a conviction on that basis. The framers of the article plainly meant this severe penalty to be reserved for offences of a certain degree of gravity. The measure of gravity is to be sought, in my opinion, in what can happen to persons guilty of that class of offence, not what does happen to the particular offender in the subsequent chapter of events as the result of the prosecution's choice to proceed in one way or another. The argument against this view could not have been more cogently presented than it was by counsel for the defendant, but it involved refinements which I cannot believe entered into the purview or intention of the draftsman of the article. Counsel was driven to say that "indictable offences" included, not only offences triable on indictment only, but also offences within sched. II and s. 24 of the Act of 1925 (*viz.*, categories (A) and (C)). He felt forced to do this because those provisions speak of the "summary trial of indictable offences" and of "indictable offences which are triable" (or "which may be dealt with") "summarily," but once it is admitted that an offence triable summarily can be described as an "indictable offence" the logic of the defendant's case is undermined. It is simpler and more satisfactory to adhere to the plain grammatical meaning and to say that "convicted of an indictable offence" means convicted (by whatever tribunal) of an offence for which the offender could have been indicted. It would have been easy for the draftsman to have said "convicted on indictment" if that had been what he meant. He may have meant it, but he has not said so.

Some argument the other way has been founded on the exception in art. 26 of offences under the Road Traffic Act, 1930, but the exception cuts both ways, for some of those excepted offences are of the same order as that involved here, *viz.*, offences which can at the sole option of the prosecution be proceeded against either summarily or by indictment (sub-category (A) above). An exception cannot be carved out of a class which does not *prima facie* include the thing excepted. You can say "all fruit except pears," but you cannot say "all apples except pears." Hence the class here involved ("indictable offences") includes offences such as the present, if sense is to be made of the exception. Whether on the view here propounded offences covered by s. 17 of the Summary Jurisdiction Act, 1879 (sub-category (B)) are "indictable offences" is a question which may present some difficulty if and when it arises. Fortunately, in the present case, we are spared this complication. I agree with my Lord that the appeal should be allowed.

HARMAN, J.: Notwithstanding the able argument of counsel for the defendant, I would allow this appeal. Articles in this form, though not favoured in the best models, have been a familiar feature for many years, and I cannot bring myself to think that disqualification can depend on whether the offence in question is to be found in the schedule to an Act of 1925 or on the method by which the authorities choose to bring it home to the offender. In my judgment, the argument of counsel for the defendant lays too much stress on the word "convicted." Of course, it is a condition precedent to disqualification that there should have been a conviction. Mere accusation may be wholly unjustified, but, once a conviction has been recorded, the test is the nature of the offence. Not every offence brings the sanction into effect. It must have been "indictable," and that in plain English means "for which an indictment lies." This offence satisfies that test, and the defendant's disqualification, in my judgment, follows.

Appeal allowed with costs. Declaration in the terms asked for.

Solicitors: *Field, Roscoe & Co.*, agents for *Herington, Willings & Penry-Davey*, Hastings (for the plaintiff company); *Blyth, Dutton & Co.*, agents for *Menneer, Idle & Brackett*, St. Leonards-on-Sea (for the defendant).

[Reported by C. ST. J. NICHOLSON, Barrister-at-Law.]

LANGHAM v. CITY OF LONDON CORPORATION.

[COURT OF APPEAL (Tucker, Cohen, L.J.J., and Birkett, J.), November 4, 5, 18, 1948.]

Tithe—Extinguishment—Detriment to officer—Compensation—“Substantial detriment to livelihood”—Enquiry into total income of office holder—City of London (Tithes) Act, 1947 (c. xxxi), s. 16 (1).

The City of London (Tithes) Act, 1947, was passed to extinguish tithes and tithe rates in the City of London. By s. 16 (1) of the Act: “Every officer in office at the date of the passing of this Act who suffers substantial detriment to his livelihood by reason of the passing of this Act shall be entitled to compensation from the corporation for that detriment.”

The claimant, a solicitor, had held the position of clerk to the Commissioners of the Rector’s Stipend, St. Andrew’s, Holborn, since July 2, 1935. On Dec. 12, 1947, he submitted a claim for £225, being a sum equal to three years’ net profits in respect of the appointment, and he also claimed an annual payment during his lifetime of £33 15s. 0d. In January, 1948, the town clerk wrote to the claimant asking for “full details as to the extent of your livelihood.” This request was repeated in February, 1948, but the claimant refused to supply the details required and the corporation disallowed the claim on the ground that without information as to the claimant’s livelihood they were unable to form any judgment on the question of “substantial detriment.” The claimant appealed to the Mayor’s and City of London Court for a decision on certain preliminary points including the question whether “in making a claim on the corporation it was incumbent on the claimant to furnish any or what evidence of his financial circumstances other than the emoluments of the office lost.”

HELD: the statute was taking away something which the claimant formerly possessed and he was entitled to have the section strictly construed. If the loss was a substantial detriment to his livelihood in the natural and ordinary meaning of words, he was entitled to compensation whether he was otherwise rich or poor, and that question could be determined without requiring the claimant to produce evidence of means.

Per TUCKER, L.J.: The practice of submitting a preliminary question to the judge for his decision, framed somewhat in the manner of a consultative case for the opinion of the court, is not to be encouraged. A case should be tried out to the end and finally determined before it is brought to the Court of Appeal.

[AS TO TITHES IN LONDON, see HALSBURY, Hailsham Edn., Vol. 11, pp. 898, 899, para. 1609; AS TO CONSTRUCTION OF LOCAL, PERSONAL, AND PRIVATE STATUTES, see *ibid.*, Vol. 31, pp. 544-547, paras. 723-729; and FOR CASES, see DIGEST, Vol. 42, pp. 740-744, Nos. 1640-1681.]

Cases referred to:

- (1) *Herron v. Rathmines & Rathgar Improvement Comrs.*, [1892] A.C. 498; 67 L.T. 658; 42 Digest 613, 134.
- (2) *Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons*, (1928), 98 L.J.Ch. 118; 42 Digest 743, 1674.

APPEAL from a decision of His Honour Judge THOMAS, dated May 16, 1948, given at the Mayor’s and City of London Court.

The claimant claimed compensation for loss of salary as clerk to the Commissioners of the Rector’s Stipend, St. Andrew’s, Holborn, due to the passing of the City of London (Tithes) Act, 1947. His claim was disallowed on the ground that he had refused to supply to the corporation details of his total income to help them to determine whether he had suffered substantial detriment to his livelihood. On an appeal by him to the Mayor’s and City of London

Court, His Honour Judge THOMAS found that the corporation were not justified in insisting on his giving details of his total income and from that judgment the corporation appealed. The Court of Appeal dismissed the appeal.

Fox-Andrews, K.C., and *Heathcote-Williams* for the corporation.

Capewell, K.C., *L. A. Blundell* and *Plume* for the claimant.

Cur. adv. vult.

Nov. 18. TUCKER, L.J.: I will ask BIRKETT, J., to read the first judgment in this case.

The following judgments were read.

BIRKETT, J.: This is an appeal from the judgment of His Honour Judge THOMAS given at the Mayor's and City of London Court on May 16, 1948. The appellants are the Corporation of London and the respondent is Arthur Cuthbert Langham. The claimant is a solicitor, and since July 2, 1935, he had held the position of clerk to the Commissioners of the Rector's Stipend, St. Andrew's, Holborn, at an annual salary of £75 a year. This appointment, though strictly determinable on reasonable notice, had come to be regarded in practice and in past experience as a permanent one, and, indeed, the claimant's father had held this appointment for 50 years. The City of London (Tithes) Act, 1947, was passed in July, 1947, and had for its purpose the extinguishing of tithes and tithe rates in the city of London. Section 16 (1) of the Act reads as follows:

"Every officer in office at the date of the passing of this Act who suffers substantial detriment to his livelihood by reason of the passing of this Act shall be entitled to compensation from the corporation for that detriment."

It was further provided, by s. 16 (5) that, if the corporation disallowed any claim, in whole or in part, the claimant could appeal to the Mayor's and City of London Court and that court had power to confirm, override or vary the decision of the corporation.

On Dec. 12, 1947, the claimant made his claim in writing claiming the payment of £225 as a capital sum which he had paid on being admitted to partnership in respect of this appointment, being, as he alleged, a sum equal to three years' net profits, that is three times £75. He also claimed an annual payment during his lifetime of £33 15s. 0d. In January, 1948, the town clerk wrote to the claimant asking for "full details as to the extent of your livelihood," and on Feb. 4 the claimant wrote declining to furnish such details. On Feb. 5 the town clerk wrote again to the claimant repeating his request, and he stated in the letter: "It must be clear to you that whilst a claimant with a total income of say £300 per annum suffers substantial detriment to his livelihood by the cesser of say £50 per annum, the claimant with a total income of say £3,000 per annum does not." The claimant having failed to comply with the demand in the letter from the town clerk, the corporation disallowed the claim, stating that without the information as to his livelihood they were unable to form any judgment on the question of substantial detriment. Accordingly, the matter went to the Mayor's and City of London Court, and it was agreed between the parties that certain preliminary points should first be tried, the second of those points being: "In making a claim on the corporation, was it incumbent on the claimant to furnish any and what evidence of his financial circumstances other than the emoluments of the office lost?" The learned judge found that the corporation were not justified in insisting on a claimant giving details of his total income, and from that judgment the corporation appeal to this court. Two passages in the judgment of the learned judge will be enough to show the grounds on which his judgment was based. He said:

"In my view, really the only question I have to decide on this part of the application is whether 'substantial' here means such a detriment as

will take from a man a large portion of his livelihood or whether it means that it will take something from him which is more than a trifling trivial matter which ought not to be considered . . . That being so, it does not seem to me possible that where a man shows or puts forward a claim, which for this purpose one must consider is more or less justified, of £2,500 or £86 per year, it can be necessary for the person who is considering whether there is a substantial detriment to his livelihood to know what the total income is."

In this court it was submitted on behalf of the corporation that it was impossible to decide whether there had been a substantial detriment to the livelihood of the claimant without knowing what that livelihood in fact was, and the demand for a financial return of income was, therefore, justified. For the claimant it was submitted that the learned judge was right in his conclusion, that the statute did not require the claimant to supply the details of his means of living, and that the question raised by the statute could be decided on the statement of facts supplied by him, which showed the actual loss sustained. This appeal was not concerned with any questions of amount but was confined solely to the proper answer to the agreed question.

When considering the wording of s. 16 (1), it is to be remembered that this is a private Act of Parliament which has the effect of depriving certain persons of income formerly enjoyed by them, and the rule of construction to be applied must be that where doubt arises the words must be construed most strongly against him who uses them. "The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the enactment grants and against those who claim to exercise them": see MAXWELL on the INTERPRETATION OF STATUTES, 9th ed., p. 306, and LORD MACNAGHTEN in *Herron v. Rathmines Improvement Commissioners* (1). To deprive the claimant by a private Act of Parliament of the right to do what he was doing for reward at the passing of the Act requires clear and unequivocal words in the private Act: see *Bournemouth-Swanage Motor Road and Ferry Company v. Harvey & Sons* (2). Applying these rules of construction to the section, it is scarcely to be supposed that any compensation to be paid was to be dependent on the amount of income owned or enjoyed by the claimant. If so, it would be introducing a means test of a most unusual kind. The question then would not be the question in the section, namely: "Is this a substantial detriment to his livelihood?" but, "Is this a substantial detriment to his livelihood, having regard to his financial position?" If that had been intended, the statute could easily have said so, but I do not think that such a construction is warranted by the provisions of this private Act. The question for the corporation is whether the loss suffered by the claimant, in ordinary language, is a thing of substance as distinct from a loss that is trivial and not worth consideration. If that be the right construction, the question can well be determined without knowing the total means of the claimant. I do not think that the compensation to be paid should depend on whether a claimant is rich or poor. These are comparative terms, and it might be necessary to go into all the details of a claimant's private life, if poverty or riches were elements in the assessment. The statute is taking away something a man formerly possessed, and he is entitled to have the section strictly construed. If the loss is a substantial detriment to his livelihood in the natural and ordinary meaning of words, he is entitled to compensation whether he be otherwise rich or poor, and that question can be determined without requiring the claimant to produce evidence of means. I have come to the conclusion that the learned judge was correct in his finding and that this appeal should be dismissed.

TUCKER, L.J.: I agree with the judgment which has been delivered by BIRKETT, J., and I do not wish to add anything with regard to the construction of s. 16 of the City of London (Tithes) Act, 1947. I do, however, desire to make

some observations on the manner in which this matter has been brought before us.

A A number of similar cases were pending before the Mayor's and City of London Court and it was thought convenient to deal with this as a test case by submitting a preliminary question to the judge for his decision framed somewhat in the manner of a consultative case for the opinion of the court. There were no pleadings, there was no agreed statement of facts in writing, and the question submitted was not very aptly framed. The learned judge seems with the tacit consent of the parties to have amended the question so as to confine it to the point really at issue, namely, the question whether or not the claimant was bound to furnish evidence of his total income to enable the corporation to decide whether there had been a substantial detriment to it or to his livelihood. In substance, what the learned judge was really asked to decide was whether the corporation were justified in dismissing Mr. Langham's claim *in limine* by reason of his refusal to disclose full details of his financial position. To avoid involving the parties in further expense I am content to deal with this appeal on the basis that the question submitted for decision as a preliminary issue was intended to be and was in fact dealt with as if it had been framed as indicated above. These attempts at short cuts seldom achieve their purpose and I am by no means certain that even now other points of difference may not arise. If this should unhappily occur I hope that some case will be tried out to the end and finally determined before it is brought again to this court.

D COHEN, L.J. : I have had the opportunity of reading the two judgments which have been delivered, and I do not desire to add any reasons of my own in concurring in the view that this appeal fails.

Appeal dismissed with costs.

Solicitors : *The Comptroller and City Solicitor* (for the corporation) ; *Sharpe, Prichard & Co.* (for the claimant).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

E E. H. LEWIS & SON, LTD. v. MORELLI AND ANOTHER.

[COURT OF APPEAL (Tucker, Asquith, L.J.J., and Harman, J.), November 9, 10, 11, 23, 1948.]

Appeal—Court of Appeal—Fresh evidence—Evidence obtainable at time of trial—Application of Rent Acts not disputed at trial—Admission of evidence in Court of Appeal to prove rateable value—R.S.C., Ord. 58, r. 4.

F *Landlord and Tenant—Landlord's title questioned by tenant—Estoppel.*

The plaintiffs brought an action against two defendants to recover possession of certain premises. The second defendant pleaded *inter alia* that the premises were subject to the Rent Acts and that the plaintiffs were not entitled to possession. At the hearing, the suggestion that the Rent Acts were not applicable to the premises was disclaimed by the plaintiffs. G On appeal, the plaintiffs asked the court to admit evidence to show the rateable value of the premises, as shown in the rate book for the district in question, in order to prove that the premises did not come within the provisions of the Acts, it being contended that there were special circumstances within R.S.C., Ord. 58, r. 4, to warrant the admission of this evidence in that it consisted of an extract from a public document and was, therefore, H conclusive and unassailable.

HELD : even assuming that the evidence, if admitted, would be conclusive in favour of the plaintiffs, it was evidence which could easily have been obtained at the time of the trial, and for that reason and in view of the disclaimer by the plaintiffs it should not be admitted.

Dictum of LORD CHELMSFORD in Shedden v. Patrick & A.-G. (1869) (L.R. 1 Sc. & Div. 545 ; 22 L.T. 634), *quoted by SCRUTTON, L.J., in Nash v. Rochford Rural Council* ([1917] 1 K.B. 393 ; 116 L.T. 132), *applied.*

Observations on the doctrine that a tenant may not question his landlord's title.

Cases referred to :

- (1) *Shedden v. Patrick & A.-G.*, (1869), L.R. 1 Sc. & Div. 470; 22 L.T. 631, H.L.; 22 Digest 476, 5022.
- (2) *Nash v. Rochford Rural Council*, [1917] 1 K.B. 384; 81 J.P. 57; 86 L.J.K.B. 370; 116 L.T. 129; 22 Digest 477, 5027.
- (3) *Sanders v. Sanders*, (1881), 19 Ch.D. 373; 51 L.J.Ch. 276; 45 L.T. 637; 32 Digest 458, 1250.
- (4) *Morton v. Woods*, (1869), L.R. 4 Q.B. 293; 9 B. & S. 632; 38 L.J.Q.B. 81; 21 Digest 250, 752.
- (5) *Jolly v. Arbuthnot*, (1859), 4 De G. & J. 224; 28 L.J.Ch. 547; 33 L.T.O.S. 263; 23 J.P. 677; 21 Digest 250, 751.

APPLICATION to admit fresh evidence.

The plaintiffs brought an action to recover possession of premises situated at No. 39, Floral Street, Covent Garden. The issues as between the plaintiffs and the second defendant were (a) whether the second defendant had acquired a tenancy of the premises from the plaintiffs, after a previous tenancy to the first defendant, one Morelli, had been determined, and (b) whether the tenancy had been duly determined. The second defendant pleaded *inter alia* that she had occupied the premises as a dwelling-house at which she had carried on and still carried on the business of a cafe proprietor and that the provisions of the Rent Acts applied to the premises and, accordingly, the plaintiffs were not entitled to possession. At the trial counsel for the plaintiff, in dealing with this point said: "I think all I can say is this. If this lady has an oral weekly tenancy, I do not think I shall contend that she is not entitled to the protection of the Rent Acts, subject, of course, to her proving she is using the premises for residential purposes." The case was, therefore, dealt with on the basis that the Rent Acts applied. On appeal, the plaintiffs wished to call evidence to show that the rateable value of the premises, as shown in the rate book, was such as to take them out of the provisions of the Acts. The Court of Appeal refused to admit this evidence.

Fox-Andrews, K.C., and *Rees-Davies* for the plaintiffs.

Barry, K.C., and *Jukes* for the defendant.

TUCKER, L.J.: In this case counsel for the plaintiffs asks us to admit some fresh evidence which was not adduced in the court below. He applies under the provisions of R.S.C., Ord. 58, r. 4, the relevant words of which are :

"Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, . . . further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court."

The evidence which he asks us to admit is evidence to show the rateable value of certain premises as shown in the rate book for the district in question.

The plaintiffs brought an action against two defendants, the second of whom is the only respondent in the present appeal, to recover possession of certain premises situated at No. 39, Floral Street, Covent Garden. The issues as between the plaintiffs and the second defendant were, first, whether or not the second defendant had at any time acquired a tenancy of the premises from the plaintiffs; secondly, whether or not that tenancy had been duly determined; and, thirdly, the second defendant raised the following defence: "At all material times the second defendant has occupied and still occupies the said premises as a dwelling-house at which she has carried on and still carries on the business of a

cafe proprietor and will object that the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920-1939, apply to the said premises, and that, accordingly, the plaintiffs, by reason of the provisions of the said Acts, are not entitled in any event to possession thereof." The plaintiffs in due course delivered a reply. It is clear, therefore, that one of the issues which might arise was whether or not the premises were within the Rent Restrictions Acts.

A Section 7 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, provides :

"If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown."

B This question, therefore, having been raised on the pleadings, the court was bound to proceed to deem the house to be within the Acts unless the contrary was shown. So far from the contrary being shown, counsel for the plaintiffs said to the learned judge : "I think all I can say is this. If this lady has an oral weekly tenancy, I do not think I shall contend that she is not entitled to the protection of the Rent Acts, subject, of course, to her proving she is using the premises for residential purposes." From then onwards, no question was C ever raised suggesting that the Rent Acts were not applicable to the premises, and the case was dealt with on that basis down to judgment. It is now sought to adduce evidence which, it is said, if accepted, will conclusively show that the whole basis of the judgment in the court below was wrong. It is argued that this court, in its desire to arrive at the truth and to save further litigation, should allow this evidence to be admitted. That is an attractive argument D from many points of view, but, none the less, I have come to the conclusion that the evidence should not be admitted.

To do so, in my view, would be contrary to the practice of this court, and to the principles which guide the court in dealing with applications under Ord. 58, r. 4. It would result in allowing the plaintiffs to take a new point E which was not only not taken, but was expressly disclaimed, in the court below, and to seek to establish that new point by adducing evidence which clearly was available and could have been discovered by the exercise of ordinary diligence before the trial in the court below. Where a point concerning the Rent Acts arises, the question of the rateable value of the premises obviously must be a material matter for the legal advisers of any party to consider. It appears that no steps whatever were taken to procure this evidence which F could have been obtained with the greatest ease.

I do not think it is necessary to refer to the authorities which have been brought to our notice once again in any great detail. It is not disputed that the general principle laid down originally in *Shedden v. Patrick* (1), and quoted by SCRUTTON, L.J., in *Nash v. Rochford Rural Council* (2), is applicable. SCRUTTON, L.J., said, quoting LORD CHELMSFORD ([1917] 1 K.B. 393) :

G " 'It is an invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, H no opportunity for producing that evidence ought to be given by the granting a new trial.' "

That principle also applies to the admission of further evidence in this court. Counsel for the plaintiffs argues, however, that there are special circumstances in the present case within the meaning of Ord. 58, r. 4, in that the very nature of the evidence is such that, if admitted, it cannot be controverted as it comes from a public document and would be decisive of the case. He says that, as shown in the authorities, the court is normally dealing with oral evidence

which is or may be highly controversial and where the court is dealing with documentary evidence it is also generally of a controversial character or, at any rate, not conclusive and unassailable as is this extract from a public document. I do not think that this case can be distinguished on those grounds.

For the purposes of my judgment, I am prepared to assume that the evidence, if admitted, would be conclusive in favour of counsel for the plaintiffs, but, none the less, it is evidence which could have been obtained with the greatest possible ease. True that it is evidence dealing with the status of premises, but it is evidence of a fact which it was necessary to prove to show the status of the premises. In view of the admission made in the court below, and in view of the fact that this evidence could have been obtained by ordinary elementary precautions and care, I think that, if we were to admit it, we should be creating a dangerous precedent and be acting far beyond what has been laid down in the authorities. In my view, therefore, this evidence should not be admitted.

ASQUITH, L.J.: I agree. To grant this application would, it is true, not entail all the abuses and risks which are envisaged by SIR GEORGE JESSEL in *Sanders v. Sanders* (3). For instance, it would not invite the concoction of evidence or the commission of perjury. It might even conceivably have the result of avoiding circuitry, but with reasonable diligence the facts sought to have been proved could easily have been proved below. Any departure from the rule so strongly laid down in *Shedden v. Patrick* (1), and so emphatically re-affirmed in *Nash v. Rochford Rural Council* (2), is, to my mind, opening the door to manifest dangers and inconveniences, and we would not be justified, even on the facts of this case, in making such an encroachment.

HARMAN, J.: To my mind this may be a sacrifice on the altar of principle, but I am not prepared to dissent from what has fallen from my Lords' lips.

Admission of additional evidence refused.

The appeal was then argued.

Cur. adv. vult.

Nov. 23. **HARMAN, J.**, delivering the judgment of the court, examined the evidence and said that the second defendant had failed to prove that the relationship of landlord and tenant ever came into being between her and the plaintiffs. The second defendant never having been a tenant but only an agent for the first defendant, Morelli, she had no rights when he ceased to have any, namely, at Lady Day, 1947. That made it unnecessary to consider the question of estoppel, but, as it had been elaborately argued, he would add one or two observations on it. His LORDSHIP continued: The doctrine that a tenant may not question his landlord's title is familiar law. This is sometimes said to rest on estoppel, and, when a lease is under seal, no doubt this is so. The doctrine, however, has been extended by analogy to written, and even to oral, tenancies. It has been well described as arising by intendment of law from the relationship of landlord and tenant: see KELLY, C.B., in *Morton v. Woods* (4) (L.R. 4 Q.B. 304), citing LORD CHELMSFORD in *Jolly v. Arbuthnot* (5). We do not think it operates by estoppel strictly so called in cases where there is no writing. The belief of the tenant in his landlord's ability to grant the term is not essential. He may know or have notice of a defect in his landlord's title and yet be precluded, once he has entered and paid rent, from denying it: see *Morton v. Woods* (4). Thus, an essential feature of an ordinary estoppel *in pais*, namely, reliance on the truth of the representation made, may be lacking. It is, therefore, a special doctrine developed by analogy from leases by specialty and peculiar to the relationship of landlord and tenant. That the doctrine exists we feel no doubt, and, if it does, so does its converse, namely, that, a landlord having by his offer of a tenancy induced a tenant to enter into (or remain in) occupation and to pay rent, cannot deny the validity of the tenancy

by alleging his own want of title to create it. So, here, if we had found that a tenancy was intended to be created in the second defendant in 1940 we should have held that the plaintiffs were precluded from bringing forward their obligations to the first defendant, Morelli, or the term vested by them in him as an excuse to avoid the new obligations which they would thus have incurred to the respondent. Morelli, of course, could not be affected and might re-enter by title paramount, but, as between themselves and their tenant, we should have held the plaintiffs irrevocably bound. When, in 1947, their reversion fell in this would serve by analogy to feed the quasi-estoppel. There will be judgment for the plaintiffs for possession.

Appeal allowed with costs here and below.

Solicitors : *Burton, Yeates & Hart* (for the plaintiffs); *Cochrane & Crippwell* (for the defendants).

[*Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.*]

Reversed. H.L. sub nom. ZIVNOSTENSKA BANKA NATIONAL CORPN. v. FRANKMAN. [1949] 2 All E.R. 671.

FRANKMAN v. ANGLO-PRAGUE CREDIT BANK.

[COURT OF APPEAL (Lord Goddard, C.J., Asquith and Singleton, L.JJ.), November 2, 3, 4, 1948.]

Conflict of Laws—Contract—Legality—Customer's debentures deposited by foreign bank at London branch—Condition that deposits be governed by laws of place where kept—Czech laws forbidding re-delivery of debentures—Validity of demand in London.

The plaintiff, as personal representative of Mrs. F., claimed the return of three debentures of £100 each in a Czechoslovak company from the London branch of the defendant bank whose head-office was in Prague. The debentures were bought in 1930 by one W. who was a Czechoslovak national residing in that country. In 1935 W. died and Mrs. F., his sister, succeeded to his estate. In 1938 Mrs. F. was notified by the defendant bank that the bonds were deposited in London and would be kept there at her risk unless she otherwise ordered. At the same time Mrs. F. received from the defendant bank conditions of business which contained a clause that securities deposited with correspondents abroad would be subject to the laws of the country where they were deposited. In 1945 Mrs. F. died in England. The defendant bank refused to return the securities to the plaintiff because, according to the laws of Czechoslovakia, the consent of the National Bank of Czechoslovakia was necessary and this had been refused.

HELD : as the debentures were to be held in London and the contract provided that obligations to be performed in England should be treated as governed by English municipal law, the Czech domestic legislation, such as the exchange or currency regulations, did not govern their deposit, and the plaintiff, who was at all material times in England, could validly assert his right to re-delivery by a demand addressed to the defendant's London branch where the bonds were, instead of resorting to the circuitry of addressing such a demand to the Prague Head Office where they were not.

Decision of CASSELS, J. ([1948] 1 All E.R. 337; [1948] 1 K.B. 730), reversed.

[AS TO ENFORCEMENT OF CONTRACTS ILLEGAL BY THE LEX LOCI SOLUTIONIS, see HALSBURY, Hailsham Edn., Vol. 6, p. 272, para. 327; and FOR CASES, see DIGEST, Vol. 11, pp. 402, 403, Nos. 729-738.]

Case referred to :

Kahler v. Midland Bank, Ltd., [1948] 1 All E.R. 811.

APPEAL from a decision of CASSELS, J., dated Feb. 2, 1948, in an action by the plaintiff, as administrator of his mother, Mrs. Frankman, to recover from the defendants, the Anglo-Prague Credit Bank, three debentures of £100 each in Skoda Works, a Czechoslovakian company, which had been deposited by the bank at its London office. CASSELS, J., held that, as Czechoslovak law prohibited the surrender of the bonds in London without the consent of the National Bank of Czechoslovakia, which had been refused, the plaintiff was not entitled to recover the bonds. This decision was now reversed by the Court of Appeal.

Laski, K.C., and R. J. S. Thompson for the plaintiff.

Sir Valentine Holmes, K.C., and J. P. Ashworth for the defendants.

LORD GODDARD, C.J.: This is an appeal against a judgment of CASSELS, J., in an action brought by the plaintiff to recover from the defendants, Anglo-Prague Credit Bank, whose head office is in Prague and who have a London office, three debentures of £100 each in Skoda Works, which is a Czechoslovak company. The bonds in question were part of an issue made in sterling in London. The plaintiff's case is that he is the owner of those bonds as the administrator of his mother, who, in her turn, was the administratrix of the original subscriber for the bonds.

Questions relating to foreign law have been raised and it is represented as a case of very great importance to the defendants who, no doubt, are anxious that in anything they do they should not expose their head office in Prague and the employees of that office to any sanctions which the totalitarian government now in power in Czechoslovakia might see fit to impose on them if they do anything contrary to law. It is not at all surprising, therefore, that they say in the circumstances that have happened that they will only hand over these bonds to the plaintiff, whose title they do not deny, if the English courts order them to do it. CASSELS, J., held that the Czechoslovak law prohibited the handing over of these bonds in London without the consent of the National Bank of Czechoslovakia, and that, as the National Bank of Czechoslovakia refused to give consent, the plaintiff could not get them from the bank in London. For reasons which I shall endeavour to express when I have dealt with the facts, with all respect to the learned judge who gave a long and reasoned judgment in this case, I cannot take the same view.

The story starts in 1930, at which time a Doctor Richard Weiner, a Czechoslovak national living at that time near Prague, who was the brother of a Mrs. Frankman, ordered the bank to buy these three debentures for him in London. The bank carried out that transaction for him in London and on Oct. 14, 1930, they wrote to him saying: "We beg to inform you that in accordance with your instruction of Oct. 8 we have bought for your account the undermentioned securities, for which we have debited you, according to statement. We are crediting you with the securities on your securities account. At the same time we take note of your authorisation to deal with the securities enumerated below as we choose, and to deposit the same as we think best, even abroad. We do not mention about the name of our foreign correspondent with whom the securities acquired and mentioned below are deposited, following your declaration, according to which you exempted us from our obligation to do so." Apparently, Dr. Weiner did not want to have anything in writing showing where these bonds were deposited. At the same time, we know that the transaction was carried out by the bank in accordance with the banking conditions which they imposed on all their customers. If anybody had seen those conditions and this document, there would not have been much doubt in his mind that the bank had bought these bonds in London (which was the only place at which at that time they could be bought, because it was a new London issue) and that they were holding them in London, as, in fact, they were. The document which I have just read, in setting out in the account

at the bottom the amount in which Dr. Weiner was debited for this purpose, shows that the securities would be bought on the London Stock Exchange.

Dr. Weiner died in 1935 and his sister, Mrs. Frankman, succeeded to his estate. She was thereupon possessed, not only of those three £100 debentures, but also of a further £400 of debentures which either she or Dr. Weiner had bought. In 1935, therefore, she was the owner of £700 debentures. At that time she had an ordinary current account at the head office of this bank in Prague. On Mar. 22, 1938, the head office at Prague wrote to her: "We write to inform you that, by order of our Trautenau branch, we credit you with £700 6 per cent. Skoda Works debentures." They enclosed the coupons and set out the numbers. They first set out the three £100 bonds, numbered 261,991; 261,992 and 261,993, which had been bought for Dr. Weiner, and then they set out the other four debentures and another bond, the number of which they give, and they say: "On your deposit account with us—held in London as above. We enclose in addition to our business conditions, a declaration concerning the deposit of the securities abroad and specimen signature forms, which please return to us duly completed." That is signed by the Anglo-Prague Credit Bank, at Prague. They sent her some specimen signature forms, which she did not fill in. On Apr. 27, 1938, they wrote to her: "As you have not returned to us the declaration form sent to you on the 22nd of last month relating to the place of custody of your £700 6 per cent. Skoda Works debentures, we have to inform you that the above-mentioned securities are deposited with our branch in London. Requesting you to take notice of this fact."

The Conditions of Business which they had sent to Mrs. Frankman in March, contain this clause:

"Condition 11. As regards such stocks and securities as were purchased at a stock exchange other than that of Prague or were received by any bank other than a Prague bank, we shall not have the same sent to us unless the customer has ordered the transmission thereof at his own expense and risk, but will leave the same, at the risk and expense of the customer, deposited with our correspondent, where they shall be subject to the laws of the respective country [the country where they are deposited]. This also applies in the case of our having credited the principal with such securities on a securities deposit account. In the event of our entrusting any securities to or leaving them in the custody of any third party—provided, of course, that we are otherwise authorised so to do—we shall only be responsible for our diligence in selecting the depositary, naturally subject to the provisions of the law of Oct. 10, 1924."

I do not think that that last sentence has any bearing on this case. Condition 50, on which considerable reliance is placed by the bank, is in these terms:

"The place of performance and payment in respect of all obligations resulting from the business connection with us shall be considered to be the place of that department of our establishment which has carried out the relevant transaction with the customer, except in so far, however, as any special stipulation has been made in this connection."

In 1942, Mrs. Frankman closed her account with the bank, but, meanwhile, about the end of 1938 she had come to London and lived here until she died in 1945. She was not, for the purpose of the Trading with the Enemy Act, an enemy, and once or twice she received dividends on these shares, which were credited to her account in Prague before she closed her account there. On July 6, 1940, she wrote a letter to the British and Allied Investments Corporation, Ltd., who were working in conjunction with the Custodian of Enemy Property with regard to these three debentures, identifying herself as the owner of the debentures. There the matter remained until she died

in August, 1945. After she died, her son, the plaintiff, took out letters of administration. They were granted to him and he thereby became her personal representative. He appears to have been her sole next of kin, and, therefore, the title in these three debentures had passed to him.

On Sept. 11, 1946, his solicitors in Manchester wrote to the Custodian of Enemy Property, who answered saying that the position appeared to be "that the deceased was not of enemy status within the meaning of the Act, neither is the administrator of her estate, who is stated to be the sole beneficiary. The Custodian is not, therefore, concerned with the estate and can have no objection to the sale of the first mortgage debentures in the Skoda Works, Ltd. belonging thereto, as far as the trading with the enemy legislation is concerned." On Sept. 21, 1946, the solicitors wrote to the London branch of the bank, where these debentures were, saying: "Referring to our interview with you some days ago, we have now received a letter from the Custodian of Enemy Property stating that as the deceased was not of enemy status within the meaning of the Act, the Custodian is not concerned with the estate, and, therefore, can have no objection to the sale of the first mortgage debentures in the Skoda Works, Ltd., belonging to her. May we now enquire whether this document is in the possession of your bank and if so whether you are prepared to forward it on to us on behalf of your client on sending you the necessary authority."

The position with regard to the bank at that time, so far as this court was concerned, was this. The Treasury had granted a licence to the bank to continue its banking business in England. It had, of course, been shut off from all connection with its head office in Prague during the war and in September, 1946, there certainly had been, and there has not even yet, so far as I know, been, any conclusion of the war with those parts, although Czechoslovakia is now no longer an occupied country. According, however, to the evidence which was given by the defendants, the London branch did not link up again with its head office and have communications with them until Dec. 31, 1946, or January, 1947. The bank, however, did not hand over the bonds at that time and further requests were made which did not bring any satisfaction, and the matter then passed into the hands of the bank's solicitors. On Nov. 26 they wrote this letter to the plaintiff's solicitors: "Your letter of Nov. 18, addressed to our clients has been handed to us. Although we have not seen the earlier correspondence we understand that you act for the executors of Mrs. Paula Frankman and are claiming, on her behalf the delivery of certain bonds of the Skoda Works. Entirely without prejudice to any attitude which our clients might have to take up if legal proceedings were commenced, we should like to give you the following information: (1) We gather from our clients that they are satisfied that Mrs. Paula Frankman was the person entitled to the bonds so that, if proper evidence of the grant of probate can be furnished, this would seem to dispose of the question of the title of the executors to receive the bonds. (2) The next stumbling block is the interest of the Custodian of Enemy Property. Our clients inform us that their discussions with the Trading with the Enemy Department have advanced to a stage at which it seems practically certain that the Custodian will release the bonds with a view to enabling them to be handed over to the rightful owners. (3) We are informed, however, that under the laws of Czechoslovakia which govern the deposit of these bonds, the consent of the Czech National Bank is required before they can be handed out. This consent is not forthcoming. This, as far as we can see, is the only remaining stumbling block. Our clients, having no beneficial interest in the bonds, are obviously even less anxious to embark upon legal proceedings than yours, and we are looking into this question of the consent of the National Bank in order to find out whether there is any way of disposing of it. If nothing comes of this it may be that you will feel bound to advise your

clients to test the question in the English courts, but for the moment we would suggest that you might defer legal action until we have had a chance of finding out more about the situation. Perhaps you would let us hear from you on the matter." The defendants asked the National Bank of Czechoslovakia to give their consent to the handing over of these debentures, that bank refused its consent, and thereupon this writ was issued.

- A A great deal of time was taken up in the course of the case with the evidence of a Czech lawyer with regard to the Czech law regulating all matters of foreign exchange and so forth. I do not think that it is necessary to go through that evidence in detail, for a reason which will appear in a moment. Suffice it to say that the laws in force in Czechoslovakia at all materials times made it illegal in Czechoslovakia for a Czech subject, a resident, to transfer any property to a
- B non-resident or, as it was called in the language that was used in the court below, "an exchange foreigner." For the purposes of this case, the people who are to be regarded as being "exchange foreigners" may be summarised as people resident outside Czechoslovakia, and "exchange citizens" as people who were resident in Czechoslovakia. Transactions between "exchange citizens" and "exchange foreigners" were prohibited without the consent of the
- C National Bank. So far as that part of the case was concerned, the Czech lawyer who was called agreed that for the purpose of Czech law the English branch of this bank was regarded as an "exchange foreigner." *Ex hypothesi* the plaintiff was "an exchange foreigner," and the lawyer agreed that there was nothing in Czech law to prevent a transaction of any nature taking place between two "exchange foreigners." Therefore, it was quite clear that, if
- D the plaintiff had a current account in London with the defendant bank, there was no reason why the defendant bank should not honour his cheques, because they were both "exchange foreigners" and the law of Czechoslovakia could not prohibit transactions between two people who were not subject to its jurisdiction. It is said that, by the terms of the contract between Mrs. Frankman, whose representative the plaintiff is, and the bank, these bonds could only be
- E demanded in Prague, and, therefore, it would follow that, as the contract provided that the bank were only bound to deliver those bonds in Prague, the handing over of the bonds would, in effect, be a transfer by the Czech bank, an "exchange citizen," to an "exchange foreigner" and, therefore, would be prohibited. The case seems to me to come down to a due consideration and construction of the Conditions of Business which were sent by the
- F bank to Mrs. Frankman, indicating to her the terms under which they were holding her bonds for safe custody.

- I will now look at Condition 11 a little more closely. The condition which that imposed with regard to securities bought by the bank elsewhere than in Prague was that stocks bought on a stock exchange other than that of Prague would not be "sent to us unless the customer has ordered the transmission thereof at his own expense and risk, but will" be left "deposited with our
- G correspondent," which must mean the correspondent who has bought the securities for the customer—in this case, as the debentures were bought on the London Stock Exchange, the correspondent would be the London correspondent and we know that the London correspondent was the London branch—"where they shall be subject to the laws of the respective country." In other
- H words, there we shall leave the certificates or other documents of title to all stocks and securities which we have bought and they will be subject to the laws of that country. Condition 50, on which so much reliance was placed, was this :

"The place of performance and payment in respect of all obligations resulting from the business connection with us shall be considered to be the place of that department of our establishment which has carried out

the relevant transaction with the customer, except in so far, however, as any special stipulation has been made in this connection."

It was agreed by the Czech lawyer who gave evidence that "department" would include a branch of the bank. Counsel for the plaintiff has argued, and I think that there is a great deal to be said for the argument, that, when you examine the whole of these conditions and see what I may call the fasciculi of the different paragraphs, that Condition 50 is not dealing with any such matters as the buying of stocks and shares and that, indeed, the fasciculi of clauses, some of which have preceded it and some of which succeed it, show that it is really only dealing with the payment and collection of moneys. It is well-known law that, if a person has a current account with a bank which has been opened and kept for him at a particular branch, the transactions with the bank, so far as that current account is concerned, must be carried out with that branch. If I bank at Branch A, subject to any special arrangement for enabling customers to cash cheques at other branches, I cannot demand that my cheques shall be cashed anywhere else. If I take a cheque into a branch of my bank where my account is not kept, the bank is not bound to honour the cheque, and they do not commit any breach of their contract with me by saying: "You must take your cheque to the branch at which you keep your account." In the same way, if I want to pay money into my bank, in the absence of any special facility which the bank may, but is not bound to, give, I must pay it into my account at my branch of the bank. Transactions, so far as current accounts are concerned, must in the absence of special arrangements be conducted at the branch at which the account is kept and so must transactions with regard to bills of exchange in which the customer is interested. There is a great deal to be said, though I do not feel it necessary to give a concluded opinion on the matter, for the view that, when one regards the context in which one finds Condition 50 in these Conditions of Business, it has nothing to do with the deposit of these debentures, but, assuming that it does apply to debentures and not merely to the operation of the current account, let us see how it fits in with Condition 11. A customer orders the bank in Prague to buy shares for him on the London Stock Exchange, according to their Conditions of Business. The shares are bought on a stock exchange other than that of Prague, and, therefore, they will not be sent to Prague unless the customer has ordered that that should be done and then it would have to be done at his expense and risk. Otherwise they will be left in London at the risk and expense of the customer. They will be "deposited with our correspondent" and they will then be subject to the laws prevailing in the foreign country in question. Once the shares have been bought, they will lie with the correspondent in London, and, if they are to be kept there for safe custody, they will then be held for safe custody, because they will be the property of the customer being held by the bank who do not pretend that they have a lien on them or that they are holding them as security in any way. How does that work in with Condition 50? That condition says: "The place of performance in respect of all obligations resulting from the business connection with us shall be considered to be the place of that department of our establishment which has carried out the relevant transaction." So far as safe custody of the shares is concerned, this is being carried out by the branch in London. It is said that Mrs. Frankman had no account in London. Be it so, but her shares were in London because the bank stipulated that they should be left there unless she gave special orders to the contrary. Those shares were to be held in London according to the laws of England. Therefore, any consideration of what is the proper law of the contract is provided by the condition itself and the proper law of the country is the law of England and not the law of Czechoslovakia.

Once it is established, as it is, by the evidence of the lawyer who was called

by the defendants, that, even if Czech law governed this matter, there is nothing in that law to make illegal a transaction between two "exchange foreigners" and that both of these parties were "exchange foreigners," no difficulty arises. I think that, as soon as these bonds were bought, any transaction which would be governed by Czechoslovak law came to an end. The contract of purchase, being made in Czechoslovakia, was, undoubtedly, governed by Czechoslovak law, but thereafter the bank, in fulfilment of their mandate, were holding by their branch or department in London these debentures for safe custody. I think that thereupon the debentures became subject to English law, and, accordingly, as the plaintiff has proved his title to them, in my opinion, he is entitled to maintain this action.

ASQUITH, L.J.: I agree. This appeal would seem to turn on the application to the facts of this case of the rules of English private international law. Two conclusions, among others, seem to me to result from that application—first, that the contract entered into between Mrs. Frankman and the bank in 1938 was governed by Czechoslovak law, the *lex loci contractus*, but, secondly, that, if and so far as, construed by that law, the contract provided for obligations to be performed in England, such obligations were intended to be governed by, and should be treated by English courts as governed by, the municipal law of this country, the *lex loci solutionis*. Such obligations are, accordingly, not affected by Czech domestic legislation, such as the Exchange or Currency Regulations which have played a great part in this case (even if those regulations were otherwise applicable to the case, having regard to the evidence about the transaction being between two "exchange foreigners"). That being so, the appeal turns mainly on whether the material obligations were to be performed in Czechoslovakia or in England. What were those obligations? The obligations of the Prague Bank under the contract were (a) to keep in safe custody the three bonds belonging to Mrs. Frankman and later to the plaintiff, (b) to re-deliver them to the owner against a valid demand for re-delivery, and (c) to perform each of those obligations in accordance with the written conditions of the contract which were furnished to Mrs. Frankman at the time when it was concluded, and acquiesced in by her. The Prague Bank performed the first of those obligations, that of safe custody (as it was entitled by Condition 11 to do, in the case of securities of this class), vicariously, that is, not by getting the bonds transmitted to its Prague headquarters office, but by causing or permitting its London branch to retain physical possession of them. If it had elected to discharge its obligations as custodian by assuming and retaining physical possession in Prague, it might well have been necessary for the owner of the securities, the plaintiff, to have made a demand in Prague as a condition precedent to his right to re-delivery. Since, however, the bank asserted its contractual right under Condition 11 to have the bonds retained in the hands of its London branch, it seems to me implicit in its election to do so and in the arrangement generally that the depositor, who was at the material time in England, could validly assert his right to re-delivery by a demand addressed to the defendants' London branch where the bonds were instead of resorting to the circuitry of addressing such a demand to the Prague branch where they were not. I, therefore, think that the demand was valid and the refusal to re-deliver unjustified.

It is arguable that a similar result might be deduced or flows from an application of the provisions of Condition 50 to the facts. The obligation to re-deliver falls within the literal scope of the words "all obligations resulting from the business connection with us," that is, with the bank. "The place of performance," further to quote the language of Condition 50, "is the place of that department of our establishment which has carried out the relevant transaction with the customer, except in so far as any special stipulation has been made in this connection." It seems to me that a possible construction of "the department

of our establishment which has carried out the relevant transaction with the customer" is the London department or branch, on which the actual custody of the bonds has devolved. It is true that there is a possible ambiguity, as these words might also mean the department or branch which negotiated the contract, that is, the Prague branch of the Bank. The Czech lawyer called for the defendants assumed that it meant this last, without, apparently, appreciating that there is any possible ambiguity or possible application of the principle *contra proferentem*. On the whole, I would not rest my conclusion on Condition 50. There is great force in the argument of counsel for the defendant that the words "transaction with the customer" do not fit in comfortably with the construction which I have suggested—a construction which rather requires "a transaction for the customer" if it is to relate to services *de facto* rendered to the customer as against services stipulated for—but, while Condition 50 may not help, I do not think that it hinders the plaintiff or invalidates the conclusion drawn from Condition 11. Condition 50, in spite of the apparent generality of its language when it speaks of "all obligations," comes at the end of a number of provisions quite unconnected with the custody of securities, whereas Condition 11 deals specifically, not only with the custody of securities, but with that of securities of the limited class here involved. For these reasons, I think that the appeal should be allowed.

SINGLETON, L.J.: I agree.

Appeal allowed with costs in both courts. Judgment for the plaintiff for the return of the debentures mentioned in the statement of claim and an order that the defendants do execute all documents necessary to transfer them in to the name of the plaintiff.

Solicitors: *W. R. Bennett & Co.*, agents for *Barrow-Sicree & Co.*, Manchester (for the plaintiff); *Freshfields* (for the defendants).

Applied. MUNRO v. MUNRO. [1950]
1 All E.R. 832.

McGOWAN v. McGOWAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson and Pilcher, JJ.),
October 13, 14, 22, 1948.]

Desertion—Maintenance—Provision of matrimonial home—Reasonable accommodation offered—Sharing of husband's parents' home—Wife securing flat elsewhere—Husband's refusal to occupy flat.

On Aug. 4, 1945, the parties were married, and at that time the husband was serving with the Royal Marines. The wife continued to live with her mother, but stayed at the home of the husband's parents when the husband was on leave. In March, 1946, the husband was demobilised and he and his wife went to live at his parents' house. After three days the wife returned to her mother. The house of the husband's parents at all times remained open to her, but she refused to return there because she was not prepared to live with her husband's parents. In October, 1947, the wife of her own volition secured the tenancy of a flat and asked the husband to live there with her. He refused, and the wife issued a summons alleging desertion by the husband and wilful neglect to maintain her. The justices considered that the wife had no reasonable ground for leaving her husband's parents' house, but were of the opinion that the husband was unreasonable in refusing to live in the flat found by the wife. Accordingly, they dismissed the charge of desertion, but found that the husband was guilty of wilful neglect to maintain the wife. On appeal:—

HELD: the wife, having left the husband unreasonably, did not succeed in establishing that he had not provided her with a reasonable home by finding accommodation elsewhere which he was unwilling to accept, and

she had not, therefore, proved that the husband was not fulfilling his obligation to maintain her, and the appeal must be allowed.

Jackson v. Jackson (1932) (146 L.T. 406), *applied*.

[AS TO OBLIGATION TO MAINTAIN SPOUSE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 608-610, paras. 951-955; and FOR CASES, see DIGEST, Vol. 27, pp. 75-78, Nos. 590-606.]

A Cases referred to :

(1) *Millichamp v. Millichamp*, (1931), 146 L.T. 96; 95 J.P. 207; Digest Supp.

(2) *Jackson v. Jackson*, (1932), 146 L.T. 406; 96 J.P. 97; Digest Supp.

(3) *Mansey v. Mansey*, [1940] 2 All E.R. 424; [1940] P. 139; 109 L.J.P. 83; 163 L.T. 157; 2nd Digest Supp.

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(4) *King v. King*, [1941] 2 All E.R. 103; [1942] P. 1; 111 L.J.P. 90; 167 L.T. 241; 2nd Digest Supp.

(5) *Dunn v. Dunn*, [1948] 2 All E.R. 822.

APPEAL from an order of justices for the city of Liverpool made on Mar. 19, 1948, whereby the husband was found guilty of wilful neglect to maintain the wife and ordered to pay her 15s. 6d. weekly for her maintenance. The husband's appeal to the Divisional Court of the Probate, Divorce and Admiralty Division was allowed. The facts appear in the judgment of HODSON, J.

Ormrod for the husband.

G. R. F. Morris for the wife.

Cur. adv. vult.

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Oct. 22. HODSON, J.: The parties were married on Aug. 4, 1945, and there is one child, which was born on Oct. 15, 1946, after the separation of its parents. At the time of the marriage the husband was serving in the Royal Marines and the wife continued to live with her mother, save that on his leaves she stayed with him at his parents' house, 74, Grovehurst Avenue, Liverpool, which is the only matrimonial home they have ever shared. In March, 1946, the husband was demobilised, and the parties went to live at his parents' house. After a few days the wife left, and returned to her mother. Since then this home at the house of the husband's

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parents has always been open to the wife, but she has consistently refused to return on the ground that she was not prepared to live in her mother-in-law's house. The husband's evidence before the justices was that he did not intend to live at his parents' house permanently, but only until he and his wife got accommodation of their own. In October, 1947, the wife, of her own volition, or, at any rate, without consulting the husband, got the tenancy of a flat at 96, Thurlow House, off Christian Street, Liverpool, and she told the husband of that fact and asked him to come there. This he refused to do, being unwilling to live in the middle of the city, and the wife got her solicitor to write a letter dated Oct. 29, 1947, placing on record what she had done and intimating that action would be taken against the husband if he did not fall in with the proposition that he should take up the tenancy of the flat. This letter having produced no result, a summons was issued alleging desertion of the wife and wilful neglect to maintain her on the part of the husband.

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The case first came on for hearing on Nov. 21, 1947. It came on again on Nov. 28, 1947, Jan. 9, 1948, Feb. 27, 1948, and Mar. 5, 1948. It was finally adjudicated on on Mar. 19. It is clear that the justices gave very close attention to the evidence and to the questions of law and fact involved, and also to the desirability of effecting a reconciliation between the parties, but all efforts to bring about a reconciliation failed. The husband maintained that he could not be guilty of wilful neglect to maintain, since his wife had deserted him by leaving the matrimonial home which was still open to her. The wife, on the other hand, maintained that she could not be expected to return to the

home so long as the husband's parents remained in it and in the circumstances it was unreasonable for the husband to refuse to consider the alternative home she had taken at 96, Thurlow House. The justices dismissed the summons based on desertion, but made the order appealed against on the ground that the husband had been guilty of wilful neglect to maintain his wife.

The case has to be approached keeping in mind that the common law obligation of a husband to maintain his wife is *prima facie* discharged by the provision of a home for her, with all that that entails in the way of her maintenance and that of any children there may be. There is no obligation to provide maintenance in a separate home merely at the option of the wife. The justices not only dismissed the summons based on desertion, but also, in their reasons for the decision at which they arrived, stated that they were not satisfied that the wife had reasonable grounds for leaving her mother-in-law's house in the first instance.

Various authorities were referred to before the justices and before this court. In the first of these, *Millichamp v. Millichamp* (1), a decision of the Divisional Court, an order of the justices for maintenance on the ground of wilful neglect to maintain was upheld. There the justices, in a case where the wife had left the husband who was living in his mother's house, held that the husband had brought about the separation by putting his mother first instead of his wife, so that it was unreasonable for him to expect his wife to continue to live in that house under the conditions involved. This was tantamount to a finding that the husband had not maintained, or, indeed, offered to maintain, his wife in a reasonable home in the circumstances and the finding was upheld. In *Jackson v. Jackson* (2) the husband had taken a house next door to his mother's house, and the wife had left him there. LORD MERRIVALE, P., put the question thus (146 L.T. 407) :

"Is it right to say that the conditions imposed on the wife were unbearable for her or any other wife, conditions which it was not competent for a reasonable husband to set up? Were they such conditions that a reasonable wife, being so treated by an unreasonable husband, could not be expected to proceed with the conjugal life?"

This question he answered in the negative, and the order of the justices based on wilful neglect to maintain was discharged.

It seems to me that the justices in this case have rightly approached the problem in the same way as LORD MERRIVALE, and have answered the question similarly in so far as they have found that the wife had no reasonable ground for leaving her mother-in-law's house in 1946. The other cases referred to, namely, *Mansey v. Mansey* (3) and *King v. King* (4), deal with the right of the husband to choose the matrimonial home, but in each case it is clearly recognised that the husband must act reasonably. LORD MERRIMAN, P., in the latter case, made it clear that the husband's right to choose the home is not to be erected into a proposition of law so as to shift the burden of proof to the wife in a case where the husband alleges desertion without cause. Each case must be determined on its own facts, having regard to the circumstances in which the parties find themselves, paying due regard, for example, to any agreement on the subject which they may have made.

Since the hearing of this appeal the same topic has been discussed in the Court of Appeal in *Dunn v. Dunn* (5). DENNING, L.J., is reported to have enunciated the same proposition, adding the words ([1948] 2 All E.R. 823) :

"The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern. Neither has a casting vote, though, to be sure, they should try so to arrange their affairs that they spend their

time together as a family and not apart. If such an arrangement is frustrated by the unreasonableness of one or the other, and this leads to a separation between them, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion."

A It is true that the LORD JUSTICE said that, in his opinion, neither spouse had a casting vote in the choice of the home, but that is but another way of expressing the proposition that neither has, as a matter of law, the right to choose the matrimonial home.

B In claiming that a husband has wilfully neglected to maintain her, a wife has to prove her case just as much as if she were seeking to establish desertion without cause, and I do not think that it is inconsistent with the quoted observations of the LORD JUSTICE to recognise that a wife who, as in this case, has been found to have acted unreasonably in leaving her husband, may find herself in difficulty thereafter in seeking to prove that he is in breach of his obligation to maintain her. She can hardly complain of lack of "give and take" on his part if she rents a dwelling-house without consulting him as to its locality or anything else, and then presents him with an ultimatum directing him to live there with her or take the consequences. Here, although the justices have found that the husband acted reasonably in providing the home from which his wife left him, they have found him unreasonable in refusing to set up home with his wife and child at 96, Thurlow House, and based their decision against him on this last ground. I think it is impossible to sustain the second part of their finding so as to justify an order against the husband on the ground of wilful neglect to maintain the wife. So long as the husband's obligation to maintain his wife remains, he can fulfil this obligation by providing his wife with a reasonable home. She does not succeed in establishing that he has not provided her with a reasonable home by showing that, having left him unreasonably, she has, by her independent action, found accommodation somewhere else which he is unwilling to accept. To put the matter in another way, having deserted him in the first place, she does not bring her desertion to an end by offering to live with her husband elsewhere than in the place of his choice, unless she can show that the place of his choice is not a reasonable home for him to offer her, having regard to all the circumstances. In view of the justices' findings as to the original leaving, I do not think that there was any evidence here to justify them in making an order which is really based on the husband's failure to provide his wife with a reasonable home. In my judgment, therefore, the appeal succeeds, and the order of the justices must be discharged.

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H PILCHER, J.: I am satisfied in this case that there was abundant evidence on which the justices were entitled to find, as they did, that the wife acted unreasonably in March, 1946, when, after three days' sojourn in the home provided by her husband under his parents' roof, she left him. At that time the husband had only just been demobilised, his parents' house was open to him, and it would almost certainly have been very difficult for him to have provided an alternative home elsewhere. The wife thus put herself in the wrong. Since March, 1946, the home offered by the husband has always been open to her. She did not invoke in evidence the birth of the child in October, 1946, as an event which materially altered the circumstances in reference to the suitability of the accommodation offered by her husband. The authorities referred to by my Lord make it clear that neither husband nor wife has any legal right to dictate the whereabouts of the matrimonial home. In the event of any unfortunate difference of view the rights of the parties must be governed by reason. At one time I felt considerable doubt whether the mere passage of time from March, 1946, to November, 1947, giving, as it did to the husband, an opportunity of seeking accommodation other than his parents' house,

coupled with the fact that he appeared to have made little, if any, effort to seek such accommodation, did, in itself, have an important bearing on the reasonableness of his behaviour. After giving the matter the best consideration of which I am capable, however, I have now come to the conclusion that there was not sufficient evidence covering the period March, 1946, to November, 1947, to justify the justices in coming to the conclusion, which they did, that the husband was unreasonable in failing to join his wife at the flat in Thurlow House, which she rented without consulting him in any way. Since March, 1946, the parties have unfortunately remained almost at arm's length. There has been no give and take. Each party has attempted to impose his will on the other. The wife still refuses to make any real trial of married life in the only home offered by her husband, and, as I say, having considered the matter carefully, I agree with my Lord that there was no evidence before the magistrates as to what took place between March, 1946, and November, 1947, which justified them in taking the unfavourable view which they did with regard to the husband's conduct. That being so, I agree with my Lord that this appeal must be allowed.

Appeal allowed.

Solicitors: *Helder, Roberts, Giles & Co.*, for *John A. Behn, Twyford & Reece*, Liverpool (for the husband); *Mawby, Barrie & Letts*, for *Silverman & Livermore*, Liverpool (for the wife).

[*Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.*]

HORN v. MINISTER OF FOOD.

[KING'S BENCH DIVISION (Morris, J.), October 27, 28, November 8, 1948.]

Sale of Goods—Implied warranty of fitness—Variation of implied rights—Avoidance of agreement—"Perishing" of goods before risk passes to buyer—Sale of potatoes to Minister of Food—Buyer's duty to give delivery instructions—Risk of deterioration with buyer—Sale of Goods Act, 1893 (c. 71), ss. 7, 14 (2), 20, 55.

In January, 1943, after inspection on behalf of the buyer, 33 tons of Majestic ware potatoes in a clamp were sold by a farmer to the Minister of Food at an agreed price. Delivery instructions were to be given by the Minister in the ensuing May, June or July. The agreement provided *inter alia* as follows: By Condition 1: "The seller will exercise all reasonable care in the storage of the potatoes forming the subject of the agreement and will protect potatoes in clamps against frost and winter weather by means of adequate coverings of straw and soil and in the event of any excessive deterioration of the potatoes will notify in writing the appropriate area potato supervisor forthwith of any such deterioration." By Condition 2 the property in the potatoes was to pass to the buyer on delivery according to his instructions. By Condition 4: "In the case of a tonnage contract, notwithstanding that the property in the potatoes shall have passed in accordance with Condition 2, the buyer, having taken a sample of any consignment of potatoes on arrival at its destination by rail or road and being satisfied that such sample fails to correspond to the description of the potatoes sold, may reject the whole consignment or any part thereof or accept the same at a fair value." By Condition 6, no further payment after the advance payment was to be made until delivery instructions had been completed by the claimant. On June 21, 1943, the farmer discovered a seam of rot in the potatoes and on the same day the area supervisor sent him delivery instructions by letter received the following day. On June 23 the farmer sent the area supervisor notice of the deterioration of the potatoes. On June 25 the area supervisor

inspected them, and, as they were no longer fit for use, cancelled the delivery instructions. It was found as a fact that the farmer had carried out his duty of exercising care in the storage of the potatoes and in protecting them against the weather.

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HELD : (i) section 14 (2) of the Sale of Goods Act, 1893, did not operate so that there was an implied term in the contract that the potatoes should be merchantable, since that section was subject (*inter alia*) to the provisions of s. 55 of the Act and the parties had expressly contemplated that there might be excessive deterioration of the potatoes.

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(ii) section 7 of the Act did not apply because the potatoes still answered to the description "potatoes," however grave the deterioration in their condition, and, therefore, they could not be said to have "perished before the risk passed to the buyer" within that section, nor did they "fail to correspond to the description of the potatoes sold" within Condition 4.

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(iii) the seller having complied with the obligations imposed on him by Condition 1, by the terms of that condition the risk of deterioration was with the buyer, the buyer had failed to give effective, subsisting delivery instructions, which he was obliged to do under the contract, and, therefore, the buyer was liable to the seller either in damages or for the price of the goods.

[FOR THE SALE OF GOODS ACT, 1893, see HALSBURY'S STATUTES, Vol. 17, pp. 612.]

D Case referred to :

(1) *Simmons v. Swift*, (1826), 5 B. & C. 857 ; 8 Dow. & Ry. K.B. 693 ; 5 L.J.O.S.K.B. 10 ; 39 Digest 484, 1042.

MOTION to set aside award.

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The seller was a farmer farming 64 acres at Bulcroft Farm, Leverington Common, Wisbech, Cambridgeshire. In 1942 the buyer, the Minister of Food, had decided that a potato reserve should be provided under the control of area potato supervisors. On Dec. 29, 1942, a clamp of Majestic ware potatoes situated on field 298 on the seller's land was inspected by a potato merchant employed by the local area potato supervisor *inter alia* to inspect and report on potatoes to be purchased by the Minister and to pass on delivery instructions from the supervisor to the seller. On Jan. 13, 1943, the seller entered into a contract with the Minister of Food, under which the Minister purchased 33 tons of Majestic ware potatoes in the clamp. Delivery instructions were to be given during May, June, or July, 1943. An advance payment of £132 was made by the buyer to the seller under the contract. On June 21 the seller opened clamp 298 and found a seam of rot. On June 22 he received delivery instructions from the area potato supervisor. At that time he had given no written notice of deterioration to the supervisor, the first notice of deterioration being given by letter dated June 23. On June 25 the supervisor inspected the clamp of potatoes and forthwith cancelled the delivery instructions.

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In his points of claim, as amended, the seller claimed £232 5s., the price of 33 tons of potatoes, or, alternatively that sum as damages by reason of the failure of the buyer to give delivery instructions under the terms of the contract whereby the whole of the 33 tons of potatoes rotted before they could be delivered. At the hearing the seller was permitted to amend his claim by alleging that, if such instructions were held to have been given, they had been cancelled orally by the potato merchant, and the cancellation had been confirmed by the area potato inspector on June 25. The buyer said that delivery instructions were given to the seller, but that he had failed to deliver any potatoes in accordance with the contract, or at all, and that he had failed to notify the buyer of deterioration of the

potatoes before receiving delivery instructions. He also said the seller had failed to take reasonable care in the storage of the potatoes and did not deliver ware potatoes.

The arbitrator found : (i) On June 25 the whole of the potatoes were useless and could not be delivered. (ii) The seller had performed his part under the contract by properly caring for the potatoes and by giving notice in writing of excessive deterioration as soon as he observed it. (iii) The buyer did not fail or refuse to give delivery instructions, but, in fact, gave them before the seller gave notice of deterioration and cancelled them on June 25. He held that there was no implied term in the contract that the cancellation of delivery instructions should operate as a completion of the delivery instructions so as to pass the property in the potatoes to the buyer and entitle the seller to payment of the whole of the purchase price. He, therefore, dismissed the claim with costs. MORRIS, J., now held that the buyer had committed a breach of contract.

Quintin Hogg for the seller.

Boileau for the buyer.

Cur. adv. vult.

Nov. 8. **MORRIS, J.** : The questions which are raised by this motion depend for their determination on the construction of the contract made between the parties on Jan. 13, 1943. On behalf of the seller it is submitted that the legal result that should follow from the facts found by the learned arbitrator is that he (the seller) is entitled to the sum of £232 5s. 0d. either as damages for the failure of the buyer to give delivery instructions or as the price of goods sold, the delivery of which was not required by the buyer. If this is the correct legal conclusion which should flow from the findings of the arbitrator, then it is urged that error in law is manifest on the face of the award.

There is no need for me to repeat the facts and findings which are recorded with clarity in the award. In my judgment, the contract placed the buyer under obligation to give delivery instructions. He was required to issue these in May, June, or July, 1943. The seller entered into an obligation which by Condition 1 was expressed in the following words :

"The seller will exercise all reasonable care in the storage of the potatoes forming the subject of the agreement and will protect potatoes in clamps against frost and winter weather by means of adequate coverings of straw and soil and in the event of any excessive deterioration of the potatoes will notify in writing the appropriate area potato supervisor forthwith of any such deterioration."

On June 22, 1943, the seller received delivery instructions. It was not suggested that those instructions could have been, or ought to have been, carried out by June 25. On that date the delivery instructions were cancelled. No substituted instructions or later instructions were ever given. The finding of fact of the arbitrator that the buyer did not fail or refuse to give delivery instructions is, of course, unimpeachable, and, indeed, it is found that delivery instructions were given and that they were received on June 22, but when the further finding of fact that the delivery instructions were cancelled on June 25 is conjoined to the earlier finding of fact, the clear result follows that no effective subsisting delivery instructions were given. Some reason must be assigned for this by the buyer, and then such reason must be examined to see whether it affords legal excuse for the failure to give delivery instructions or for the failure to pay. It is clear what was the reason. It was that excessive deterioration of the potatoes had taken place. By letter dated June 23 the seller notified the buyer of this. It is found as a fact that the seller discharged the obligations imposed on him by Condition 1. The question then arises

whether, on the facts as found, the buyer was excused from giving delivery instructions or from paying for the potatoes.

In my judgment, it cannot be said that the Sale of Goods Act, 1893, s. 14 (2), operated so that there was an implied condition that the potatoes should be of merchantable quality. Section 14 contains the words: "Subject to the provisions of this Act," and s. 55 of the Act is in the following terms:

A "Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract."

The potatoes were inspected by a representative of the buyer on Dec. 29, 1942. The contract was made in the circumstances detailed in the award. There was a contemplation that before the giving of delivery instructions there might be not only deterioration, but even excessive deterioration, of the potatoes, which, it is to be noted, were the particular potatoes inspected and which (as the contract shows) had been reported on and were located at a named farm. In these circumstances there is no room in this contract for an implied condition that the goods should be of merchantable quality. Furthermore, it is to be observed that s. 14 (2) only applies where goods are bought by description. Though the proviso to the sub-section indicates that goods which have been examined may, nevertheless, be bought by description, it would appear to be very questionable whether the sale of the potatoes at Bulcroft Farm, which a potato merchant employed by the buyer had inspected and reported on, was ever a sale by description. The conclusion which I have expressed makes it unnecessary to pursue this aspect of the matter further.

D It must next be considered whether the provisions of the Sale of Goods Act, s. 7, have any applicability to the facts as found. The terms of that section are as follows:

E "Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided."

The finding of the learned arbitrator is that on June 25 the whole of the potatoes were "useless and could not be delivered." The arbitrator does not find that the potatoes had ceased to exist or were no longer in a form that would permit of their being called "potatoes," but he finds that the quality of the potatoes had so far deteriorated that they had become "useless and could not be delivered." The finding is that the potatoes had become rotten with the result that they could not be used. It is not found that the use of the word "potatoes" was inapposite in reference to them. On the contrary, the award refers to "the condition of the potatoes on June 25." It would be wrong, therefore, to say that they did not answer to the description of "potatoes," however grave was the deterioration of their condition. In my judgment, s. 7 is not applicable to the facts as found, but, even if the potatoes had perished within the meaning of the section, it is to be observed that the section only deals with cases where goods perish "before the risk passes to the buyer," and, in my view the risks of deterioration and also of excessive deterioration were with the buyer, provided always that the seller complied with the obligations imposed on him by Condition 1. The position is, therefore, either that the buyer is liable because of a failure to give delivery instructions, or, if excessive deterioration happened without the fault of the seller which made delivery impossible, the buyer is liable because the contract placed this risk on him.

H It was, however, further contended on behalf of the buyer that it would have been futile for him to give delivery instructions since, by reason of Condition 4, he could thereafter have rejected the whole consignment. It was

said, therefore, that the giving of delivery instructions was a ritual that need not have been performed. Condition 4, so far as relevant, is as follows :

"In the case of a tonnage contract, notwithstanding that the property in the potatoes shall have passed in accordance with Condition 2, the buyer, having taken a sample of any consignment of potatoes on arrival at its destination by rail or road and being satisfied that such sample fails to correspond to the description of the potatoes sold, may reject the whole consignment or any part thereof or accept the same at a fair value."

Condition 2 provided that the property in the potatoes under a tonnage contract passed to the buyer on delivery. In my judgment, this submission fails for the reason that it is not found that the potatoes did not correspond to the description of the potatoes sold. The fact that in regard to their quality and condition there was very serious deterioration did not withdraw from the potatoes their classification and description as ware potatoes of the variety known as Majestic. Condition 4 deals with description as such and not with condition or quality and in this contract must be read having regard to Condition 1. So also must Condition 2. The provisions of the Sale of Goods Act, s. 20, do not affect the conclusions which I have expressed. That section provides as follows :

"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not."

Though the property is, under Condition 2 of the contract, to pass on delivery, the risk of deterioration, even excessive in extent, is one which, by reason of the express agreement contained in Condition 1, is with the buyer. The question as to the incidence of risks of other kinds in regard to the potatoes is not raised and does not call for present determination. The decision in *Simmons v. Swift* (1) does not afford guidance in the present case which, in my judgment, must be decided on a consideration of its own special terms and conditions.

During the argument before me questions were discussed as to what results should follow on the giving of a notice by the seller of excessive deterioration in accordance with Condition 1. Reference was made to the award, where it is stated :

"Counsel for the buyer agreed that provided the seller had carried out all the terms of his contract and there was unreasonable delay by the buyer in giving delivery instructions after proper notice of deterioration by the seller, then in such circumstances the buyer would be liable in some damages which would have to be assessed by me."

Counsel for the buyer, in his argument, said that for the purpose of the present dispute he had at the arbitration agreed that the buyer would, after a proper notice under Condition 1 had been sent to him by the seller, be under an implied obligation to give delivery instructions, but counsel sought to distinguish between this and accepting delivery. I do not think that it is necessary for me to decide the question whether there is an implied term in the contract. If a buyer is informed that there is excessive deterioration in the goods which he has contracted to take, then in the exercise of his rights he will in all probability immediately give delivery instructions. Common sense suggests that this is the course he would follow, but it may well be that this is a matter for the buyer. If the seller has not exercised all reasonable care in the storage of the goods, the seller would be in breach of contract. If the seller has fully complied with his contractual obligations, the buyer has no excuse if he fails to give delivery instructions. He may state that he does not require delivery, but then he remains liable to pay what he has contracted to pay. If he expressly

or impliedly states that he will not give delivery instructions then he commits an anticipatory breach. If because of deterioration there cannot be delivery and Condition 1 has been obeyed by the seller, then it is for the buyer to pay. The present case does not raise the question what would be the position if notice of excessive deterioration were given before the month of May, but presumably the seller would be entirely content to receive delivery instructions.

A For the reasons which I have given, the legal conclusion that should follow from the facts as found is that the seller should succeed, and, therefore, the concluding sentences of the award are erroneous in law. The liability of the buyer does not depend on some implied term that property passes if delivery instructions are cancelled, and I do not consider that there was any such implied term. The liability of the purchaser is, in my judgment, on the basis B which I have indicated. It was conceded that some normal wastage of tonnage would be inevitable. The award contains the following passage: "He," namely, learned counsel for the seller at the arbitration, "said that allowance should be made for normal waste in the whole tonnage amounting to some 10 per cent. covering the whole period allowed for delivery instructions up to the end of July, and after some discussion between counsel the figure arrived C at became £232 5s. 0d. as the amount claimed." The precise manner of working out this figure is not revealed, and I can, therefore, neither affirm nor reject the figure as a figure. The method of approach is, however, in my judgment, correct, and, provided that the figure is correct, I consider that the legal result of the arbitrator's findings was that the seller was entitled to that sum either by way of damages or as the price of goods the delivery of D which was waived or (in special circumstances covered by the contract) could not be given. In these circumstances, the proper course is for me to remit the matter to the arbitrator for re-consideration.

Case remitted.

Solicitors: *Metcalfe, Copeman & Pettefar*, agents for *Cozens-Hardy & Jewson*, Norwich (for the seller); *Treasury Solicitor* (for the buyer).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

COMMERCIAL STRUCTURES, LTD. v. R. A. BRIGGS (INSPECTOR OF TAXES).

F [COURT OF APPEAL (Tucker, Cohen and Asquith, L.JJ.), November 15, 16, 1948.]

Income Tax—Additional assessments—“If the surveyor discovers . . . that a person chargeable . . . has been undercharged” —“Discovers” —Mistake in general law—Income Tax Act, 1918 (c. 40), s. 125 (1).

G The Income Tax Act, 1918, s. 125 (1) provides: "If the surveyor discovers that any properties or profits chargeable to tax have been omitted from the first assessments; or that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments . . . then and in every such case (i) where the tax is H chargeable under sched. A, B, or E: . . . (b) If the first assessments have been signed and allowed, the surveyor shall certify the particulars to the General Commissioners, who shall sign and allow an additional first assessment in accordance therewith: Provided that any such additional first assessment shall be subject to appeal and other proceedings as in the case of a first assessment."

The taxpayers were owners of certain premises which, in September, 1939, were requisitioned by the Minister of Works under the Defence

Regulations. This entitled the taxpayers to a compensation rent under the Compensation (Defence) Act, 1939, s. 2, and a sum of £4,940 was arrived at by agreement. In assessing this figure for tax purposes, the inspector of taxes made the statutory deduction of one-sixth from that sum, leaving £4,113 as the figure on which tax under sched. A would be payable. Payment of tax on this basis was made until April, 1945, when the inspector became aware that the compensation rent was not a rack rent, since, by the provisions of s. 2 (1) (b) of the Act of 1939, the Minister of Works was liable to pay a sum equal to the cost of making good any damage to the building during his occupation. In purported pursuance of the Income Tax Act, 1918, s. 125 (1), the inspector thereupon made additional assessments, increasing the net assessment to £4,525.

HELD: although no new fact or circumstance had been ascertained by the inspector when he made the additional assessments, he had made a "discovery" within the meaning of s. 125 (1) when he found that a mistake had been made with regard to the effect of the general law on a particular set of facts.

Dictum of LORD NORMAND in Inland Revenue Comrs. v. Mackinlay's Trustees (1938 S.C. 771), *approved*.

Dictum of ROWLATT, J., in Anderton & Halstead, Ltd. v. Birrell ([1932] 1 K.B. 281; 146 L.T. 142), *not adopted*.

British Sugar Manufacturers, Ltd. v. Harris ([1938] 1 All E.R. 149; [1938] 2 K.B. 220; 159 L.T. 365); *discussed*.

Decision of ATKINSON, J. ([1947] 2 All E.R. 659), *affirmed*.

[AS TO THE MEANING OF "DISCOVERS," see HALSBURY, Hailsham Edn., Vol. 17, pp. 339, 340, para. 689 and Supplement; and FOR CASES, see DIGEST, Supplement, Income Tax, 592b-592e.]

Cases referred to:

- (1) *R. v. Kensington Income Tax Comrs.*, [1913] 3 K.B. 870; 83 L.J.K.B. 364; 109 L.T. 708; 6 Tax Cas. 279; *on appeal, sub nom. Kensington Income Tax Comrs. v. Aramayo*, [1916] 1 A.C. 215; 84 L.J.K.B. 2169; 113 L.T. 1083; 38 Digest 121, 888.
- (2) *Anderton & Halstead, Ltd. v. Birrell*, [1932] 1 K.B. 271; 101 L.J.K.B. 219; 146 L.T. 139; 16 Tax Cas. 200; Digest Supp.
- (3) *Williams v. Grundy's Trustees*, [1934] 1 K.B. 524; 103 L.J.K.B. 204; 150 L.T. 378; 18 Tax Cas. 271; Digest Supp.
- (4) *British Sugar Manufacturers, Ltd. v. Harris*, [1938] 1 All E.R. 149; [1938] 2 K.B. 220; 107 L.J.K.B. 472; 159 L.T. 365; 21 Tax Cas. 528; Digest Supp.
- (5) *Inland Revenue Comrs. v. Mackinlay's Trustees*, 1938, S.C. 765; 22 Tax Cas. 305; Digest Supp.

APPEAL from a decision of ATKINSON, J., on a Case stated by General Commissioners of Income Tax.

The taxpayers had originally been assessed under sched. A on a gross annual value equal to a compensation rent to which they were entitled under the Compensation (Defence) Act, 1939, in respect of property which had been requisitioned during the war, less one-sixth. The gross annual value was taken under the mistaken impression that the compensation rent was a rack rent, whereas, in fact, it was less than a rack rent. Full information was before the inspector when the first assessment was made, but, on the mistake being discovered, he made additional assessments under s. 125 (1) of the Income Tax Act, 1918. The taxpayers appealed to the General Commissioners against these additional assessments, on the ground that there was no power under the section to make them. The General Commissioners dismissed the taxpayers' appeal, as did ATKINSON, J. The Court of Appeal now affirmed his decision.

N. C. Armitage for the taxpayers.

Donovan, K.C., J. H. Stamp and *R. P. Hills* for the Inspector of Taxes.

TUCKER, L.J. : This is an appeal from a judgment of ATKINSON, J., whereby he dismissed an appeal by way of Case Stated by the General Commissioners for the Finsbury District. The General Commissioners had confirmed five additional assessments made under sched. "A" on the taxpayers, Commercial Structures, Ltd., in purported pursuance of s. 125 of the Income Tax Act, 1918.

The taxpayers were the owners of the upper part of a warehouse in Clerkenwell which was in the course of erection at the outbreak of war. In September, 1939, the building was not finished, but it was taken possession of by the Minister of Works under the Defence Regulations, and, accordingly, what is called a compensation rent became payable under the provisions of the Compensation (Defence) Act, 1939. The actual amount of the payment was arrived at by agreement, and fixed at £4,940 per annum. The relevant section is s. 2 of that Act, which reads as follows :

"(1) The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums, that is to say—(a) a sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation of the land, during the period for which possession of the land is retained in the exercise of emergency powers, under a lease granted immediately before the beginning of that period, whereby the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the land in a state to command that rent, and (b) a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession thereof is so retained (except in so far as the damage has been made good during that period by a person acting on behalf of His Majesty), no account being taken of fair wear and tear or of damage caused by war operations."

Then there are other provisions which are not material to this appeal. Having fixed the sum payable under s. 2 (1) (a), which is called a compensation rent, at £4,940 gross, the inspector made the statutory deduction of one-sixth from that sum, leaving £4,113 as the figure for tax purposes on which sched. A tax would be payable. The taxpayers went on paying on that basis until Apr. 5, 1945, and then the inspector, I will use neutral words, ascertained or became aware of the fact that he had proceeded on an erroneous basis in assenting to the figure of £4,940 as being the correct gross figure for tax purposes before the one-sixth deduction was made. He had, apparently, regarded this compensation rent as if it was a rack rent payable under a lease and had dealt with it accordingly, and he had overlooked the provisions of para. (b) of that sub-section providing for the payment of a lump sum in certain circumstances. Accordingly, he caused additional assessments to be made in which he added to the figure of £4,940 a figure of 10 per cent., representing repairs, producing a gross figure of £5,434, and from that figure he made the statutory deduction, arriving at a net assessment of £4,525. The five additional assessments in question in this appeal were made on that basis. In so proceeding the inspector purported to act in pursuance of the Income Tax Act, 1918, s. 125 (1) which, so far as material, reads as follows :

"If the surveyor discovers—that any properties or profits chargeable to tax have been omitted from the first assessments; or that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments . . . then and in every such case—(i) where the tax is chargeable under sched. A, B or E . . . (b) If the first assess-

ments have been signed and allowed, the surveyor shall certify the particulars to the General Commissioners, who shall sign and allow an additional first assessment in accordance therewith: Provided that any such additional first assessment shall be subject to appeal and other proceedings as in the case of a first assessments."

The words in that section which are immediately applicable to the present case, are: "If the surveyor discovers that a person chargeable has been undercharged in the first assessment."

It is said here on behalf of the taxpayers that the inspector, who stands for these purposes in the position of the surveyor referred to in s. 125, has not discovered anything within the meaning of that section. All he has done, it is argued, is to alter his mind or to take a different view with regard to the law applicable to the facts and circumstances, all of which were originally before him. It is common ground that no new fact or circumstance had been ascertained by the inspector at the time when he certified the particulars pursuant to the discovery which he said he had made. For the Crown the argument is that, on the plain reading of the section without introducing any additional words, the inspector has discovered that a person chargeable has been undercharged, and it is immaterial whether the discovery is based on the ascertainment of the correct law applicable to the facts and circumstances or whether it is the ascertainment of some new fact or circumstance.

This section has been considered in several cases, but the matter comes before this court without any authority binding on us. I do not propose to refer to the first case which was cited in argument, namely, *R. v. Kensington Income Tax Commissioners* (1), because, in my view, the facts of that case were so entirely different from those of the present that any observations made there with regard to the meaning to be attached to the word "discovery" really lend no assistance whatever in the solution of the problem with which we are now confronted. I pass, accordingly, to *Anderton & Halstead, Ltd. v. Birrell* (2), which is the case principally relied on by counsel for the taxpayers. In that case the taxpayers were assessed under sched. D for the years 1921-22 and 1922-23 on the basis of a writing down in two years successively of a doubtful debt. That was done by agreement with the inspector of taxes, who had all the facts before him. Subsequently, by additional first assessments, the writing down of the doubtful debt was disallowed on the ground that it had come to the surveyor's knowledge that the taxpayers had permitted the debtors to increase their indebtedness to them. That had come to his knowledge several years after the time when the agreement had been made. One of the questions which arose in that case was whether in those circumstances the surveyor had made a discovery which entitled him to certify the particulars which would lead to an additional assessment. ROWLATT, J., in giving his judgment, shows what was the real basis of his decision. He quotes r. 3 of the Rules Applicable to Cases I and II of sched. D (relating to the point in question), and goes on ([1932] 1 K.B. 282):

"What the statute requires, therefore, is an estimate to what extent a debt is bad, and this is for the purpose of a profit and loss account. Such an estimate is not a prophecy to be judged by after events, but a valuation of an asset *de praesenti* upon an uncertain future to be judged with regard to its soundness as an estimate upon the then facts and probabilities. It is not overthrown as an estimate in 1923 and 1924 by coming to the conclusion, as the General Commissioners have done, that in 1930 it had not been proved that the debts were to any extent bad. Supposing, however, instead of making an irrelevant pronouncement, the General Commissioners had addressed themselves to the true points—namely, the criticism of the estimate as in 1923 and 1924—what material had they before them to justify, first, the intervention at all of

the inspector on the ground of a 'discovery,' and, secondly, their own action in upholding the additional assessment made in pursuance of that intervention? The only way, I think, in which it could be put would be that the subsequent growth of the indebtedness indicated that there must have been some fact in 1923 and 1924 which (a) was not taken into account in the estimate, and (b) would have made the estimate as an estimate in 1922 and 1923 higher. It may indicate that the appellants in 1923 and 1924 were willing to contemplate that the debt should or might increase, but I think it is merely guesswork in the circumstances of this case to infer that that was because there was then reason to think the existing debt good."

It seems to me the learned judge was there holding that the fact that the company in subsequent years had given further credit to those debtors was irrelevant in ascertaining whether or not the debt was a bad debt several years earlier. When one examines the case carefully, one sees that is the real foundation of his judgment, but it is true that in giving that judgment ROWLATT, J., did use language which, if applied literally to the facts of the present case, would, I think, be sufficient for counsel for the taxpayers. He said (*ibid.*, 281):

"The real question is whether, within the meaning of s. 125, the inspector has 'discovered' an undercharge in the first assessment. The word 'discover' does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion."

He then goes on to refer to *R. v. Kensington Income Tax Commissioners* (1) which, as I have already said, appears to me to lend very little, if any, assistance to the solution of this problem.

A somewhat similar matter arose for decision before FINLAY, J., in *Williams v. Grundy's Trustees* (3). There the trustees under a will, in making a return to income tax of the trust income, stated in error but in good faith that by reason of the provisions of the will, which they misread, the income was not liable to income tax. After production of the will and discussion with them the inspector of taxes agreed, and no assessment was made. His successor discovered the error and additional assessments were made on the trustees. The error which had been made was this. Under the will the income in question was held in trust for one Appleton, who was a domiciled American, until he attained the age of twenty-one years. The error which treated the interest under the will as a vested interest, and, therefore, exempt from tax, was, it was conceded, a *bona fide* error. That was clearly a mistake of law. FINLAY, J., had occasion to refer to ROWLATT, J.'s, decision in the *Anderton* case. He was not able to accept in its entirety the language used by ROWLATT, J., to which I have referred. He said ([1934] 1 K.B. 533):

"I have, however, come to the conclusion upon a survey of the authorities as a whole—and one must look at them as a whole—that it must not be supposed that ROWLATT, J. there was speaking otherwise than with reference to the facts of the particular case which was before him. Clearly one would think there could be no doubt as to the correctness of the result of that case, but I do not find it possible to apply the words I have quoted to every case in the sense of reading them as meaning that an inspector can never make a discovery if the making of that discovery involves only a change of opinion. I cannot think that that was what was meant and it does not seem to me that that view is consistent with the authorities to which I have already referred . . . I have carefully considered the authorities, but, apart from the authorities, if one looks at s. 125 itself, it is rather difficult to say that on the facts of this case the surveyor had not discovered, found out, that there were properties

or profits chargeable to tax which had been omitted from the first assessments. He did, I think, find out that fact. The fact is, of course, that the properties or profits were chargeable to tax; they had been omitted from the first assessments and he found that out. The only answer made to this is that they had been omitted from the first assessment, so to speak, with the sanction of the inspector, because he, like those making the return, supposed that they were not properties or profits chargeable to tax. But of course an inspector would have no power to sanction such an omission. He discovers, he finds out, that they are chargeable, and I have difficulty in seeing why s. 125 does not then precisely apply."

I should have pointed out that the income in question was derived from foreign possessions. That is the property which had been omitted, to which FINLAY, J., was referring.

The next case is one which came before this court, *British Sugar Manufacturers, Ltd. v. Harris* (4). That was an appeal from a decision of FINLAY, J. He had followed his own decision in *Williams v. Grundy Trustees* (3), and the question involved was whether a certain sum of money that had been expended was properly deductible in arriving at the profits of the company or whether it was merely a distribution of the company's profits. In that case the inspector, who had previously taken the view on the same facts that the sum in question was properly deductible, now took the view that it was merely a distribution of profits, and he caused additional assessments to be made. On the hearing of the appeal the first question that arose was whether the inspector's second thoughts were correct, and the court held that they were not. The court came to the conclusion that the inspector's first view was the correct one, and, accordingly, the contention on behalf of the Crown failed, but the Attorney-General, in the course of his argument, had urged the second point which would have arisen if the court had held that the inspector's second thoughts were right, namely, that he had made a "discovery" within the meaning of s. 125 which would have justified the additional assessments. Having heard the whole of the argument for the Crown the court did not call on counsel for the company to reply, and when SIR WILFRID GREENE, M.R. had given his judgment on the main point he was proceeding to deal with the second point, which would have arisen if they had taken a different view on the first point, when the learned Attorney-General intervened and indicated that, if the judgment of the court was adverse to the Crown on that point, the Crown would be compelled to ask for leave to appeal to the House of Lords. Accordingly, counsel for the taxpayer consenting, the court left the matter where it was and delivered no judgment on that point, although from the observations of ROMER, L.J., that the decision of the court would have been adverse to the Crown.

Finally, we get to a case in the Court of Session—*Inland Revenue Comrs. v. Mackinlay's Trustees* (5), on July 6, 1938, six or seven months after the *British Sugar Manufacturers' case* (4) had been before this court, where a very similar point arose. There had been a deed of partnership between certain persons, one of whom was a Colonel Mackinlay who had died. A question arose with regard to the tax payable by his trustees in respect of his share of the profits for the year of his death. There was a provision in cl. 15 of the partnership deed which provided that, in the event of the death, bankruptcy or expulsion of any of the partners, "the price to be paid for the share of such deceasing or outgoing partner or partners shall be the amount standing at his credit in the immediately preceding balance sheet but under deduction of any sums drawn out by him and with the addition of any sums paid in by him since the date of that balance sheet with progressive interest at 5 per cent. per annum from the date of the balance sheet to the date when the partner's interest shall cease, and a sum in lieu of profits for the same period calculated

upon the assumption that the profits shall be the same as the average for the corresponding period during the immediately preceding three years and a proportion taken which is applicable to the said partner's share for the period that has run since the date of the said last balance sheet." On Nov. 19, 1935, the Special Commissioners wrote to the trustees' solicitors stating that, in the opinion of the assessing commissioners, the deceased was not entitled to any share of the firm's profits for the year ending Apr. 5, 1935, and that the capital sum which became payable under the partnership agreement to his representatives did not form part of his total income assessable to sur-tax for that year. An assessment to sur-tax was thereupon made on the trustees on the basis set out in the Special Commissioners' letter. Then, as the LORD PRESIDENT (LORD NORMAND), in giving his opinion, stated (1938, S.C. 770) :

"Nothing more took place between the trustees and the Special Commissioners until December, 1937, when the Special Commissioners again wrote to the trustees' solicitors stating that it was proposed to include in the computation of the deceased's total income for sur-tax purposes for the year to Apr. 5, 1935, the sum of £7,479 representing his share of income from the partnership. This amount was computed by reference to the provisions of the Income Tax Act, 1918, s. 20, and is really based on the 35/60ths of the profits of the firm to which Colonel Mackinlay was entitled during the years actually preceding the year of his death."

So the discovery there made was that what had got to be considered was not cl. 15 of the partnership deed, but the effect of the Income Tax Act, 1918, s. 20, as applied to the other provisions of the deed, which set out the share of the profits which Colonel Mackinlay would have received. In dealing with that matter LORD NORMAND said (1938, S.C. 771) :

"Accordingly, it remains to consider whether in this case the commissioners are entitled to say that such a discovery has been made. In considering that question we have, of course, to assume *pro veritate* that the first assessment to sur-tax laid upon the trustees was mistaken, and that the additional assessment now laid on will be a correct assessment. The question therefore is whether a discovery that a mistake, essentially a mistake of law, has been made is a discovery within the meaning of s. 125. I think the word 'discover' in itself, according to the ordinary use of language, may be taken simply to mean 'find out.' What has to be found or found out is that any properties or profits chargeable to tax have been omitted from the first assessment. Now, it is clear that what has happened here is within the literal meaning of these words. If the additional assessment is a correct assessment, then it is plain that certain profits chargeable to tax have been omitted. I go on to the next paragraph of s. 125 (1), which is an alternative to the first paragraph. There the discovery which must be made is stated in alternative forms of which the first is that a person chargeable has not delivered any statement or has not delivered a full and proper statement. There is an express finding in the case that a full and proper statement has been made. But then we have to go on and give effect to the alternative which follows : 'Or has not been assessed to tax, or has been undercharged.' I think that, since these words must apply where the person chargeable has delivered a full and proper statement, they are apt to cover the case of a discovery of a mistake in the assessment caused by a mistake in the construction of the partnership deed or, it may be, caused by a mistake in the law applicable to such a deed, even where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based. I do not think it is stretching the word 'discovers' to hold that it covers the finding out that an error in law has been committed in the first assess-

ment, when it is desired to correct that by an additional assessment."

Later he says :

"That again seems to me rather to point to the discovery that a deduction claimed upon a true representation of the facts has been allowed, although it is contrary to those provisions in the Act which authorise deductions to be made. That is to say that again that third paragraph appears to be intended to apply to the discovery of an error in law just as much as to an error in fact. Of course, if there were any reason in the context for restricting the word 'discover' to the discovery of an error in fact, that restriction would necessarily receive effect, but, in my opinion, the context points, not to any such restriction, but on the contrary to so wide a meaning that the word ought to be held to cover just the kind of discovery which was made here, when the Special Commissioners found out that, by reason of a misapprehension of the legal position, certain of the profits chargeable to tax had been omitted from the first assessment."

It is true that that opinion is not binding on this court, and that the Court of Appeal in 1938, in the *British Sugar Manufacturers'* case (4), had not got the benefit of reading that opinion of LORD NORMAND. All I can say, with respect, is that what is there stated by LORD NORMAND appears to me completely to fit the present case, and I can do no more than say that the way he puts it convinces me that the argument of the Crown is the one which should be accepted by us. I can do no more than adopt the language of LORD NORMAND, and will not attempt to say the same thing in poorer language. Although he may not have been dealing with a mistake in the general law of the country as distinct from a mistake in the interpretation of a document, the case was rather on the border line. He was dealing with the proper application of the Income Tax Act, 1918, s. 20, to the provisions of the particular deed, but I think his language is applicable here and the reasoning is equally applicable to mistakes made with regard to the discovery of the effect of the general law on a particular set of facts. It is true that the result of this construction of s. 125 may of necessity in some cases involve the taxpayer in the hardship that assessments made some years previously may be affected or upset by additional assessments made in the light of, perhaps, some subsequent decision of the House of Lords, but, none the less, I think that this is the proper construction of the section. In my view, any other construction of the word "discoverer" might not be welcome to taxpayers when the provisions of s. 140 come to be considered, where the legislature is dealing with discoveries made by the taxpayer. However that may be, I base my decision on what I think is the clear language of s. 125 as construed by LORD NORMAND in the opinion to which I have referred, and for those reasons I think this appeal fails.

COHEN, L.J.: I am of the same opinion. The learned judge, ATKINSON, J., based his judgment on the decision of FINLAY, J., in the *Grundy* case (3) and the Court of Session in the *Mackinlay* case (5). These cases are clear authorities for the conclusion which he reached, and had it not been for the *Anderton* case (2) and the *British Sugar Manufacturers'* case (4) to which TUCKER, L.J., has referred, I should have been content without more to adopt the reasoning of LORD NORMAND in the *Mackinlay* case (5). There are, however, observations in the *Anderton* case (2) and the *British Sugar Manufacturers'* case (4) which support the opposite view. The *Anderton* case (2) on any view, as FINLAY, J., pointed out in the *Grundy* case (3), was clearly rightly decided. The real decision in the *Anderton* case (2) was that there was no evidence that the deductions then in question were wrongly allowed by reference to the circumstances at the time of allowance, and for that reason the additional assessments were not justified. True it is, that ROWLATT, J., went on to say ([1932] 1 K.B. 281), in the passage to which my

Lord has referred: "The word 'discover' does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion." It is also clear that the Court of Appeal were inclined, in the *British Sugar Manufacturers'* case (4), to the same view, but TUCKER, L.J., has pointed out that the Court of Appeal gave no decision, and we are compelled to come to our own conclusion on the question of law unassisted by any decision on the point. I am convinced that the reasoning of LORD NORMAND in the *Mackinlay* case (5) was sound and, like TUCKER, L.J., I desire to adopt it as my reasons for the conclusion that ATKINSON, J.'s, decision was right.

I desire to add only one more word. If some other meaning is to be given to "discover" than the natural meaning "to find out," I should like to learn what it is. Counsel for the taxpayers had great difficulty in reaching a definition, but, finally, in his reply, he said: "If the surveyor discovers" means "If the surveyor sees any fact or circumstance which was not apparent when the first assessment was made and which shows or tends to show . . ." That is rather an elaborate translation, and, indeed, if that be the meaning of the draftsman, he has adopted a most unusual compendious phrase. But the matter did not stop there because that was not sufficient definition for counsel. He said, "I should have to add a definition that the provisions of an Act of Parliament are not a fact or circumstance which can be discovered." I think the fallacy of counsel's argument is exposed by the paraphrase he found himself compelled to suggest to attain the result he desired. I think, therefore, that is an additional reason for accepting the construction which LORD NORMAND has placed on the word.

There is one other matter to which I ought to refer. At one stage in his argument counsel for the taxpayers suggested that some meaning ought to be given to the word "undercharged" in the section other than its natural meaning. That point does not seem to have been taken either before the commissioners or before the learned judge, but, assuming it to be open to him, in my opinion, it has no foundation. The meaning which counsel invited us to adopt was that there should be read into the words "by accident or error, not being an error in the general law." I see no reason for reading in something which narrows the natural meaning of the expression. It seems to me that, if we were to accept this argument, we should not be fulfilling our duty of construing the language used. We should be guessing at the intention of Parliament, and in all probability guessing wrongly. For those reasons, and for the reasons given by my Lord, I am of the opinion that ATKINSON, J., was quite right in the conclusion to which he came; and the appeal fails.

ASQUITH, L.J.: I concur.

Appeal dismissed with costs.

Solicitors: *R. C. Bartlett & Co.* (for the taxpayers); *Solicitor of Inland Revenue* (for the Inspector of Taxes).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

BARBER v. ROWE.

[COURT OF APPEAL (Tucker and Cohen, L.JJ., and Birkett, J.), October 29, November 3, 1948.]

Evidence—Secondary evidence—Contents of document—Lost document—Note or memorandum of agreement—Lease—Admission of counterpart on proof of loss of lease—Law of Property Act, 1925 (c. 20), s. 40.

By an agreement in writing, dated Aug. 10, 1936, E.B. let certain offices to the defendant for a term of ten years from Aug. 3, 1936, at a yearly rent of £52 per annum. On Aug. 5, 1945, E.B. died leaving the plaintiff as sole beneficiary. On Aug. 3, 1946, the plaintiff gave the defendant notice to quit the premises, but the defendant claimed that he was entitled to a renewal of his lease under a lease alleged to have been executed by E.B. on Mar. 31, 1938. The only written evidence of this document was the counterpart of the lease held by the defendant and bearing his signature, but not signed by E.B. At the hearing the defendant testified that he and E.B. had together gone to a solicitor, when the lease and counterpart had been signed, and this evidence was corroborated by the solicitor. The plaintiff contended that there was no evidence that the alleged lease of Mar. 31, 1938, had been executed by E.B., and, alternatively, that there was no note or memorandum in writing of the covenant to grant a further lease sufficient to satisfy s. 40 of the Law of Property Act, 1925.

HELD: (i) satisfactory proof of the loss of the lease having been given, secondary evidence as to its contents in the form of the counterpart was admissible.

(ii) the contents of the lease having been thus proved, the lease constituted a sufficient note or memorandum under s. 40.

Dictum of LORD COZENS-HARDY, M.R., in Read v. Price ([1909] 2 K.B. 730; 101 L.T. 62), applied.

[AS TO ADMISSION OF DRAFTS AND COUNTERPARTS AS SECONDARY EVIDENCE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 532, para. 597; and FOR CASES, see DIGEST, Vol. 22, pp. 234-235, Nos. 2089-2095.]

Case referred to:

(1) *Read v. Price*, [1909] 2 K.B. 724; 78 L.J.K.B. 1137; 101 L.T. 60; 12 Digest 39, 190.

APPEAL by the plaintiff from a decision of His Honour JUDGE FORBES, dated Apr. 29, 1948, given at Birmingham County Court, rejecting the plaintiff's claim to possession of certain premises and decreeing specific performance of an agreement to renew the lease. The Court of Appeal dismissed the appeal. The facts appear in the judgment of COHEN, L.J.

R. K. Brown for the plaintiff.

J. H. Moss for the defendant.

Cur. adv. vult.

Nov. 3. COHEN, L.J., read the following judgment of the court. This is an appeal from a decision of His Honour JUDGE FORBES given at the Birmingham County Court by which he rejected the plaintiff's claim for possession and on the defendant's counterclaim decreed specific performance of an agreement to renew the lease of the premises, which consisted of offices, workshops and store-rooms at the rear of 25 and 27, Sutton Road, Erdington, in the county borough of Birmingham. The plaintiff was the widow of one Eli Barber and deposed in her evidence that she managed her husband's affairs. He died on Aug. 5, 1945, and she (his widow) was the sole beneficiary. The defendant first became interested in the premises in August, 1936. By an agreement in writing dated Aug. 10, 1936, Eli Barber let the premises to the

A defendant for a term of ten years from Aug. 3, 1936, at the yearly rent of £52 per annum. That term expired in August, 1946, and on Aug. 3, 1946, the plaintiff gave the defendant notice to quit the premises. The defendant, however, refused to do so, alleging that he was entitled to a renewal of his lease under a lease alleged to have been executed on Mar. 31, 1938, for a term expiring on Aug. 3, 1946. The only evidence in writing of this document was the counterpart, which was signed by the defendant, but not signed by the late Eli Barber, and which was produced from the custody of the defendant. The defendant, however, deposed in evidence that he and the late Eli Barber had gone together to a solicitor, Mr. C. H. Wareing, and that on the occasion of their visit to him the late Eli Barber and the defendant signed respectively the lease and counterpart of the lease. The solicitor in question, Mr. C. H. Wareing, was also called by the defendant. The learned judge's notes only show that Mr. Wareing said that he knew Eli Barber before 1920, but counsel who appeared for the defendant both in this court and the court below said that Mr. Wareing said a great deal more, and, indeed, corroborated the defendant's evidence that the late Eli Barber and the defendant signed respectively the lease and counterpart of the lease in his (Mr. Wareing's) office. On this evidence the learned judge found that the lease referred to in the counterclaim was duly executed by Eli Barber as lessor, and, as it had been lost, he admitted the counterpart as evidence of its contents. He found that the option contained in the lease had been duly exercised and decreed specific performance of the covenant to grant a further lease. The plaintiff, by her defence to counterclaim, had taken the objection that there was no memorandum in writing of the covenant to grant a further lease sufficient to satisfy the Law of Property Act, 1925, s. 40, but the learned judge held that the lost lease was a sufficient memorandum.

D From this judgment the plaintiff appeals, and counsel on her behalf has submitted that there was no evidence on which the learned judge could hold that the lease in question was signed, sealed, and delivered by the late Eli Barber. Alternatively, he submitted that the learned judge was wrong in law in holding that there was a note or memorandum sufficient to satisfy s. 40. E In our opinion, the first argument cannot be sustained. If the evidence of the defendant and Mr. Wareing was admissible, it clearly established that the lease had been signed by the late Eli Barber. In our opinion, the second argument also fails. Counsel for the plaintiff suggested that, if evidence of this kind could be admitted and the document thus proved be held to satisfy F s. 40, it would be easy for a plaintiff to escape the provisions of that section by going into the box and swearing that the other party to the document had executed it and that it was now lost. This argument may be a reason why the court should approach with care evidence directed to establishing in this way a memorandum sufficient to satisfy s. 40, but we see no reason in theory why the general rule as to secondary evidence should not apply. Indeed, G there is clear authority that it does apply: see *Read v. Price* (1). In that case the document in question was an acknowledgment to take the case out of the Statute of Limitations, and the relevant section was s. 5 of the Civil Procedure Act, 1833, but LORD COZENS-HARDY, M.R., made some observations of general import where he said ([1909] 2 K.B. 730):

H "You may prove the existence of the writing by the ordinary law of evidence, and when the writing is lost, and the proof of the loss is satisfactory to the court, you may give secondary evidence of the contents of the lost document, just as in cases where writing is required under the Statute of Frauds you can always prove the existence of the writing by parol evidence, if proof is given of the loss of the written document."

Indeed, were it otherwise s. 40 might be made an instrument of fraud, for a party desirous of escaping from his obligation under a contract might

destroy the written evidence of that contract, thus making it impossible for the opposite party to prove the contract.

In the present case the learned judge found as a fact that the lease had been executed, that it had been lost, and he accepted the counterpart as secondary evidence of its contents. There seems to us to be ample evidence on which he could so find, and in these circumstances it is impossible for us to interfere with the order he has made. In our opinion, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Sweepstones*, agents for *Margetts & Ritchie*, Birmingham (for the plaintiff); *G. Martin & Co.*, agents for *Charles H. Wareing*, Birmingham (for the defendant).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

Re ITTER (*deceased*). DEDMAN AND OTHERS *v.* GODFREY AND ANOTHER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Ormerod, J.), November 10, 1948.]

Will—Alteration—Evidence of original contents—Dependent relative revocation—Infra-red photography to reveal words hidden by slips of paper—Words “apparent” before the alteration—Wills Act, 1837 (c. 26), s. 21.

By a codicil, dated Feb. 22, 1944, to a will, dated Nov. 5, 1942, the testator, who died on Apr. 6, 1946, purported to give certain legacies to the plaintiffs. The amounts of these legacies were written on strips of paper pasted over words and figures appearing in the original document, but the alteration was not executed as a will in accordance with the Wills Act, 1837, s. 21. Letters of administration were granted to the defendants with the amounts of the legacies left blank. The plaintiffs contended that there had been no effective revocation of the original bequests and applied for leave to subject the original codicil to infra-red photography or other similar process, or, alternatively, that an expert be appointed to examine and report on the codicil.

HELD: (i) the doctrine of dependent relative revocation applied, the use of a photographic process to ascertain the state of the document in its original form was permissible, and an expert would be appointed by the court for that purpose.

(ii) even if the doctrine did not apply, if the original words could be read by means of this process, they would be “apparent” within the meaning of the Wills Act, 1837, s. 21, so as to prevent effect being given to any alteration which was not itself executed as a will.

[AS TO DEPENDENT RELATIVE REVOCATION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 89, 90, para. 127; and FOR CASES, see DIGEST, Vol. 44, pp. 361-365, Nos. 1944-1978.]

Case referred to:

- (1) *In the Goods of Horsford*, (1874), L.R. 3 P. & D. 211; 44 L.J.P. & M. 9; 31 L.T. 553; 44 Digest 307, 1381.

ADJOURNED SUMMONS to determine whether an order should be made permitting the use of infra-red photography or other similar process to ascertain certain passages in a hand-written codicil to a will which were concealed by slips of paper with writing on them pasted over those passages, or, alternatively, applying for the appointment of an expert to examine and report on the will.

The plaintiffs were legatees under a codicil, dated Feb. 22, 1944, to the will of the testatrix. This codicil, which was in the handwriting of the testatrix

A and purported to give substantial legacies to the plaintiffs, had slips of paper with writing on them pasted over other writing in each of the clauses purporting to bequeath the legacies. The attesting witnesses were unable to say whether the slips were on the document at the time of its execution. Letters of administration with the codicil annexed were granted to the defendants with blanks referring to the matter covered by the slips. The plaintiffs claimed revocation of the letters of administration, and, since the words could be made visible, the granting of the letters of administration with the inclusion of the original writing. Expert evidence was given of the methods which could be adopted for photographing the document with the object of ascertaining the words beneath the slips of paper pasted over them, and it was stated that no physical damage to, or interference with, the document would be involved. ORMEROD, J., B held, reversing the decision of the registrar, that the plaintiffs were entitled to have the document photographed by infra-red or other process and directed that an expert be appointed for that purpose.

Sophian for the plaintiffs.

R. T. Barnard for the defendants (administrators of the estate).

C ORMEROD, J. : I think that an order should be made on this summons. It is, so far as I know, the first time that an application has been made for the consent of the court to the use of this modern scientific process to photograph a will to ascertain the truth which lies behind a piece of paper. If the truth can be obtained by this method the fact that it has not been done before is no reason why it should not be done now, or in the future.

D The argument on behalf of the plaintiffs is put in two ways. First, it is said that it is a case of dependent relative revocation, and, therefore, any method may be used to ascertain the state of the document as it was originally drawn. In *In the Goods of Horsford* (1), it was held that in such circumstances the piece of paper may be removed to discover what was written underneath, but here the plaintiffs are not asking for any physical interference with the will. They E ask for the will to be photographed by a process which may enable the court to know what is under those slips of paper without any interference with the document itself. This appears to be a case where the doctrine of dependent relative revocation applies and I am satisfied that an order should be made.

F Secondly, the plaintiffs say that, even if this were not a case where the doctrine applies, an order should still be made on the ground that, if the words can be read by means of this photographic process, they are "apparent" within the meaning of s. 21 of the Wills Act, 1837. In the circumstances it is not necessary for me to decide this point, but I think it is not stretching the language of the Act too far to say that if by the use of this photographic process the words can be seen and ascertained then they are "apparent" within the meaning of the section. If, therefore, this had not been a case of dependent relative G revocation I should still have made an order on this summons. In these circumstances there will be an order for a court expert to be appointed to report on the codicil.

Order accordingly.

Solicitors : *Mount, Sterry & Co.* (for the plaintiffs); *Kingsford, Dorman & Co.* (for the defendants).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

WEBB v. JACKSON WYNESS, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Birkett, JJ.), November 24, 1948.]

Food and Drugs—Food not of nature, substance or quality demanded—Standard of quality—No standard prescribed by law—Standard to be fixed in accordance with evidence—Vinegar—Deficiency in acetic acid content—Food and Drugs Act, 1938 (c. 56), s. 3 (1).

The respondents were charged under s. 83 (1) of the Food and Drugs Act, 1938, with being responsible for the commission of an offence under s. 3 (1) of the Act, namely, selling to the prejudice of the purchaser non-brewed vinegar not of the quality demanded. The vinegar contained acetic acid to a less extent than 4 per cent. No standard of the amount of acetic acid which non-brewed vinegar should contain is prescribed by law, but it was found by the justices that public analysts, the Non-Brewed Vinegar Manufacturers' Association, and the Ministry of Food regarded 4 per cent. as the minimum amount of acetic acid which non-brewed vinegar should contain. The defence was that the respondents manufactured over 20,000 bottles a month, which they had sold to the public without any complaint. The justices dismissed the information on the ground that the prosecutor had not fully discharged the burden of proving that the vinegar was not of the quality demanded by an ordinary purchaser.

HELD: where there was no standard of quality prescribed by law, a standard must be fixed in accordance with the evidence before the court; the question for the justices was whether the vinegar sold to the public was deficient in respect of the acetic acid it contained by reference to the standard which, according to the evidence, genuine vinegar ought to contain; the fact that purchasers did not complain, and probably did not know what percentage of acetic acid the vinegar should contain was immaterial; and, therefore, the offence was proved.

[AS TO STANDARD OF QUALITY, see HALSBURY, Hailsham Edn., Vol. 15, p. 155, para. 248; and FOR CASES, see DIGEST, Vol. 25, pp. 88, 89, Nos. 146-155.]

FOR THE FOOD AND DRUGS ACT, 1938, ss. 3 and 83, see HALSBURY'S STATUTES, Vol. 31, pp. 254 and 305.]

CASE STATED by Kensington justices.

The respondents were charged, under the Food and Drugs Act, 1938, s. 83 (1), with being responsible for the commission of an offence under s. 3 (1) of the Act, namely, selling to the prejudice of the purchaser non-brewed vinegar not of the nature, substance or quality demanded. The justices dismissed the information on the ground that the prosecutor had not fully discharged the burden of proving that the vinegar was not of the quality demanded by an ordinary purchaser. The Divisional Court now allowed the appeal from the justices' decision. The facts appear in the judgment of LORD GODDARD, C.J.

Neve, K.C., and R. A. Robinson for the appellant (the prosecutor).

F. M. Landau for the respondents.

LORD GODDARD, C.J.: This is a Case stated by the justices of the Kensington Division, before whom the respondents were charged, under the Food and Drugs Act, 1938, s. 83 (1), with selling an article of food, to wit, non-brewed vinegar, to the prejudice of the purchaser, contrary to s. 3 (1) of the Act, and it was proved beyond doubt that the vinegar contained acetic acid to a less extent than 4 per cent. It was intimated to the justices, when the case first came before them, that there would be a challenge on the question whether non-brewed vinegar should contain any particular amount of acetic

acid, and, accordingly, the case was adjourned. Later, the public analyst was called and several other witnesses of great weight and standing, and it appears from the facts set out by the justices that all public analysts, the Non-Brewed Vinegar Manufacturers' Association, and others, including the Ministry of Food, regard 4 per cent. as the minimum amount of acetic acid that non-brewed vinegar should contain.

The only evidence called for the defence was that the respondents have manufactured between 20,000 and 21,000 bottles a month of this vinegar, it has been sold to the public, and there has been no complaint. That means that the respondents have been selling vinegar which, apparently, nearly all reputable brewers and manufacturers of such vinegar regard as not containing the proper amount of acetic acid. An ordinary purchaser, however, would not know that. He would only know that the stuff had the taste of vinegar on the tongue, and, possibly, its reaction on a steel implement. The justices were evidently troubled in this case and gave as their opinion :

"We were of opinion that the appellant had not fully discharged the burden of proving that the sample in question was not of the nature, substance or quality which is to be deemed to be demanded by an ordinary purchaser of non-brewed vinegar and, therefore, dismissed the information."

With all respect to the justices, I think that their decision was wrong. The question to which they should have applied their minds was : Is there a standard of quality prescribed by law, and, if there is not a standard prescribed by law, what is the standard which, on the evidence, we must prescribe ? The justices simply say that they do not find any standard. On the evidence, I think the only decision to which they could have come, if they had applied their minds to that point, was that the vinegar must contain 4 per cent. of acetic acid. It is no answer to say that the ordinary person buying this description of vinegar does not know how much acetic acid it ought to contain, and, therefore, is satisfied with anything. There must be some standard, and that standard must be fixed in accordance with the evidence which the justices have before them. The evidence in this case is overwhelming that there is a standard recognised by reputable manufacturers, by public analysts and by the Ministry of Food. The justices, therefore, ought not to have considered merely whether people who buy the vinegar complain, or whether the people who buy the vinegar know what is the proper percentage of acetic acid the vinegar should contain. They ought to have considered whether this vinegar, which has been sold to the public, is deficient in some respect, *i.e.*, in respect of the acetic acid which it contains, as regards the standard which genuine vinegar ought to contain ? For these reasons, I think this Case must go back to the justices, with an intimation that an offence was proved.

HILBERY, J. : I agree.

BIRKETT, J. : I also agree.

Appeal allowed with costs.

Solicitors : *J. Waring Sainsbury*, town clerk, Kensington (for the appellant) ; *Philip L. Ross* (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

GAMMACK v. JACKSON WYNESS, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Birkett, JJ.), November 24, 1948.]

Food and Drugs—Analyst's certificate—Analysis of sample—Form of certificate—Need of standard for comparison—Food and Drugs Act, 1938 (c. 56), s. 81 (1).

The respondents were charged under the Food and Drugs Act, 1938, s. 83 (3), that it was due to their act or default that a certain company had sold to the prejudice of the purchaser non-brewed vinegar which was not of the quality demanded, contrary to s. 3 (1) of the Act. The only evidence that the vinegar was not of the quality demanded was a public analyst's certificate, which was on the prescribed form but merely stated: " . . . as a result of my analysis, I am of opinion that the constituents of the sample included the following substances in proportions as under: acetic acid 3.54 per cent. I am of the opinion that this sample is 11.5 per cent. deficient in acetic acid."

HELD: as the analyst's certificate did not show any standard by reference to which a deficiency in acetic acid content could be measured, the magistrate was not bound to accept the certificate as evidence that the vinegar was not of the quality demanded.

Per curiam: Where an analyst's certificate is to be put in as evidence, the analyst should state enough to enable, not only the court, but also the defendant, to see exactly what is the offence with which the defendant is charged.

Dictum of LORD ALVERSTONE, C.J., in Bayley v. Cook, (1905) (92 L.T. 171), applied.

[AS TO STANDARD OF QUALITY, see HALSBURY, Hailsham Edn., Vol. 15, p. 155, para. 248; and FOR CASES, see DIGEST, Vol. 25, pp. 88, 89, Nos. 146-154.]

FOR THE FOOD AND DRUGS ACT, 1938, ss. 3 (1) and 83 (3), see HALSBURY'S STATUTES, Vol. 31, pp. 254 and 306.]

Case referred to:

(1) *Bayley v. Cook, (1905), 92 L.T. 170; 69 J.P. 139; 25 Digest 77, 67.*

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at West London, an information was preferred by the appellant, a sampling officer of the metropolitan borough of Fulham, against the respondents under the Food and Drugs Act, 1938, s. 83 (3). The charge was that, by reason of the act or default of the respondents, a company, Wills & Sons, Ltd., unlawfully sold to the prejudice of the purchaser an article of food, namely, non-brewed vinegar, which was not of the quality of the article demanded, contrary to s. 3 (1) of the Act. The sample of vinegar sold by the company bore a label "Non-brewed vinegar, manufactured by Jackson Wyness, Ltd." (the respondents), and it was sold in the condition in which it was supplied with a written warranty by the respondents. The public analyst certified that the sample included 3.54 per cent of acetic acid, and that, in his opinion, it was 11.5 per cent. deficient in acetic acid. After being served with the summons, the respondents informed the appellant that they did not require the attendance of the public analyst at the hearing, and no other evidence of the deficiency was offered. At the close of the appellant's case the respondents contended that there was no case to answer as there was no evidence to prove the percentage of acetic acid which non-brewed vinegar ought to contain and no standard for non-brewed vinegar was set up by statute or regulation. The appellant contended that, in the absence of contrary evidence, the certificate of the public analyst was conclusive proof of the

offence. The magistrate dismissed the information on the ground that there was no standard prescribed by law for the acetic acid content of non-brewed vinegar and that the analyst's certificate was too vague. The Divisional Court now dismissed an appeal from that decision.

R. A. Robinson for the appellant.

F. M. Landau for the respondents.

A

LORD GODDARD, C.J.: This is a Case stated by a metropolitan magistrate before whom the appellants were charged, under the Food and Drugs Act, 1938, s. 83 (3), that it was due to their act or default that a company named Wills & Sons, Ltd., had sold to the prejudice of the purchaser a certain article of food, non-brewed vinegar, which was not of the quality demanded, contrary to s. 3 (1) of the Act. The only evidence that was put before the

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learned magistrate, other than the formal evidence of purchase and that the necessary steps had been taken under the Food and Drugs Act, 1938, (*i.e.*, that a sample had been taken and submitted to the public analyst), was an analyst's certificate, which was in these words :

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"I certify that I received on Mar. 5, 1943, from you a sample submitted as a sample of non-brewed vinegar for analysis, which was marked No. 178. I further certify that I have analysed it and, as a result of my analysis, I am of opinion that the constituents of the sample included the following substances in proportions as under : acetic acid 3.54 per cent. I am of the opinion that this sample is 11.5 per cent. deficient in acetic acid."

D

The magistrate said that, as there was no standard prescribed by law for the acetic acid content in non-brewed vinegar, the statement in the analyst's certificate was too vague to justify a conviction, and, therefore, he dismissed the summons. We are asked to say that, on that certificate, the magistrate was bound to convict.

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Where an analyst's certificate is to be put in evidence the analyst should state enough to enable, not only the court, but also the defendant, to see exactly what is the offence—exactly why he is said to have sold an article to the prejudice of the purchaser. It was said, as long ago as 1905, by LORD ALVERSTONE, C.J. (92 L.T. 171), in *Bayley v. Cook* (1) :

"The certificate must show that the sample of milk has been compared with some standard."

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Unless it can be shown what the standard is, one cannot say that an article is deficient. There must be a standard, some yard-stick, in order to show whether there is a deficiency. In the present case, speaking for myself and, I think, I may also speak for HILBERY, J., when I read the Case and the analysis, I came to the conclusion that something entirely different was being certified from what the explanation of counsel for the appellant had shown was being certified. If it misled us, it may very well have misled other people.

G

The magistrate was not satisfied because the certificate does not say with what standard the sample had been compared. The sample is said to contain 3.54 per cent. of acetic acid, and then the analyst observes that it is 11.5 per cent. deficient in acetic acid. By a process of mathematics, *i.e.*, by starting with the 11.5 per cent. by which the sample is said to be deficient, and taking the 3.54 per cent. of acetic acid it contains, one can work out that the analyst is saying that 4 per cent. is the standard. I do not think that any court is called on to do these sums to enable it to decide whether or not a case is proved. If the analyst had certified that genuine non-brewed vinegar must contain 4 per cent. of acetic acid and no evidence had been called to controvert that, then a series of cases, to which our attention has been called but to which I need not refer, show that the analyst's opinion must be taken as conclusive, and the magistrate must have held that an offence had been committed. But I do

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not think we can say that the magistrate was bound to be satisfied on a certificate of this kind which can only be explained as containing a reference to a 4 per cent. standard if one makes calculations with decimal points and percentages. This court does not think it right in a criminal case to encourage analysts to give certificates like this which leave the matter in a vague and unsatisfactory way and can only be tested by doing these sums. Analysts should understand that their certificates should be in a form which an ordinary person, not an analyst and, perhaps, not a mathematician, can understand. These certificates may affect quite humble and unintelligent people, and it is right that they should know what it is suggested they have done wrong. In these circumstances, I think the magistrate was right in dismissing this information, and this appeal fails.

HILBERY, J. : I agree.

BIRKETT, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Cyril F. Thatcher*, Town Clerk, Fulham (for the appellant); *Philip L. Ross & Co.* (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

BECK v. BINKS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Birkett, JJ.), November 25, 1948.]

Customs—Carrying uncustomed goods with intent to defraud—Possession away from port of entry—Evasion of purchase tax on imported goods and evasion of customs duty one offence—Customs Consolidation Act, 1876 (c. 36), s. 186—Finance Act, 1944 (c. 23), s. 11 (1).

The appellant was found in Stamford Hill, London, in possession of 208 Swiss watches on which duty had not been paid. He was convicted on two counts (i) of evading customs duty on them, contrary to the Customs Consolidation Act, 1876, s. 186, and (ii) of evading purchase tax, contrary to s. 186 as applied by the Finance Act, 1944, s. 11 (1). He contended (a) that s. 186 of the Act of 1876 applied only where a person was found in possession of prohibited goods at a port of entry, and (b) that evasion of purchase tax should not have been dealt with in a separate charge.

HELD : (i) as the appellant had been found dealing with uncustomed goods with intent to defraud the Crown of duties, he was guilty of an offence against s. 186 of the Act of 1876, notwithstanding that he was found in possession of the goods inland and not at a port of entry or where the goods were landed.

(ii) by the Finance Act, 1944, s. 11 (1), purchase tax in regard to imported goods was to be regarded as customs duty, and, therefore, a person who was evading customs duty and purchase tax on the same goods was guilty of one offence only, and the conviction of the appellant of evading purchase tax was wrong.

[FOR THE FINANCE ACT, 1944, s. 11 (1), see HALSBURY'S STATUTES, Vol. 37, p. 536.]

CASE STATED by a metropolitan police magistrate.

The appellant was charged with (i) carrying uncustomed goods with intent to defraud the Crown of duties, contrary to the Customs Consolidation Act, 1876, s. 186, and (ii) evading purchase tax on them, contrary to s. 186 as applied by the Finance Act, 1944, s. 11 (1). He was convicted of both offences, and sentenced to 6 months' imprisonment on each count, the sentences to run

concurrently, and to a fine of £2,000 on each count. The Divisional Court now held that he had been rightly convicted on the first count, but that the offence of evading purchase tax on imported goods was included in the offence of evading customs duty, and, therefore, the conviction and sentence on the second count must be quashed. The facts appear in the judgment of LORD GODDARD, C.J.

A *Serjeant Sullivan, K.C., and Baerlein* for the appellant.
John Foster for the Crown.

LORD GODDARD, C.J. : This is a Special Case stated by a metropolitan police magistrate, before whom the appellant was charged with four offences, two of which were dismissed. The third charge was :

B “ Knowingly carrying uncustomed goods [208 watches] on Apr. 13, 1948, with intent to defraud His Majesty of the duties due thereon contrary to the Customs Consolidation Act, 1876, s. 186.”

The fourth charge was :

C “ Knowingly carrying goods chargeable with purchase tax [208 watches] on Apr. 13, 1948, with intent to defraud His Majesty of the tax due thereon contrary to the Customs Consolidation Act, 1876, s. 186, as applied by the Finance Act, 1944, s. 11.”

D An officer of the customs who was keeping watch on the appellant found that he was carrying in a brief case 208 Swiss watches on which duty had not been paid. The appellant was arrested in Stamford Hill, London when he was in possession of these watches, and, apparently, trying to pass them to someone else. The magistrate has found that the appellant knew that the watches were uncustomed. In any case the *onus* would be on him to show that he did not know, because the *onus* is put on him by the statute [s. 259].

E Counsel for the appellant argued that the provisions of the Customs Consolidation Act, 1876, s. 186, apply only to goods which are being dealt with —i.e., carried or taken into possession—at the port of entry because it is at the port of entry where the duty has to be paid, but it seems to me that this point is too clear for argument. Section 186 makes it an offence for anyone knowingly to acquire possession of uncustomed goods or to

F “ . . . be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon . . . ”

If a person is knowingly carrying uncustomed goods and assisting, therefore, in the smuggling of the goods, he, as much as anyone else, has an intent to defraud His Majesty of any duties due thereon. It is all part of one operation, and in this case, when the appellant was found dealing with 208 watches which were uncustomed, it is beyond question that he was carrying goods with intent to defraud His Majesty of duties thereon. Otherwise, a most extraordinary *lacuna* is left in the Act because it would be said that anyone who was dealing with smuggled goods and carrying them inland would never be guilty of an offence because he had got away from the port of entry where the goods were actually landed. I do not think that has ever yet been held

H to be the law and I am certainly not prepared so to hold now. I think it is clear that the appellant was carrying uncustomed goods with intent to defraud His Majesty of the duties thereon.

The second point is that a separate charge was put on the appellant of evading the purchase tax. It is said that where goods which are imported bear not only customs duty but also purchase tax, a person who is dealing with any such goods on which duties have been evaded is committing two offences and not one. This point depends on the wording of the Finance Act,

1944, s. 11 (1), which relates to purchase tax, and it seems to me to put the matter beyond doubt. Section 11 (1) is :

"The Customs Consolidation Act, 1876, and enactments amending that Act and other enactments (including provisions of regulations or other instruments having statutory effect) relating to customs generally shall have effect, subject to the provisions of this section and with such exceptions and adaptations as may be prescribed, in relation to chargeable goods imported into the United Kingdom, whether liable to any duty of customs or not, as if all such goods were liable to duties of customs and as if those duties included tax chargeable by virtue of importation."

By "chargeable goods" is meant goods chargeable with purchase tax. Section 11 (1) seems to me to provide that with regard to imported goods purchase tax is to be regarded as a customs duty and is made part of the customs duties. It simply increases the customs duty. Therefore, if a man evades one charge, he, no doubt, evades the other. His crime is only one crime and not two. He is evading customs duty and he is evading the purchase tax, but, by the operation of s. 11 of the Act of 1944, the two are to be regarded as one thing—customs duty. The appellant has been convicted of evading customs duty, and, as that duty includes both the customs duty and the purchase tax, he cannot be convicted of two offences. He is guilty of one offence, and, therefore, the conviction and the sentence passed on the charge alleging the evasion of purchase tax must be quashed.

HILBERY, J.: I agree.

BIRKETT, J.: I also agree.

Appeal dismissed on first point, and allowed on second point. The respondent to pay half the appellant's taxed costs.

Solicitors: *Alfred Kerstein & Co.* (for the appellant); *Solicitor for the Customs and Excise* (for the Crown).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

PARRY v. ANGLESEY ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Birkett, JJ.), November 25, 1948.]

Rating—Agricultural building—Shed used as garage—Car used partly for farm and partly for private purposes—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 2 (2)—Agricultural Rates Act, 1929 (c. 26), s. 1 (1).

By the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), "agricultural buildings" are defined as "buildings . . . occupied together with agricultural land . . . and . . . used solely in connection with agricultural operations thereon."

The ratepayer, a farmer, used a motor car partly for purposes connected with his farm and partly for private purposes, and he claimed that the building in which the car was garaged was an "agricultural building" within the meaning of s. 2 (2) of the Act of 1928, so as to be exempt from rates under the Agricultural Rates Act, 1929, s. 1 (1).

HELD: whether the use of the car as a private car was so slight that the doctrine *de minimis* applied was a matter of degree and a question of fact for the justices to decide, and they were justified in holding on the facts that a building which garaged a car used substantially for private domestic purposes was not used solely in connection with agricultural operations.

[AS TO "AGRICULTURAL BUILDINGS," see HALSBURY, Hailsham Edn., Vol. 27, p. 379, para. 809.]

CASE STATED by Anglesey Quarter Sessions, pursuant to the Rating and Valuation Act, 1925, s. 31 (5).

The ratepayer, a farmer, used a motor car for general purposes connected with his farm, and, so far as permitted by law, also for general domestic or recreational purposes. The car was kept in a shed on the farm, which was "agricultural land" within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2). Before Dec. 12, 1947, no assessment for rates had been made in respect of the shed, but on that date the Anglesey Assessment Committee confirmed a proposal made by the rating authority for the amendment of the valuation list by increasing the ratepayer's assessment, the increase being in respect of the shed. The ratepayer appealed to quarter sessions on the ground that the shed was an "agricultural building" within the meaning of s. 2 (2) of the Act of 1928, but on Feb. 20, 1948, his appeal was dismissed by quarter sessions whose order the Divisional Court now affirmed.

Scott Henderson, K.C., and *Blease* for the ratepayer.

Simes, K.C., and *W. L. Roots* for the assessment committee.

LORD GODDARD, C.J.: This is a Special Case stated by the county of Anglesey Quarter Sessions and raises a very short point. The ratepayer, who is a farmer, keeps a motor car, which he uses for a variety of purposes. He uses it for the purposes of his farm and to take his produce to market, and he also uses it for a variety of domestic and social purposes—to go to a place of worship on Sundays and to go to the cinema. As it is put in the Special Case, "so far as permitted by law"—I suppose that means so far as the allowance of petrol permits—he has used it for social and domestic purposes. Therefore, the car is not merely a farm waggon or implement, but partly that and partly a private car.

The Agricultural Rates Act, 1929, grants exemption from rates during the current half-year in the case of agricultural hereditaments to which the Rating and Valuation (Apportionment) Act, 1928, applies. Section 2 (1) of the Act of 1928 defines "agricultural hereditament" as "any hereditament being agricultural land or agricultural buildings," and s. 2 (2) defines "agricultural buildings" as

"... buildings ... occupied together with agricultural land or being or forming part of a market garden, and in either case used solely in connection with agricultural operations thereon."

The ratepayer claims that the building in which the car is kept is an "agricultural building" within the meaning of s. 2 (2).

The justices would seem to have come to the conclusion that the car is both a private car and a farmer's car. It was for them to decide as a question of fact whether the use as a private car was so slight and so occasional that the doctrine of *de minimis* might fairly be applied. It is a matter of degree. It seems to me clear, on the facts which they have found, that the justices have applied their minds to the right point and have come to the conclusion that they cannot say that a building which garages a car which is used substantially for private domestic purposes and not merely for agricultural purposes can be regarded as a building used solely in connection with agricultural operations. Therefore, I think the question was essentially one of fact for the justices, and we cannot disturb their finding.

HILBERY, J.: I agree.

BIRKETT, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Ellis & Fairbairn* (for the ratepayer); *Whitfield, Byrne & Dean*, agents for *R. Gordon Roberts & Co.*, Llangefni (for the assessment committee).

[Reported by **F. GUTTMAN, Esq.**, Barrister-at-Law.]

LYONS v. MAY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Birkett, JJ.), November 24, 1948.]

Road Traffic—Insurance against third party risks—Permitting vehicle to be used on road without policy of insurance being in force—Owner's policy covering only owner and persons in his employ—Lorry driven back to owner's premises by garage proprietor—Garage proprietor not in owner's employ—Garage proprietor not insured—Disqualification—"Special reasons"—Road Traffic Act, 1930 (c. 43), s. 35 (1) (2).

At the request of the owner, a garage proprietor drove a motor lorry, which he had been repairing, back to the owner's premises. The garage proprietor had no policy of insurance in force which covered the lorry, and the lorry owner's policy covered only himself and any authorised person in his employment. The lorry owner had not inquired whether the garage proprietor had a policy which would cover his driving of the lorry.

HELD : (i) a person who is ignorant of the fact that there is no policy of insurance covering a vehicle may be guilty of an offence if he permits the use of the vehicle while uninsured ; the garage proprietor was not a person in the lorry owner's employment while driving the lorry to the owner's premises ; and, therefore, the insurance did not cover the lorry at the time and the lorry owner was guilty of the offence of permitting the lorry to be used on the highway without a policy of insurance against third party risks being in force in respect of it, contrary to the Road Traffic Act, 1930, s. 35 (1).

(ii) as the lorry owner's request to drive the car to his premises was made to a garage proprietor, who, according to the ordinary commercial experience of people, would usually be covered by a policy of insurance because of his trade requirements, there were special reasons for not disqualifying the lorry owner from holding a licence under s. 35 (2) of the Act.

Rennison v. Knowler ([1947] 1 All E.R. 302 ; *sub nom. Knowler v. Rennison* ([1947] K.B. 488 ; 176 L.T. 271), *distinguished*.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Case referred to :

- (1) *Rennison v. Knowler*, [1947] 1 All E.R. 302 ; [1947] L.J.R. 555 ; 111 J.P. 171 ; *sub nom. Knowler v. Rennison*, [1947] K.B. 488 ; 176 L.T. 271 ; 2nd Digest Supp.

CASE STATED by Glamorgan justices.

At a court of summary jurisdiction sitting at Bridgend the respondent was charged with having permitted a motor lorry to be used on a road in Glamorgan without a policy of insurance in respect of third party risks being in force, contrary to the Road Traffic Act, 1930, s. 35 (1). The only policy of insurance applicable to the lorry covered the respondent and any duly authorised person in his employ. At the respondent's request, the lorry was driven to his premises by a garage proprietor who had been requested by the respondent to repair it. The justices held that no offence had been committed because the garage proprietor had been employed by the respondent to drive the car to the respondent's premises. The Divisional Court now allowed the appeal from the justices' order.

Featherstone for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Glamorgan in which the respondent was charged with permitting a certain motor lorry to be used on a highway without a policy of insurance against third party risks being in force in respect of it, contrary to the Road Traffic Act, 1930, s. 35 (1). The respondent sent his lorry to a garage to be repaired, and, on finding it inconvenient to fetch it when it was ready for delivery after certain repairs had been done, he wrote to the garage proprietor, saying :

“I would be extremely obliged if you would endeavour to deliver lorry at my premises on Sunday, Feb. 29, 1948, as urgently required.”

The lorry was driven by the garage proprietor in accordance with that request, and at that time he had no insurance policy in respect of that lorry. The lorry was only covered if it was being driven by the respondent or any duly authorised person in his employ. It would follow, therefore, contrary to the opinion of the justices, that, when it was being driven by the garage proprietor, it was not being driven by a person in the respondent's employment. The garage proprietor was not employed by him.

The cases which have been cited to us show that *scienter* is not necessary, that is to say, a person who is ignorant of the fact that there is no policy of insurance covering a vehicle, may, nevertheless, be held to commit an offence if he permits the use of the vehicle. It is difficult to say that the respondent did not permit the garage proprietor to drive the lorry, because he asked him to do so, and the garage proprietor agreed. The respondent did not ask the garage proprietor whether he had a policy which would cover his driving of the lorry, and the respondent's policy clearly covered only the respondent. Therefore, this court feels that an offence has been committed, and the case must be sent back to the justices with a direction to convict.

The question then arises whether in the circumstances there were special reasons for not disqualifying the respondent for holding a licence under s. 35 (2) of the Act. Although it is primarily a matter for the justices, the court thinks that the case is entirely different from *Rennison v. Knowler* (1) where a man allowed a friend to drive his motor cycle in the belief that his own policy covered the cycle at the time, which it did not. In this case we think that there are special reasons. The request that the lorry should be delivered to the respondent's premises was made to a man who, in the ordinary course and according to the ordinary commercial experience of people, would be covered by a policy of insurance because his trade would require him to have such a policy to cover the driving of a lorry, *e.g.*, for testing and for putting it on the road. We think the case must go back to the justices with a direction to convict, but with an intimation that there are ample grounds for the justices to find special reasons for not disqualifying the respondent for holding a licence under s. 35 (2) of the Act.

HILBERY, J.: I agree.

BIRKETT, J.: I also agree.

Case remitted.

Solicitors : *Torr & Co.*, agents for *Richard John*, Cardiff (for the appellant).
[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Explained. Re MCGREADY. [1950]
1 All E.R. 30.

SHEARS v. MATTHEWS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Birkett, JJ.),
November 23, 1948.]

Highway—Negligence of driver causing hurt to a person—Injury to cyclist by driver opening door of stationary motor lorry—Highway Act, 1835 (c. 50), s. 78.

On arriving at his destination a lorry driver opened the door on the off-side of his lorry, and, in doing so, struck a cyclist who was passing. He was charged under the Highway Act, 1835, s. 78, which makes it an offence for "the driver of any carriage whatsoever on any part of any highway . . . by negligence or wilful misbehaviour" to "cause any hurt or damage to any person . . . passing or being upon such highway."

HELD : section 78 was aimed at negligence in driving and did not cover an act which had no connection with driving, and, therefore, assuming that the lorry driver was guilty of negligence, he had not committed an offence under the section, as his negligence was not in connection with driving.

[AS TO DRIVING OFFENCES, see HALSBURY, Hailsham Edn., Vol. 31, p. 664, para. 971 ; and FOR CASES, see DIGEST, Vol. 26, pp. 437, 438, Nos. 1547-1558.]

CASE STATED by Wiltshire justices.

The respondent, a lorry driver, opened the off-side door of the lorry while it was stationary in a street, and the door struck and injured a cyclist who was passing. On Apr. 5, 1948, the respondent was charged before a court of summary jurisdiction, sitting at Melksham, with having committed an offence under the Highway Act, 1835, s. 78. The information was dismissed by the justices, and the Divisional Court now dismissed an appeal from their decision.

Vernon Gattie for the appellant.

J. T. Molony for the respondent.

LORD GODDARD, C.J. : This is a Case stated by justices of Wiltshire. They dismissed an information preferred by a police officer who certainly showed some ingenuity in charging the respondent, who was the driver of a motor lorry, with a criminal offence. The facts show that, having got to his destination, the respondent opened the door of the lorry and thereby struck a cyclist who was passing the lorry. I am assuming for the purpose of this judgment, though the justices do not find it as a fact, that the respondent was guilty of negligence. The question is whether he committed an offence under the Highway Act, 1835, s. 78, which provides :

" . . . if the driver of any carriage whatsoever on any part of any highway shall by negligence or wilful misbehaviour cause any hurt or damage to any person, horse, cattle, or goods conveyed in any carriage, passing or being upon such highway, or shall quit the same, and go on the other side of the hedge or fence inclosing the same, or negligently or wilfully be at such distance from such carriage, or in such a situation whilst it shall be passing upon such highway that he cannot have the direction and government of the horses or cattle drawing the same, or shall leave any cart or carriage on such highway, so as to obstruct the passage thereof . . . "

he shall commit an offence.

It is clear from the wording of the section that it is aimed at negligence in driving, and not at a mere casual act of negligence which has no connection with driving. In this case the respondent opened the door of his motor lorry without noticing that there was a cyclist passing by. It would be strange if he were regarded as committing an offence, but, if a passenger in the lorry had opened the door, the passenger would not be committing an offence. The justices put their opinion in this way :

"We were of opinion that the respondent had not committed an offence against the Highway Act, 1835, s. 78, because he was not the driver of the carriage or motor lorry at the time of the said accident to Margaret Phyllis Chilcott within the meaning and intention of the said section, and accordingly dismissed the information."

Perhaps that is a little unfortunately put, because, obviously, the respondent was the driver, but the negligence, if there were any, was not in connection with the driving. In my view, therefore, it was not a case within the section and the justices were right in dismissing the summons, although, as I have said, they did not express their finding in quite the true manner. The respondent was the driver, and it is not denied that he was, but the action it is alleged he committed would not, even if negligence were found, bring the case within the section. For these reasons, this appeal fails and must be dismissed with costs.

HILBERY, J. : I am of the same opinion.

BIRKETT, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Collyer-Bristow & Co.*, agents for *A. G. Smith & Son*, Melksham (for the appellant); *Pattinson & Brewer*, agents for *Lemon, Humphreys & Parker*, Swindon (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

HUNT v. MORGAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Birkett, JJ.), November 23, December 1, 1948.]

Hackney Carriage—Taxicab—Metropolitan police district—"Plying for hire"—Obligation to accept fare while travelling along street—London Hackney Carriage Act, 1853 (c. 33), ss. 7, 17 (2).

By the London Hackney Carriage Act, 1853, s. 7: "The driver of every hackney carriage which shall ply for hire at any place within the limits of this Act shall (unless such driver have a reasonable excuse, to be allowed by the justice before whom the matter shall be brought in question), drive such hackney carriage to any place to which he shall be required by the hirer thereof to drive the same not exceeding six miles from the place where the same shall have been hired . . ." and by s. 17 (2): "Every driver of a hackney carriage who shall refuse to drive such carriage to any place within the limits of this Act . . . to which he shall be required to drive any person hiring or intending to hire such carriage" shall be guilty of an offence.

On July 8, 1947, the appellant, a taxicab driver, was driving along a London street with the flag of the taximeter in the "For hire" position when he was hailed by a person wishing to hire the taxicab. The appellant, without reasonable excuse, refused to stop and accept the fare.

HELD : a taxicab driver commits no offence under the Act of 1853 by refusing to stop when hailed and can only be required to accept anyone who chooses to hire him when his cab is on a rank or in certain circumstances is stationary in a street, and, therefore, the appellant was not liable to conviction under s. 17 (2).

[FOR ACTS RELATING TO HACKNEY CARRIAGES AND CABS IN LONDON, see HALSBURY'S STATUTES, Vol. 19, pp. 106-172.]

Case referred to :

(1) *Goodman v. Serle*, [1942] 2 All E.R. 318; [1947] K.B. 808; 177 L.T. 521; 111 J.P. 492; 2nd Digest Supp.

CASE STATED by County of London Quarter Sessions.

The appellant was convicted by a metropolitan magistrate sitting at Bow Street Magistrate's Court of unlawfully refusing to drive a motor hackney carriage to a place within the limits of the London Hackney Carriage Act, 1853, not exceeding six miles, to which he was required to drive by a person intending to hire such carriage, contrary to s. 17 (2) of the London Hackney Carriage Act, 1853, and was fined 10s. The appellant was driving a taxicab in Victoria Street, London, S.W. The taxicab was not already hired and the flag of the taximeter was in the "For hire" position and not covered. A person was standing on a road "island" in Victoria Street, and, as the appellant's taxicab approached the "island," this person made clear signals and shouted to indicate that he desired to hire the taxicab. The appellant saw the person and realised that he wished to hire the taxicab, but did not stop on the ground that, in his view, the person was under the influence of drink. The appellant passed the "island," heard the person calling out "I will report you," and still did not stop. The intending passenger was not drunk or under the influence of drink. Quarter sessions dismissed an appeal by the appellant against the magistrates' decision and increased the fine to £1. The appellant now appealed to the Divisional Court who allowed the appeal and quashed the conviction.

Collard and Borders for the appellant.

Cassels for the respondent.

Cur. adv. vult.

Dec. 1. **LORD GODDARD, C.J.**, read the following judgment of the court. The appellant in this case was convicted before a metropolitan magistrate "for that he at Victoria Street, Westminster, being the driver of a motor hackney carriage did unlawfully refuse to drive the said carriage to a place within the limits of the London Hackney Carriage Act, 1853, not exceeding six miles, to which he was required to drive by a person intending to hire such carriage, contrary to s. 17 (2) of the London Hackney Carriage Act, 1853." The appellant appealed to the appeal committee of the quarter sessions for the County of London who dismissed the appeal and increased the fine imposed by the learned magistrate, but subject to a Case stated for the opinion of this court. The facts were that at 1 a.m. on July 8, 1947, the appellant was hailed by a person desiring to hire the cab at the corner of Victoria Street and Vauxhall Bridge Road. The appellant refused to stop and accept the fare, and the reason which he subsequently gave was that in his opinion the person hailing him was under the influence of drink. Both the learned magistrate and the appeal committee found that this opinion, if it was held by the appellant, was both inaccurate and unreasonable, from which it follows that he had no reasonable ground for refusing the fare if he was bound in law to drive him.

The question raised is whether a cruising taxicab driver is bound to accept anyone who hails him. It is obviously one of general importance, not only to cab drivers, but also to the members of the public, and it seems never to have been the subject of a decision. There is, no doubt, a widely held belief that a cabman, whether on the rank or not, is bound to accept a fare unless he has a reasonable excuse for refusing, and a full examination of the statutes relating to hackney carriages in London is necessary to decide whether this belief, which, at any rate, accords with the opinion both of the learned magistrate and the appeal committee, is well-founded.

The first Act dealing with hackney carriages in London to which it is necessary to refer is the London Hackney Carriage Act, 1831, an Act to amend the laws relating to hackney carriages and other conveyances. By s. 34 of that Act it was provided that :

" . . . the driver of every hackney carriage which shall be let for hire at any place within the distance of five miles from the General Post Office

... shall be obliged and compellable, if required by any person hiring such hackney carriage (unless such driver shall have a reasonable excuse to be allowed by the justices . . .) to drive such hackney carriage to any place to which he shall be so required to drive the same within the distance of five miles . . .”

A That Act repealed a very large number of old statutes which dealt with hackney carriages and coaches in London as well as other means of transport. In that Act no reference is made to standing places or, as they are commonly called, cab ranks. A reference to contemporary literature will, however, show that unofficial cab ranks did exist in London at that time, as it may be remembered that Mr. Pickwick, on May 13, 1827, set out for the Golden Cross in a cab which was the first one on the rank at St. Martins-le-Grand in order to get the coach for Rochester, but we have not been able to find any Act regulating or setting up cab ranks before the London Hackney Carriages Act, 1843. Section 29 of that Act provided that it shall be lawful for the Commissioners of Police to appoint standings for hackney carriages at such places as they shall think convenient within the Metropolitan Police District and to make regulations concerning them, and s. 33 provided that :

“ . . . every driver of a hackney carriage who shall ply for hire elsewhere than at some standing or place appointed for that purpose, or who by loitering . . . shall cause any obstruction in . . . any public street . . . shall for every such offence forfeit [a fine].”

D It may be observed that in this Act, as in another Act dealing with the subject, it seems as though to stand and to ply for hire are used as interchangeable terms meaning the same thing. For instance, in s. 31 of the 1843 Act, it is provided that nothing in the Act shall authorise any cab (which expression, for brevity, we shall use throughout to describe a hackney carriage) to stand or ply for hire opposite to the General Post Office in St. Martins-le-Grand, where obviously from the reference in Pickwick there used to be a rank. Section 33, it will be seen from the reference above, forbids a cabman to ply for hire otherwise than at a standing, so clearly for the purpose of the Act the word “ply” does not connote motion, as in common parlance it often does if one speaks of a vehicle or ferry boat plying between certain points.

We now turn to the London Hackney Carriage Act, 1853, under which the appellant was summoned. By s. 7, it is provided :

“The driver of every [cab] which shall ply for hire at any place within the limits of this Act shall (unless such driver have a reasonable excuse, to be allowed by the justice before whom the matter shall be brought in question) drive such [cab] to any place to which he shall be required by the hirer thereof to drive the same, not exceeding six miles . . .”

and by s. 17 (2) it is provided that the driver of a cab who shall commit any of the offences therein specified shall be liable to a penalty, one of such offences being thus described :

“Every driver of a [cab] who shall refuse to drive [it] to any place within the limits of this Act, not exceeding six miles, to which he shall be required to drive any person hiring or intending to hire such carriage . . .”

One must, however, turn back to s. 7, to which we have just referred, the section which imposes the duty on the driver and provides him with the defence of a reasonable excuse. The real question in this case is : What do the words in s. 7, “which shall ply for hire at any place within the limits of this Act,” mean ? Have they got the popular meaning which would certainly include a cab driving down a street with the flag up on which the words “For hire” appear, or must they be confined to the cabman on the rank ? In our opinion,

with one exception which we will mention hereafter, it is only the cabman on the rank who is obliged to accept a fare. The plying for hire referred to in s. 7, which is the material section, must, we think, be so confined. It refers to the driver of every cab which shall ply for hire at any *place* within the limits of the Act and that must, in our opinion, refer to a place appointed for the standing of hackney carriages under the Act of 1843, which is to be read together with and as part of the Act of 1853. "Place" must mean a definite point, just as the same word later in the section clearly refers to a definite destination to which the driver is required to go. It cannot mean "anywhere in a street." This view is reinforced by the fact that it is actually made an offence for a cab driver to ply for hire elsewhere than at one of those places. No doubt, the cabman who has set down a fare and is proceeding to one of those places can accept a fare if he is hailed, and it could not, we think, be held, unless he was soliciting fares as he drove along the street, that he was committing an offence against s. 33 of the Act of 1843.

That it is the standing cab and not the moving cab that must accept a fare seems to be shown also by s. 35 of the Act of 1831. As we have already said, that Act contained no provision with regard to cab ranks or standing places, but it does provide that :

"Every [cab] . . . found standing in any street or place . . . shall, unless actually hired, be deemed to be plying for hire, although such [cab] shall not be on any standing or place usually appropriated for the purpose of [cabs] standing or plying for hire . . ."

The onus of proving that he was actually hired at the time of his refusal is laid on the driver. This section is unrepealed, and it would, therefore, appear that, if a cab is standing in the street, having, for instance, just set down a passenger, the driver is bound to accept as a fare any person who desires to be driven, provided that person so informs the driver while he is still stationary and not engaged. At any rate, it seems to us clear that a cab driver commits no offence under the Act of 1853 by refusing to stop when hailed, and that he can only be required to accept anyone who chooses to hire him when he is actually on a rank or is stationary in a street.

It may not be inappropriate to hope that this matter will receive the attention of the appropriate authority which, in relation to cabs, is the Home Secretary. Conditions in 1948 are very different from what they were in 1853, when taxicabs were unknown. At present, every taxicab which is not actually hired must be driven with the flag of the taximeter in the upward position, and the words "For hire" appear on it. Modern taxicabs are now fitted with devices illuminated at night which show on the front of the roof the words "Taxi" or "For hire," and the public may well believe that in those circumstances it is open to them to demand to be driven in any cab which is not actually conveying a passenger. It is evident that in the middle of the last century when all cabs were horse-drawn, the legislature desired to discourage the crawling cab, which might easily cause obstruction in the street, for the horse would naturally be allowed to proceed at a walking pace if the cab was not actually hired. Therefore, it may well have seemed to the legislature in those days that it was desirable so far as possible to ensure that the hiring of cabs should take place at recognised ranks and not casually in the streets. Under modern conditions, the cruising taxicab is one of the commonest sights in London streets. We have, however, to deal with the law as it stands and must see that the existing statutes are not strained so as to make a man guilty of an offence unless the words of the section clearly apply to his case. A full consideration of those sections shows that the expression "Like the cabman on the rank," so often applied with regard to people bound to accept employment if offered, for instance, members of the Bar, is well-founded. It is also

to be remembered that there are no fewer than six Acts on the statute book dealing with cabs in London, Acts of 1831, 1843, 1850, 1853, 1869 and 1907. Some of the sections in these numerous statutes are obsolete. Many are obscure, as may be seen from the judgment of this court in *Goodman v. Serle* (1), and others, as this case shows, are out of date. It is, therefore, not surprising that cab drivers, the police, and magistrates, to say nothing of the general public, have difficulty in ascertaining the law on this subject and make mistakes about it. It would seem that an Act consolidating and amending, and, if possible, simplifying, the law with regard to cabs, is very desirable. The appeal is allowed with costs here and before the appeal committee.

Appeal allowed with costs.

Solicitors: *Seifert, Sedley & Co.* (for the appellant); *Solicitor for the Metropolitan Police* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

GARDNER v. JAMES.

C [KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Birkett, JJ.), November 30, 1948.]

Road Traffic—Insurance against third party risks—Use of motor vehicle not covered by insurance policy—Dismissal of charge under Probation of Offenders Act, 1907 (c. 17), s. 1 (1)—“Special reasons”—Good character—Road Traffic Act, 1930 (c. 43), s. 35 (1) (2).

D The respondent was charged, *inter alia*, with driving a motor cycle on the road without there being in force in relation to the user of it by him a policy of insurance or security for third party risks. He had only been demobilised from the army a few weeks before the commission of the offence and had purchased the motor cycle which he had assembled himself and was anxious to test. He was stopped a short distance from the garage in which the machine was kept. The justices dismissed the charge under the Probation of Offenders Act, 1907, s. 1 (1), on the ground that the respondent was of good character and having regard to the extenuating circumstances in which the offence was committed.

E HELD: this was not a case which could be dealt with under the Probation of Offenders Act, 1907; it was a deliberate commission of an offence; and there were no reasons constituting “special circumstances” entitling the justices to refuse to suspend the licence.

F *Quelch v. Collett* ([1948] 1 All E.R. 252; [1948] 1 K.B. 478), *distinguished*.

[AS TO COMPULSORY INSURANCE OF MOTOR VEHICLES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 560-563, paras. 907-912.]

G FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Cases referred to:

(1) *Whittall v. Kirby*, [1946] 2 All E.R. 552; [1947] K.B. 194; [1947] L.J.R. 234; 175 L.T. 449; 111 J.P. 1; 2nd Digest Supp.

(2) *Quelch v. Collett*, [1948] 1 All E.R. 252; [1948] 1 K.B. 478; [1948] L.J.R. 956; 112 J.P. 167.

H CASE STATED by Warwick justices.

At a court of summary jurisdiction sitting at Royal Leamington Spa, the respondent was charged (*inter alia*) that he did use a motor cycle there not being in force in relation to the user thereof such policy of insurance or such security in respect of third party risks as complied with Part II of the Road Traffic Act, 1930, contrary to s. 35 of the said Act. The justices dismissed the information under the Probation of Offenders Act, 1907, s. 1 (1).

At the hearing the following facts were proved. The respondent was driving a motor cycle at 8.35 p.m. on May 19, 1948. When stopped by a police constable and asked to produce his insurance certificate he was unable to do so and said: "I am buying this motor cycle from my boss, the R. Garage, where I work. I have not got an insurance certificate. I had the bike about two weeks ago and this is the first time I have had it out." A director of R. Garage, Ltd., the respondent's employer, stated that he had sold the motor cycle in question to the respondent on or about Apr. 20, 1948, and that the machine was not covered by insurance. The justices were of the opinion that the respondent's behaviour had been foolish to a degree, but that the offences referred to in the informations had all arisen from the same circumstances and resulted from the same cause, namely, his over-eagerness to test the machine which he had assembled himself after being demobilised from the army. They took the view that it was possible, in view of the habit which the respondent would form in the army of driving without the requisite documents appertaining to civilian drivers, that he had, in his enthusiasm to test the machine, lost sight of the need to obtain an insurance certificate, and that the appropriate course would be to dismiss the information under the Probation of Offenders Act, 1907, s. 1 (1), having taken into account the effect of the decision in *Quelch v. Collett* (2). Being apprised of the respondent's good character and record, they felt that the circumstances of the case justified them in saying that, having regard to the health, character and antecedents of the respondent and the extenuating circumstances in which the offence was committed, it was inexpedient to inflict any punishment under the Road Traffic Act, 1930, s. 35, and in dismissing the information on ordering the respondent to pay 4s. costs. The Divisional Court now allowed an appeal by the prosecutor.

Vernon Gattie for the appellant.

The respondent did not appear and was not represented.

LORD GODDARD, C.J. : This is a Case stated by justices of the borough of Royal Leamington Spa, before whom the respondent was charged with three separate offences, driving a motor cycle without a road fund licence, driving a motor cycle which was uninsured, and driving a motor cycle for which he had no driving licence. In respect of the offences relating to road fund and driving licences, the justices convicted and fined him. They were comparatively trivial offences because, although relating to a matter in which the Exchequer is much concerned, they arise from defaults which can easily be remedied. The offence of driving a motor cycle without an insurance policy being in force, however, is a very serious thing, and one wonders what would have been thought in this case if, while the respondent was riding his motor cycle, he had run into somebody and either killed or seriously injured him. He was a mechanic at a weekly wage, and could not have contributed any substantial sum in damages, and, there being no insurance, the injured person would have got no compensation. Happily, there was not an accident, but the justices dealt with this offence under the Probation of Offenders Act, 1907, and imposed no penalty. The only reason they have set out for doing that is good character, but that is no reason, as the well-known leading case of *Whittall v. Kirby* (1) clearly decides, for their refusing to suspend the respondent's licence, and, if his mere good character cannot be a "special circumstance" for that purpose, how much less can it be a reason for refusing to convict? One is driven, in spite of what the justices have said, to the conclusion that the only reason they refused to convict and dealt with the case under the Probation of Offenders Act, 1907, was to avoid imposing a disqualification. They tell us that the respondent did not want a motor cycle for the purposes of his work, and so there was not even an element of hardship to be taken into account.

This case is not in *pari materia* to *Quelch v. Collett* (2) to which the justices refer. The court thought the justices could deal with that case under the Probation of Offenders Act, 1907, because there the defendant had been misled into thinking that he was insured. There was an insurance policy in force in respect of the motor vehicle which was being used in that case, the person who had sold the motor vehicle had undertaken to get the policy transferred, and, in the belief that it had been transferred, the defendant used the car. In the present case, there was no such circumstance at all. The respondent knew perfectly well that (a) he had not a road licence, (b) he had not a driving licence, and (c) he had not an insurance certificate, and he knew that he ought to have all those three things. Yet, with regard to the charge relating to the insurance certificate, the justices say that the case can be dealt with under the Probation of Offenders Act, 1907. It is not the class of case which can be so dealt with. It is an entirely different case from *Quelch v. Collett* (2). The offence was deliberately committed. This case must go back to the justices with a direction that a conviction must be registered, with the usual consequences.

HILBERY, J. : I agree.

BIRKETT, J. : I agree.

Solicitors : *Sharpe, Pritchard & Co.* (for the appellant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NEILD v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Tucker, Cohen and Asquith, L.JJ.), November 16, 17, 26, 1948.]

Excess Profits Tax—Exemption—Profession—Profits dependent on personal qualifications—Severance of trade from profession—Finance (No. 2) Act, 1939 (c. 109), s. 12 (3).

By s. 12 (1) of Finance (No. 2) Act, 1939, where the profits arising from any trade or business to which the section applies exceed the standard profits, the excess shall be liable to excess profits tax, but sub-s. (3) provides : "The carrying on of a profession by an individual or by individuals in partnership shall not be deemed to be the carrying on of a trade or business to which this section applies if the profits of the profession are dependent wholly or mainly on his or their personal qualifications."

The taxpayer, a member of the British Optical Association, the Worshipful Company of Spectacle Makers and the Joint Council of Qualified Opticians, carried on the activities of an optician, in the course of which he examined patients' eyes by appointment. If disease were found, he advised the patient to consult a doctor, but if no disease were found he prescribed and supplied spectacles. On occasion he would also make up spectacles from other people's prescriptions. On his appeal against an assessment to excess profits tax on the profits of his activities the commissioners found that they were mainly of a commercial nature, but that £750 out of a total profit of £2,902 was derived from the carrying on of a profession and was dependent wholly or mainly on the personal qualifications of the taxpayer.

HELD : a business can be treated as severable, so that part of the profits are to be regarded as derived from a trade and part from a profession, only if it can be found as a fact that two separate businesses are being carried on at one and the same time ; in the present case there was only one business, found to be mainly of a commercial nature ; and accordingly, there was no evidence that part of the profits were derived from the carrying on of a profession and were dependent wholly or mainly on the

taxpayer's personal qualifications ; and, therefore, the whole of the profits of the business were assessable to excess profits tax.

Inland Revenue Commissioners v. Maxse ([1919] 1 K.B. 647 ; 120 L.T. 680), distinguished.

Decision of MACNAGHTEN, J. ([1946] 2 All E.R. 405), reversed.

[FOR THE FINANCE (No. 2) ACT, 1939, s. 12 (3), see HALSBURY'S STATUTES, Vol. 32, p. 1193.]

Cases referred to :

- (1) *Carr v. Inland Revenue Comrs.*, [1944] 2 All E.R. 163 ; 171 L.T. 177 ; 2nd Digest Supp.
- (2) *Inland Revenue Comrs. v. Maxse*, [1919] 1 K.B. 647 ; 88 L.J.K.B. 752 ; 120 L.T. 680 ; 12 Tax Cas. 41 ; Digest Supp.
- (3) *Inland Revenue Comrs. v. Ransom (William) & Son, Ltd.*, [1918] 2 K.B. 709 ; 88 L.J.K.B. 342 ; 119 L.T. 369 ; 12 Tax Cas. 21 ; Digest Supp.
- (4) *Inland Revenue Comrs. v. Marx (R.J.)*, 5 A.T.C. 25.

APPEAL by the Crown from a decision of MACNAGHTEN, J., dated July 26, 1946, and reported [1946] 2 All E.R. 405, on a Case stated by General Commissioners of Income Tax.

The taxpayer was assessed to excess profits tax at a figure of £1,042 in respect of excess profits based on his total profits for the chargeable accounting period ending Apr. 5, 1943, of £2,902. On appeal by the taxpayer the commissioners held that £750 of that profit was professional, and the remainder trading, profit, but they did not say whether they affirmed or reduced the assessment. The matter was brought before them a second time, by agreement, and this hearing was treated as an adjourned hearing, when the commissioners resolved that the appeal should be dismissed since the taxpayer's business was mainly of a "commercial" nature. On appeal, MACNAGHTEN, J., held that the £750 which was due to the carrying on of the profession of an oculist ought to be deducted from the sum representing the combined profits of both the profession and the trade carried on by the taxpayer and made an order that the assessment be reduced by £750. From this decision the Crown appealed to the Court of Appeal ([1947] 1 All E.R. 480), who remitted the case to the commissioners requesting them to answer two specific questions, reserving the question whether there was any evidence to support the findings as contained in the original Case or as might be contained in the supplemental Case. The commissioners answered these questions as follows : (1) That the profit of £750 was derived from the carrying on of a profession, and (2) that that profit, so derived, was dependent wholly or mainly on the personal qualifications of the taxpayer.

Both Cases now came before the Court of Appeal, who held that there was no evidence to support the findings of the commissioners, and allowed the Crown's appeal.

Mitchison, K.C., J. H. Stamp and R. P. Hills, for the Crown.

J. W. P. Clements for the taxpayer.

Cur. adv. vult.

Nov. 26. TUCKER, L.J., read the following judgment. This is an appeal from a judgment of MACNAGHTEN, J., in a case in which the taxpayer, John Neild, had been assessed at a figure of £1,402 in respect of excess profits based on total profits amounting to £2,902. He appealed from that decision by way of Case Stated which duly came before MACNAGHTEN, J. : see [1946] 2 All E.R. 405. MACNAGHTEN, J., reduced the assessment by eliminating £750 out of the total profits, on the basis that, on his reading of the Case Stated, the taxpayer was really carrying on two businesses, one the profession of optician and the other the trade of spectacle maker, and that, accordingly, his assessment should be reduced to the extent of the profits which resulted

from the profession. The matter arises under the Finance (No. 2) Act, 1939, s. 12, which provides :

“(1) Where the profits arising in any chargeable accounting period from any trade or business to which this section applies exceed the standard profits, there shall, subject to the provisions of this Part of this Act, be charged on the excess a tax (to be called excess profits tax) equal to three-fifths of the excess.”

Sub-section (2) provides :

“Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom.”

By sub-s. (3) :

“The carrying on of a profession by an individual or by individuals in partnership shall not be deemed to be the carrying on of a trade or business to which this section applies if the profits of the profession are dependent wholly or mainly on his or their personal qualifications.”

From that decision of MACNAGHTEN, J., the Crown appealed (see [1947] 1 All E.R. 480), and, when the case came before the Court of Appeal, the court were in doubt whether the findings of the commissioners were intended to amount to findings of the carrying on of what I call, for convenience, two separate businesses, namely, a profession and a trade, and, accordingly, the matter was remitted to the commissioners who were requested to answer two specific questions. Those questions were ([1947] 1 All E.R. 483) :

- “1. Whether the profit, the taxpayer appealed from, or any, and, if so, what, part thereof, was derived from the carrying on of a profession.
2. If question 1 is answered in the affirmative, whether the profit so derived was dependent wholly or mainly on the personal qualifications of the appellant.”

Before taking that course, the court clearly intimated that, when those questions were answered and the case could be considered in its entirety, the question was reserved whether there was any evidence to support the findings as contained in the original Case or in the Supplemental Case. The commissioners having answered the questions, the Case comes before us, and the matter which falls to be decided now is whether, on these two Cases, there was evidence to support a finding that there were two businesses being carried on.

It is now necessary to refer to the facts as found in the two Cases. They were that since Nov. 5, 1935, Mr. Neild has carried on the activities of an optician in Lincoln, and, that :

“... he is and was during the chargeable accounting period in question a member of the British Optical Association and the Worshipful Company of Spectacle Makers and the Joint Council of Qualified Opticians. His premises include a waiting room and a consulting room. Optical frames without glasses and unpriced are exhibited in a show window at the entrance to his premises. The general procedure adopted by him in the carrying on of his activities is as follows :—(a) An appointment is made. (b) Eyes are examined for disease, and if disease is found the person is advised to consult an eye doctor. (c) If no disease is found, the refraction of the eyes is worked out. (d) Lenses are then prescribed having regard to the type of work, etc., the person is engaged on. (e) Rough lenses are then cut at the correct angles in accordance with the prescription. (f) ... his mechanics shape and frame them. (g) The appellant tests the correctness of the spectacles when completed. The estimated average number of examinations made per day is 15. A fee of 10s. 6d. is charged

for examination of the eyes and supplying the prescription in cases where he himself does not make the spectacles and a fee of 5s. for examination without a prescription. A fee of 5s. is included in the inclusive charge for examination and the supplying of spectacles. Spectacles are on occasion made up from other people's prescriptions. He advertises in the local press, in magazines, and on cinema screens and 'buses, and such advertising is carried out on lines approved by the British Optical Association."

The commissioners found that: "The gross profit, *i.e.*, the profit before debiting the overhead expenses, was £4,185, and the nett profit of the said chargeable accounting period in question as computed for purposes of excess profits tax was £2,902." The commissioners held that £750 of the profit of £2,902 for the chargeable accounting period ending on Apr. 5, 1943, was professional and the remainder trading profit. They having so found, the first hearing ended, but, the inspector of taxes and the accountant representing the taxpayer having agreed that on those findings the matter was not concluded and that further findings were necessary and desirable, the matter was brought before the commissioners a second time, by agreement, and the further hearing was treated as an adjourned hearing. At that hearing the accountant representing the taxpayer contended that the fact that the taxpayer sold spectacles did not preclude him from being treated as a professional man, and quoted from the case of *Carr v. Inland Revenue Comrs.* (1). The Crown contended:

"(a) That the taxpayer's business was a single activity and not two separate activities one of which was professional and the other a merchant's business. (b) That, as the commissioners had found that out of a profit of £2,902 only £750 represented professional profit, the taxpayer was not carrying on a profession the profits from which were dependent wholly or mainly on his personal qualifications. (c) That the whole of his profits were liable to assessment to excess profits tax and the assessment should be confirmed. The commissioners resolved that the appeal be dismissed as, in their opinion, the taxpayer's business was mainly of a commercial nature, and, therefore, liable to excess profits tax."

That was the position in which the matter stood before the Case was remitted to the commissioners for a further hearing. As a result of the further hearing, a Supplemental Case was stated, answering the specific questions which had been put by this court, as follows:

"On June 26, 1947, we heard both parties to the appeal. We reconsidered the facts and evidence on which we stated the Case dated Mar. 11, 1946. We heard no further evidence. We, the commissioners, answer the questions set out in the order of the Court of Appeal dated Mar. 7, 1947, as follows:—(1) That of the profit, the subject of the assessment appealed from, £750 was derived from the carrying on of a profession. (2) That the profit of £750, so derived, was dependent wholly or mainly on the personal qualifications of the appellant."

The question which now falls to be decided is whether, on the facts set out in the Case, there was any evidence on which the commissioners could find that part of the profit of the taxpayer's business was derived from the carrying on of a profession. I am prepared to assume that the findings in the Supplemental Case must be taken to involve a finding of the existence of a separate profession. This requires consideration of the principle to be derived from *Inland Revenue Comrs. v. Maxse* (2). In that case Mr. Maxse was the proprietor, editor and publisher of the NATIONAL REVIEW. He was also a journalist and as such contributed most of the articles to the NATIONAL REVIEW, for which he received no remuneration other than the profits derived from the sale of the magazine. He was assessed to excess profits duty, but on appeal he was held by the commissioners to be exempt on the ground that

he was carrying on a profession the profits of which were dependent mainly on his personal qualifications. SANKEY, J., on appeal, held that on the facts found he was conducting an ordinary commercial business and that there was no evidence that he was carrying on a profession within the meaning of the Finance (No. 2) Act, 1915, s. 39. Up to this point neither Mr. Maxse nor the Crown had contended that the business carried on by him was severable and consisted of (a) the profession of journalist and (b) the trade of publisher. In the Court of Appeal, however, SWINFEN EADY, M.R., took this point in the course of the argument and the court ultimately held that this was the true view on the facts found. It is one of only two reported cases where this process of severance has been upheld. The other is *Inland Revenue Comrs. v. William Ransom & Son, Ltd.* (3), where a company owned a factory in which they carried on business as manufacturing chemists and also occupied a farm where they grew herbs for the purpose of the factory. It was held that there was evidence to support the finding that the company was engaged in husbandry (which was exempt from excess profits duty) and that as it was possible for the commissioners to separate the business of husbandry from the other business there was nothing in law to prevent them from doing so.

In *Ransom's* case (3) there was complete physical separation in fact, and the commissioners found that the profits of the farm could be ascertained and excluded from the profits of the business as a whole. With regard to *Maxse's* case (2), I adopt the language used by WARRINGTON, L.J., in *Inland Revenue Comrs. v. Marx* (4) (5 A.T.C. 30), where he said:

"In my opinion in order to bring the case within the principle of *Maxse's* case (2) there must be a finding that the taxpayer in question was carrying on—supposing he were carrying on a professional business—he was carrying on a profession separate from the trade or business, and that the profits of the profession so carried on were severable from the profits of the trade or business, so that when so severed those profits might be exempted from excess profits duty . . ."

This shows that it is erroneous to say, "Here is a business which involves substantial professional activities and substantial business activities, we will accordingly apportion the profits equitably between the two." It is necessary to find that there are, in fact, two separate businesses being carried on at one and the same time. I do not think the commissioners in the present case could have found as they have if they had applied the correct test—in other words, there was, in my opinion, no evidence to support their finding. The business carried on by the taxpayer was, in fact, one business. By its very nature it required a man with professional qualifications to carry it on and part of his activities were purely professional, but it did not, thereby, become two separate businesses. I think that when MACNAGHTEN, J., said in the present case ([1946] 2 All E.R. 407) with reference to *Maxse's* case (2):

"The Court of Appeal held that he was carrying on the trade of a publisher and he was also carrying on the profession of a writer, and that the sum which ought to be allowed to Maxse for his literary contributions ought to be deducted from the profits arising from the sale of the review."

he was stating the result of that case rather too widely and using language which might cause the commissioners to overlook the fact that separation and severability are, as stated by WARRINGTON, L.J., essential to the proper application of the principle in *Maxse's* case (2).

In the result, therefore, I have arrived at the conclusion that there is nothing in the original Case or the Supplemental Case to justify a finding that any part of the profit, the subject of the assessment appealed from, was derived from the carrying on of a separate and severable profession, which is how the finding of the commissioners must be read if the reduction of £750 from the profits

ordered by MACNAGHTEN, J., is to stand. Whether or not there is a separate and severable profession is, of course, a question of fact. This was emphasised by WARRINGTON, L.J., in his judgment in *Inland Revenue Comrs. v. Marx* (4) referred to above. In my view, the commissioners could only have arrived at their findings in the Supplemental Case on the view that there were professional activities involved in the business which they valued at £750. There was no evidence to support a finding that the profession was separate and severable from the trade, which finding is necessary if the assessment based on the total profits is to be reduced.

On this footing the findings of the commissioners in both the cases must be approached on the basis that there was, in fact, at all times only one business. The commissioners have found in the original Case that £750 of the total profits of £2,902 was professional and the remainder trading profit. They also found the business was mainly of a commercial nature, and in the Supplemental Case they have found that only £750 of the profit was dependent wholly or mainly on the personal qualifications of the taxpayer. I think it would be impossible on these findings to hold that this business, regarded as a whole, is a profession the profits of which are dependent wholly or mainly on the personal qualifications of the taxpayer. Accordingly, the case can be dealt with on the findings of the commissioners without the necessity of its being once more remitted to them for further findings, a course which is clearly to be avoided unless we are compelled to adopt it. For these reasons I would allow this appeal from the judgment of MACNAGHTEN, J., and restore the original assessment of £1,402.

COHEN, L.J.: I agree.

ASQUITH, L.J.: I also agree.

Appeal allowed with costs (there being an arrangement as to costs satisfactory to both sides).

Solicitors: Waterhouse & Co. (for the taxpayer); Solicitor of Inland Revenue (for the Crown).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

LOWE AND ANOTHER v. STC

Considered. LONDON COUNTY COUNCIL v. HAYS WHARF CARTAGE LTD. [1953] 2 All E.R. 34.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Birkett, J.J.), November 26, 1948.]

Motor Vehicle—Licence—Rate of duty—Altered condition of vehicle—Removable boards fitted to sides of lorry—Whether “loose equipment”—Finance Act, 1922 (c. 17), s. 14 (1) (2)—Road Traffic Act, 1930 (c. 43), s. 26.

To enable a motor lorry to carry coal slack without scattering it on the road, boards were fitted to the sides of the vehicle by means of slots. The unladen weight of the vehicle was just under 3 tons without the boards and just over 3 tons with the boards, and the boards were not fitted when the vehicle was used for other purposes. The vehicle was licensed as a 3 ton vehicle and the appellants were charged, under the Finance Act, 1922, s. 14 (2), with unlawfully using it in an altered condition which brought it within a class of vehicle to which a higher rate of duty was applicable under s. 14 (1). The appellants contended that, under the Road Traffic Act, 1930, s. 26, the boards should not be included in calculating the weight of the vehicle as they were “loose equipment” within the meaning of that section.

HELD: since the result of fixing the boards to the vehicle was that the vehicle was capable of carrying much larger loads, the boards could not be regarded merely as “loose equipment” within the meaning of the Road Traffic Act, 1930, s. 26, so as not to be included in the weight

of the vehicle (*Darling v. Burton* (1928 S.C. (J.) 11) *distinguished*), and, therefore, the vehicle was being used in an "altered condition" within the meaning of the Finance Act, 1922, s. 14 (1), and the appellants were liable to a penalty under s. 14 (2).

[AS TO LICENCES FOR MECHANICALLY-PROPELLED VEHICLES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 425-431, paras. 923-928, and 1948 Supplement.]

Case referred to :

(1) *Darling v. Burton*, 1928 S.C. (J.) 11 ; Digest Supp.

CASE STATED by Kidderminster justices.

On May 7, 1948, at a court of summary jurisdiction sitting at Kidderminster, the appellants were charged, under the Finance Act, 1922, s. 14 (2), with having failed to pay the higher rate of duty to which a mechanically-propelled vehicle became chargeable, under s. 14 (1), by reason of the fact that it was used in an altered condition. The vehicle had been licensed as a vehicle used for the conveyance of goods and as weighing not more than 3 tons, and an annual licence of £35 had been taken out in respect of it under the Finance Act, 1920, s. 13 and sched. II, para. 5 [as amended by the Finance (No. 2) Act, 1945, s. 4 (3) and sched. II, pt. II.] On Mar. 3, 1948, it was carrying a load of coal slack, and to prevent the slack from scattering on the road, boards were attached to the sides of the lorry by means of slots. The lorry had been used with the boards on several occasions, although on the majority of occasions that it had been in use it was used without the boards. It weighed 2 tons, 19 cwt., 3 qrs., without the boards, and 3 tons, 1 cwt., 1 qr., with the boards. The appellants contended that the boards were "loose equipment" within the meaning of the Road Traffic Act, 1930, s. 26, and, therefore, should not be included in calculating the weight of the vehicle. The justices held that the boards could not be regarded as loose equipment, but were alternative parts which had been ordinarily used with the vehicle, within the meaning of s. 26 of the Act of 1930, and that the vehicle had been used in an altered condition, within the meaning of the Finance Act, 1922, s. 14 (1), and, accordingly, they convicted the appellants and fined them £2. The Divisional Court now dismissed the appeal from the decision of the justices.

D. Karmel for the appellants.

J. G. Foster for the respondent.

LORD GODDARD, C.J. : This is a Case stated by justices of the borough of Kidderminster before whom the appellants were charged that they did unlawfully use a vehicle, while a particular licence was in force, in an altered condition which brought it, under the Finance Act, 1922, s. 14, within a class or description of vehicle to which a higher rate of duty was applicable. The justices convicted the appellants and imposed on them a small fine. I do not pretend that I have found this case an easy one, and I confess that my mind has fluctuated a good deal during the course of the argument, but I have come to the conclusion that the justices were right. I am not going to base my judgment solely on the ground that this is a question of fact, but I think that the justices came to the right decision on the evidence.

It is necessary to look at two sections of two different Acts of Parliament. The Finance Act, 1922, s. 14, which creates the offence with which the appellants were charged, provides :

"(1) Where a licence has been taken out for a mechanically-propelled vehicle at any rate under the Finance Act, 1920, sched. 2, and the vehicle is at any time while such licence is in force used in an altered condition or in a manner or for a purpose which brings it within, or which if it was used solely in that condition or in that manner or for that purpose would bring it within, a class or description of vehicle to which a higher rate

of duty is applicable under the said schedule, duty at such higher rate shall become chargeable in respect of the licence for the vehicle."

Section 14 (2) imposes a penalty on a person who uses the vehicle in an altered condition without taking out a licence at the higher rate of duty.

The vehicle in the present case was said to be a 3 ton vehicle, and to find out whether it was a 3 ton vehicle or not one must refer to the Road Traffic Act, 1930, s. 26, which provides :

"For the purposes of this Part of this Act, and of any other enactment relating to the use of motor vehicles on roads, the weight unladen of any vehicle shall be taken to be the weight of the vehicle inclusive of the body and all parts (the heavier being taken where alternative bodies or parts are used) which are necessary to or ordinarily used with the vehicle when working on a road, but exclusive of the weight of water, fuel or accumulators used for the purpose of the supply of power for the propulsion of the vehicle, and of loose tools and loose equipment."

This lorry, which, in its ordinary use (if I may use that expression) would be a lorry not exceeding 3 tons unladen weight, was, on the day with which the informations were concerned, being used with boards fitted to its sides for the purpose of carrying a load of slack. I have no doubt that they were so fitted because the sides of the lorry were not high enough to contain the slack and prevent it falling on the road. The boards really formed part of the sides of the lorry.

It will be observed that the section with which we are primarily concerned, *i.e.*, s. 14 of the Finance Act, 1922, speaks, not of the alteration of the lorry, but of using it "in an altered condition." It also provides that regard should be had to the fact whether, if the vehicle was used solely in that condition, it would attract a higher rate of duty. Therefore, a mere temporary use of a vehicle, if it is in an altered condition, attracts a penalty. The justices found that the vehicle had been altered and that the boards could not be regarded as loose equipment. If they had been loose equipment, they must be disregarded when ascertaining the unladen weight.

In support of his argument that the boards should be regarded as loose equipment, counsel for the appellants relied on *Darling v. Burton* (1), a Scottish case, in which the question was whether the trays with which bakers' vans are fitted should be regarded as loose equipment or as part of the van. The court held that those trays, which are merely put in the van to contain the bread, should be regarded as loose equipment. I respectfully agree that the judgment of the Lord Justice-General, LORD CLYDE, sitting in Justiciary, was right. The trays were no part of the van. They were shelves which were put into the van merely for holding the bread which was to be carried in the van. Their presence or absence made no difference to the van as a van, and they must necessarily be regarded as loose equipment. In fact, the presence of the shelves would tend to decrease, and not to increase, the load that was carried in the van, because, if the shelves were not in the van the bread could be packed much tighter than when it was placed in the ordinary manner on the shelves. In the present case the boards are affixed by means of slots to the sides of the van, with the result that the van is capable of carrying a much larger load. The sides of the van are built up with an additional structure, and, if that is done, it seems to me, on full consideration of the case, that the condition of the lorry is altered. If these boards were not fastened on to the lorry, the lorry would have a much smaller sill or surround, but when the boards are affixed, the containing part of the lorry (*i.e.*, the part surrounded by boards or planks) is a great deal higher, which enables the lorry to carry much heavier loads. I think that if we held that the justices were wrong in this case and that the boards must be regarded merely as loose equipment,

we would be opening a very wide door to evasions of the Finance Act, 1922, s. 14. Having regard to the fact that s. 14 refers to the "altered condition" of the van or lorry, we cannot say that the justices were in any way wrong in holding that this vehicle had been altered within the meaning of s. 14 by the affixing of the boards, which, in effect, turned the lorry into a vehicle the capacity of which for carrying was much greater than it would have been if that had not been done. I think the decision of the justices was right.

A Accordingly, this appeal fails.

HILBERY, J : For the reasons which my Lord has stated, I am of the same opinion.

BIRKETT, J. : I also agree.

Appeal dismissed with costs.

B Solicitors : *Mawby, Barrie & Letts*, agents for *Chulow & Rudge*, Brierley Hill (for the appellants) ; *Treasury Solicitor* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

C ALBERT E. REED & CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Tucker, Cohen and Asquith, L.JJ.), November 19, 22, 1948.]

Excess Profits Tax—"Investments"—*Temporary letting and requisition of business premises*—*Finance (No. 2) Act, 1939 (c. 109), sched. VII, pt. I, para. 6 (1).*

D A company carried on business as paper manufacturers at premises which included two stock rooms. Owing to the restriction of business at the outbreak of war the company no longer required the use of the two stock rooms, and, therefore, one was let in 1940 for a term expiring three months after the termination of hostilities (with a proviso for prior determination by the lessees in certain events), and the other was requisitioned by the Admiralty in 1940. The company was assessed to

E excess profits tax in respect of the rent and compensation rent arising from the letting and requisition respectively. They contended that such rents were income received from investments within the meaning of the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 6 (1), and that the rents were, accordingly, to be excluded from the profits for the purpose

F of excess profits tax, since it was agreed that the company did not come within para. 6 (2) (which requires the inclusion of income from investments in certain events). The Special Commissioners, interpreting the word "investment" in the ordinary business sense (an interpretation subse-

G quently prescribed by the Court of Appeal in *Inland Revenue Comrs. v. Desoutter Brothers, Ltd.* ([1946] 1 All E.R. 58) found that the temporary letting of business premises—not in themselves in the nature of an investment—the use of which was temporarily not required by the company, did not create an investment in the business sense of the word. It was conceded that no distinction was to be drawn between the letting of the one stock room, and the requisition of the other.

H **HELD :** the question was one of fact, the commissioners were entitled to take into consideration the use to which the stock rooms had been put before the war, the temporary nature of the letting and requisition, and the probability of the return of the rooms to a commercial user in the future, and there was no evidence to justify the court in interfering with the finding of the commissioners, and, accordingly, the rents were not to be regarded as income received from investments, but fell to be included in profits for excess profits tax purposes.

Inland Revenue Comrs. v. Broadway Car Co. (Wimbledon), Ltd. ([1946] 2 All E.R. 609), *distinguished.*

Decision of SINGLETON, J., reversed.

[FOR THE FINANCE (No. 2) ACT, 1939, SCHED. VII, pt. I, para. 6, see HALSBURY'S STATUTES, Vol. 32, p. 1220.]

Cases referred to :

- (1) *Inland Revenue Comrs. v. Desoutter Bros., Ltd.*, [1946] 1 All E.R. 58 ; 174 L.T. 162 ; 2nd Digest Supp.
- (2) *Inland Revenue Comrs. v. Broadway Car Co. (Wimbledon), Ltd.*, [1946] 2 All E.R. 609 ; 2nd Digest Supp.
- (3) *Inland Revenue Comrs. v. Gas Lighting Improvement Co., Ltd.*, (1923), 129 L.T. 481 ; 12 Tax Cas. 503 ; Digest Supp.

APPEAL by the Inland Revenue Commissioners from an order of SINGLETON, J., dated July 15, 1948, on a Case stated by the Special Commissioners of Income Tax.

The Special Commissioners had found that certain rents were not income from investments within the meaning of the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 6 (1). Their finding was reversed by SINGLETON, J., but the Court of Appeal now restored the decision of the Special Commissioners. The facts appear in the judgment of TUCKER, L.J.

Sir Roland Burrows, K.C., and *R. P. Hills* for the Commissioners.
Donovan, K.C., and *Graham-Dixon* for the company.

Cur. adv. vult.

Nov. 22. TUCKER, L.J., read the following judgment. This case arises in connection with an assessment to excess profits tax by virtue of the Finance (No. 2) Act, 1939, s. 12, which provides :

"(1) Where the profits arising in any chargeable accounting period from any trade or business to which this section applies exceed the standard profits, there shall, subject to the provisions of this Part of this Act, be charged on the excess a tax (to be called the excess profits tax) equal to three-fifths of the excess. (2) Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

By s. 14 it is provided :

"(1) For the purposes of this Part of this Act, the profits arising from a trade or business in the standard period or in any chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of Part I of sched. VII to this Act."

Part I of sched. VII to that Act contains in para. 6 the following provision :

"(1) Income received from investments shall be included in the profits in the cases and to the extent provided in sub-para. (2) of this paragraph and not otherwise."

It being conceded that the company concerned in the present appeal does not come within sub-para. (2), it follows that, if the profits in the present case are derived from investments, they would fall to be excluded from the assessment to excess profits tax.

The company was incorporated in 1903 and carries on the business of paper manufacturers at three mills, namely, the Aylesford Mills in Kent and two other mills. The present appeal is concerned solely with the Aylesford Mills. These premises cover 20 to 25 acres and comprise, *inter alia*, mills for the manufacture of paper, factories for the manufacture of cardboard boxes, and separate buildings, called stock rooms, which are used for the storage of

manufactured goods. This appeal is concerned with two of those stock rooms. Stock room No. 4, which has an area of 42,000 sq. ft., was completed in June, 1937, at a cost of just over £12,000. Stock room No. 5, which has an area of 54,600 sq. ft. was built in three sections at a total cost exceeding £15,000. It appears from the Case Stated that at or shortly after the outbreak of war the Ministry of Supply took over all stocks of pulp, with the result that the manufacture of paper was restricted. In consequence of this restriction, the company found that for the present it did not require the use of stock rooms Nos. 4 and 5. Consequently, by a lease dated Sept. 20, 1940, the company let No. 4 stock room to Short Brothers, Ltd., until the expiration of the period three months after the date on which His Majesty should by Order in Council declare that the then present state of hostilities had ceased (determinable, however, as provided by cl. 5 of the lease) at a yearly rent of £2,250. Stock room No. 5 was requisitioned by the Admiralty on July 25, 1940, the company having informed the Admiralty that it was available if required. In respect of that requisition the Admiralty paid the company a compensation rent of £412 a year. I should have said that the first requisition was of one section of the No. 5 stock room. In the following year the Admiralty requisitioned the remaining sections of No. 5 stock room. It is conceded that for the purposes of this appeal no distinction is to be drawn between the letting of the one stock room and the requisition of the other. The Case finds that evidence was given, which was accepted by the commissioners, that both stock rooms in question were erected and equipped by the company solely for use by them as stock rooms in their business as paper manufacturers, that this purpose still subsists, and, as soon as the production of paper becomes normal and the buildings become available, the premises will revert to their normal use as stock rooms in the company's business.

The whole question involved in this appeal was whether or not the rent and compensation rent received by the company in respect of those stock rooms was derived from an investment within the meaning of the schedule. It was decided in *Desoutter's* case (1) that the word "investment" is not a word of art, but is to be interpreted in an ordinary business commonsense way as businessmen would deal with it. The commissioners in the present case, perhaps anticipating that decision, or, possibly, applying previous decisions relating to the old excess profits duty, have so interpreted the word. They say:

"In our opinion, up to the respective dates of the lease and requisition the buildings, though assets of the business, plainly were not investments in the business sense of that word."

So it is clear that they approached the question from the right angle, and the only question is whether or not there was evidence to support their conclusion. That is a pure question of fact and unless it can be said that there was no evidence to support their finding or unless it is manifest that they in some way dealt with the matter on a wrong principle or took into consideration matters which were irrelevant, this court cannot interfere with the finding of the commissioners.

It is said by counsel for the company that this case is to all intents and purposes indistinguishable from a case decided in this court, namely, *Inland Revenue Comrs. v. Broadway Car Co., Ltd.* (2). Counsel says that the case is indistinguishable on its facts from that case and that the commissioners in the present case have misdirected themselves by considering that, because the letting was only a temporary one (as they described it), that was conclusive against the view that it could be an investment. *Inland Revenue Comrs. v. Broadway Car Co., Ltd.* (2) decided that there was evidence to justify the commissioners in arriving at the conclusion to which they had come in that case. That is all the case decided. It is true that on its facts the case is somewhat similar to the present case. A company was carrying on

business as motor car agents and repairers, and they held land on lease from 1935 to 1956. The business of the company dwindled in 1940 to such an extent that they required no more than one-third of the land which they occupied and they sublet for 14 years out of a total of 16 years which there was to run, at an annual rent of £1,150, the remaining two-thirds of their property. It is quite true that a fact which did not appear in the ALL ENGLAND REPORTS, but did appear in the TAX LEAFLETS, was that there was a provision in that lease entitling the company to determine the sub-lease at the conclusion of the war. That fact is not mentioned in the judgments, and, in fact, SCOTT, L.J., says that the company had put it out of their power to resume business there ([1946] 2 All E.R. 610):

“War conditions had reduced the company’s business to very small proportions, and they cut their loss by going out of business in respect of the major part of their land and put it out of their power for 14 years to resume business there.”

That statement was not strictly accurate, but none the less the court clearly treated it as material that *prima facie* the company had parted with that portion of their premises for a very considerable period of time, although no doubt, they did have the power to change their minds at a subsequent date. It is clear that in that case there was no finding, as in the present, that the company wished and intended to resume possession of the property in question and use it for the purposes of their business at the earliest possible moment of time.

In my view, this is a pure question of fact, there was evidence to justify the finding at which the commissioners arrived in the present case, and it is one with which this court cannot interfere. What they said was this, and this is the language which was criticised:

“In our opinion, up to the respective dates of the lease and requisition the buildings, though assets of the business, plainly were not investments in the business sense of that word—the sense in which we think the word is used in para. 6. Nor, indeed, is the contrary alleged. The contention is that the execution of the lease in the one case, and the requisition by the Admiralty in the other, had the effect of creating investments, and not the less so because the lettings were temporary. As regards No. 4 stock room, in our opinion all that happened was that the company temporarily let to a third party, for a rent, a trading asset—not itself in the nature of an investment—the use of which was temporarily not required by the company, and we were unable to regard this temporary letting as creating an investment, in the business sense of that word. Nor do we think it makes any difference in principle that No. 5 stock room was not let, but requisitioned.”

I think that was a matter which they were entitled to take into consideration. I am not suggesting that that test would always be conclusive, but I think it is impossible to say that, in deciding a matter of this kind, the commissioners are not entitled to take into consideration that the letting is a temporary one. It is said that “temporary” is not a very apt description of this letting, having regard to the uncertainty prevailing with regard to the duration of the war in 1940, but I think those are all matters of fact to be dealt with by the commissioners and that there was material on which they could find that this was not an investment.

Before parting with the case, it is necessary for me to refer to the judgment of SINGLETON, J., because he came to the conclusion that the commissioners had misdirected themselves and that the question involved in the appeal was a question of law. He said:

A "The important element to be considered is the position at the time
in question, not what had been the user before, nor what might be the
user at some time thereafter. The finding [in the Case] goes on: 'In
our opinion, up to the respective dates of the lease and requisition the
buildings, though assets of the business, plainly were not investments
in the business sense of that word—the sense in which we think the word
is used in para. 6. Nor, indeed, is the contrary alleged. The contention
is that the execution of the lease in the one case, and the requisition by
the Admiralty in the other, had the effect of creating investments, and
not the less so because the lettings were temporary.' Again I am not sure
that that is the right way of approach. The effect of the lease was that
that rent came about, rent was paid in respect of the occupation of one
B of the buildings—the building which was the subject-matter of the lease.
It was then for the Special Commissioners to determine whether that
rent was income from an investment . . . Everyone agreed that there
is no difference between the two cases in principle, but it is to be observed
that the Special Commissioners attach importance to that which they
C speak of as 'temporary letting.' If there was an income from an invest-
ment it does not seem to me that it matters for this purpose that it was
only for a period—a short period or an indefinite period. The word
'therefore' [used by the commissioners in coming to their final decision]
would appear to show that the commissioners are determining this question
because of what they describe as the temporary nature of the letting and
the fact that the buildings were erected for another purpose and might
D at some time in the future be used for that purpose again. I do not think
that this is the true way of approaching the question, and I do not say
that in any sense by way of criticism. Everyone knows these questions
are extraordinarily difficult and different persons may look at them in
different ways, but it seems to me essential that what one should have
regard to in a case of this kind is the user which was being made of those
E premises at the time in question. They were let, and out of them and from
them there came a rent. That rent was received by the company. Was
it income from an investment? That is what has to be determined and,
as I have said, I regard it not so much as a question of fact in this case,
but rather a question as to the proper inference to be drawn from the
documents and from the receipt of rent."

F Earlier in his judgment he had indicated the view that the matter before him
was one of law and not of fact by quoting a passage from the speech of LORD
SUMNER in the *Gas Lighting Improvement Co.* case (3). LORD SUMNER, in
dealing with the word "investment" in the Act of 1915, which referred to
excess profits duty, had said this (12 Tax Cas. 541):

G "My Lords, the Commissioners of Taxes held 'that the money employed
in the foreign companies referred to was employed in the business of the
company as capital and not as an investment within the meaning of the
Finance (No. 2) Act, 1915.' This is a conclusion of law."

When one looks at that case, one finds in LORD SUMNER's speech that in his
view the commissioners had applied the wrong test altogether. He says
H (*ibid.*, 543):

"What, however, is the context in which the word ['investment']
is used here? The schedule prescribes rules for an operation closely akin
to preparing a balance sheet of the assets and liabilities of a trading
company. It does so for the purpose of ascertaining, sometimes the
trading capital, sometimes its trading profits or gains. The provisions
as to charging excess profits duty are only concerned with profits which
are trading profits, and they are taxed with reference to a pre-war standard

depending upon the one or the other. In such a connection why should an ordinary business term be used in any but its ordinary business sense ? ”

It is clear that the commissioners had not used the word in its ordinary business sense and therein lay their error. Furthermore, referring back to the opening paragraph of LORD SUMNER's speech, he goes on after the passage I have already cited (*ibid.*, 541) :

“ The facts never were in dispute and they are fully set out in the Case. I think the evidence is all one way . . . ”

So, that case shows, first, that the commissioners had applied the wrong test. and, secondly, that there was no evidence to support their finding. That, of course, always involves a question of law. I do not think that that case really assists in the decision of the present appeal, which, to my mind, involves a pure question of fact, and I have formed a different view from that which was formed by SINGLETON, J., as to the approach of the Special Commissioners. Although they have to look at the matter at the moment of time with which they are concerned, I do not think that it can be said that they erred by looking at the past and the future in coming to a conclusion whether or not the lease had resulted in an investment. I think all the matters which they took into consideration were matters proper to be taken into consideration in enabling them to form their final judgment. For these reasons I think this appeal succeeds and the assessment upheld by the commissioners should be restored.

COHEN, L.J. : I am of the same opinion. As we are differing from the learned judge in the court below, I will state my reasons shortly. Counsel for the company argued that there is no material distinction between the facts of this case and those of the *Broadway Car Co.* case (2), and, therefore, he says, it necessarily follows that the commissioners in this case must have gone wrong in law. I am not sure whether that is a necessary consequence. To take the analogy of juries, I should have thought that, if two juries, properly directed, came to opposite conclusions on indistinguishable facts, this court might be unable to disturb either finding, unless, of course, the facts were such that one jury had no evidence to justify its verdict. I do not find it necessary to reach a conclusion on this submission since, in my opinion, the case before us is distinguishable from the *Broadway Car Co.* case (2) on the facts in the respect to which TUCKER, L.J., has referred. First, there is the distinction as to the length of the term. In the *Broadway Car Co.* case (2), the term was 14 years, subject, it is true, to a right to either party to determine the lease at the conclusion of hostilities, but it is plain from the last part of the judgment of SCOTT, L.J., that he, at any rate, thought that on the facts it was extremely unlikely that that power would be exercised. Secondly, there is the finding as to the intention of the parties and the purpose for which the building had been used and was to be used in the future. Those two findings of fact seem to me to make the two cases distinguishable. It is immaterial what conclusion I should myself have reached. The question I have to consider is whether there was evidence on which the commissioners could reach their conclusion. The point on which I differ from SINGLETON, J., is that, as I read his judgment, he thought that evidence as to the future user, after the conclusion of the year in question, was inadmissible. I am unable to accept that view. Although the profits of a particular year are being assessed, it seems to me that, in considering whether the rent of a portion of the business premises of the company is a yield from an investment or not, one is entitled to have regard to the question of the duration of the intended user. Counsel for the company had to admit, in answer to a question put by TUCKER, L.J., that, if the letting was for 14 days, it would be difficult to argue that there

had been conversion from an operation of business premises into an investment. From that admission it would seem to follow that the matter is one of degree and it seems to me to be impossible to exclude evidence of the intention of the parties as to the user before and after the term. For these reasons I think, as I did in the *Broadway Car Co.* case (2), that the commissioners properly appreciated the principles of law which they should apply and that there was evidence on which they could reach the conclusion to which they came. I can see no ground on which we ought to interfere with their finding, and, therefore, I think that the appeal succeeds.

ASQUITH, L.J. : I also agree. The only principle of law applicable to the construction of the word "investment" appears to be that laid down in the *Desoutter* case (1) and in the *Broadway Car Co.* case (2)—that it must be taken to mean what an ordinary business man would understand by the word. Can the conclusion of the commissioners be challenged? It seems to me that it can only be challenged in one or other of two events. First, if, the business man's criterion having been properly applied, the lease in question could not possibly have been described as an "investment." (That is the equivalent of saying, if there was no evidence on which the commissioners could have found that it was an investment). Secondly, if the commissioners, while professing to apply the businessman's criterion, had, in fact, applied some different criterion which they thought to be binding on them in law. If, for instance, after recording the undoubted fact that these stock rooms were originally a trading asset of the company and no more, they had gone on to say that this fact in itself precluded them in law from deciding that subsequent leases were investments, they would have gone wrong in law. Counsel for the company urged that, in effect, this was exactly what they had done, with the difference that they had treated, not a single factor, but two factors—first, the original character of the stock rooms as trading assets, and, secondly, the brevity of the term of the letting—as conclusive in law against an investment resulting. I do not think the commissioners have done this. What the Case Stated seems to me to do is, first, to record, as a matter of history, that the stock rooms started life as a trading asset, and, then to go on to enquire whether that trading asset later acquired the character of an investment in the business sense of the word. They nowhere say that a trading asset cannot become an investment. By implication they admit that it may become so by being let, if the term of the lease is sufficiently long, but they find that, owing to the temporary character of the lease, the brevity of the term, no investment results. Once the proper standard was applied, as, in fact, it was, to the question whether there was an investment or not, the question seems to be one of fact and degree on which the commissioners' findings are irreversible. I agree that the appeal ought to be allowed.

Appeal allowed with costs.

Solicitors : *Solicitor of Inland Revenue ; Biddle, Thorne, Welsford & Barnes* (for the company).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

BUCKLAND *v.* GUILDFORD GAS LIGHT AND COKE CO.

[KING'S BENCH DIVISION (Morris, J.), October 21, 22, 25, November 25, 1948.]

Negligence—Child—High-voltage electric overhead wires—Easily climbed tree immediately below wires—Child electrocuted while climbing tree—Liability of electricity undertakers.

The defendants, electricity undertakers, provided electric current for a district by means of overhead high-voltage wires carried on poles. The wires passed over a field which was rented by a farmer and over which there was an unfenced footpath leading to the farm. About 90 yds. from the footpath and immediately under the wires was a large oak tree, the top of which had been cut away to permit the passage of the wires. The tree was easy to climb owing to a long branch hanging near to the ground, but there was no danger notice on or near it and no anti-climbing devices fixed to it. On June 21, 1947, a girl aged 13, who was staying at a schoolchildren's camp near by, climbed the tree and was electrocuted. Owing to the density of the foliage at the time, the wires could not easily be seen from under the tree. Children from the camp were allowed to visit the farm by arrangement, but no general permission had been given to them to use the field and at the time of the accident the girl was not taking part in any arranged visit to the farm. The plaintiff, the father of the girl, contended that the defendants were guilty of negligence in that (a) having placed something dangerous on another person's land, they had failed to take steps to protect persons who might be on the land from dangers which might reasonably be anticipated, and (b) they should not have permitted live wires to pass close to a climbable tree which constituted an attraction to children. The defendants contended (a) that the girl was a trespasser, and, therefore, they owed no duty to her, as their duty to her was no higher than that of the owner of the land, who would be under no liability to a tree-climbing trespasser, and (b) the girl was guilty of contributory negligence. The court held that contributory negligence had not been established.

HELD : (i) the defendants owed a duty to take reasonable care to avoid acts or omissions which they could reasonably foresee would be likely to injure a person so closely and directly affected by their acts or omissions that the defendants ought to have had such a person in contemplation as being so affected (*dictum* of LORD ATKIN in *Donoghue v. Stevenson* ([1932] A.C. 580 ; 147 L.T. 285) *applied*) ; they should have known that it was dangerous to have high-voltage wires immediately above a tree which could be easily climbed and the foliage of which was so dense that the presence of the wires could not easily be seen ; and, therefore, as the deceased girl was a person whom the defendants ought to have had in contemplation as being directly affected by their failure to take proper precautions, they were guilty of breach of duty amounting to negligence.

Bourhill v. Young ([1942] 2 All E.R. 396 ; [1943] A.C. 92 ; 167 L.T. 261), *considered*.

(ii) the girl was not a trespasser *vis-a-vis* the defendants and the defendants had not proved that she was a trespasser *vis-a-vis* the occupier of the land, but, assuming that she was a trespasser on the land, the defendants' liability was on a different basis from that of the occupier as it arose from the duty to take reasonable care while maintaining highly dangerous overhead wires, and, therefore, as the girl's action in climbing the tree was one that should have been reasonably foreseen, she was a

person to whom the defendants owed a duty to take all reasonable steps to prevent the existence of a hidden peril.

[AS TO ALLUREMENT OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, pp. 584-586, para. 836; and FOR CASES, see DIGEST, Vol. 36, pp. 68-71, Nos. 433-462.]

Cases referred to :

- A (1) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.
- ✓ (2) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- ✓ (3) *Heaven v. Pender*, (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 36 Digest 8, 9.
- B (4) *Hardy v. Central London Ry. Co.*, [1920] 3 K.B. 459; 89 L.J.K.B. 1187; 124 L.T. 136; 36 Digest 71, 457.
- ✓ (5) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest 38, 223.
- ✓ (6) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.
- C (7) *Adams v. Naylor*, [1944] 2 All E.R. 21; [1944] K.B. 750; 113 L.J.K.B. 499; 171 L.T. 105; *on appeal*, [1946] 2 All E.R. 241; [1946] A.C. 543; 115 L.J.K.B. 356; 175 L.T. 97; 2nd Digest Supp.
- (8) *Excelsior Wire Rope Co., Ltd. v. Callan*, [1930] A.C. 404; 99 L.J.K.B. 380; 142 L.T. 531; 94 J.P. 174; Digest Supp.
- D ✓ (9) *Mourton v. Poulter*, [1930] 2 K.B. 183; 99 L.J.K.B. 289; 143 L.T. 20; *sub nom. Moulton v. Poulter*, 94 J.P. 190; Digest Supp.
- (10) *Kimber v. Gas Light & Coke Co.*, [1918] 1 K.B. 439; 87 L.J.K.B. 651; 118 L.T. 562; 82 J.P. 125; 36 Digest 18, 83.
- (11) *Brown v. Cotterill*, (1934), 51 T.L.R. 21; Digest Supp.
- (12) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.
- E (13) *Barnes v. Irwell Valley Water Board*, [1938] 2 All E.R. 650; [1939] 1 K.B. 21; 107 L.J.K.B. 629; 159 L.T. 125; 102 J.P. 373; Digest Supp.
- (14) *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K.B. 101; 103 L.J.K.B. 527; 151 L.T. 202; 98 J.P. 319; Digest Supp.
- (15) *United Zinc and Chemical Co. v. van Britt*, (1922), U.S. 268.

F ACTION for damages on the ground of negligence.

The action was brought under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846, by the father of a girl, aged 13, who was killed on June 21, 1947, by coming into contact with a live electric cable which was used by the defendants, an electricity company, to carry their electric current to a district supplied by them. The cable passed immediately above a large and easily climbable tree, standing in a field, about 90 yds. from a footpath leading to a farm. The girl, who was staying at a schoolchildren's camp in the neighbourhood, climbed to the top of the tree and was electrocuted. The defendants contended (a) that they owed no duty to the girl as she was a trespasser in the field, and (b) that she was guilty of contributory negligence. MORRIS, J., held that the defendants owed a duty to the girl and were liable for damages for negligence and he negatived contributory negligence. The facts appear in the judgment.

Astell Burt for the plaintiff.

Melford Stevenson, K.C., and *J. Harcourt Barrington* for the defendants.

Cur. adv. vult.

Nov. 25. MORRIS, J. : On June 21, 1947, a daughter of the plaintiff, by name Iris May Buckland, who was 13 years of age, met her death in

circumstances which the plaintiff alleges render the defendants liable in law. The plaintiff, as administrator of the estate of his late daughter, claims damages for loss of expectation of life, and, furthermore, on his own and his wife's behalf he claims damages pursuant to the provisions of the Fatal Accidents Act, 1846. On the date mentioned the defendants provided electric current for the district of Surrey, which included Ewhurst. They had caused poles to be erected which carried overhead wires charged with electric current of 11,000 volts, and they maintained the system of supply which required those wires. A copy of a section of the ordnance survey map shows the location of a farm known as Coneyhurst Farm and the line of a footpath from the farm passing over a field, No. 298, and leading to a road shown on the right-hand side of the map. That road, if continued for about $1\frac{1}{2}$ miles in a southerly or south-easterly direction, leads to a camp known as Sayers Croft Camp which was under the control of the London County Council and was attended by school children from within the London area. The deceased girl had been staying at the camp during the week preceding her death. The overhead wires of the defendants were carried over the field No. 298 in a north-easterly direction over a scrub hedge in the line of which there were several trees. The plan further shows the position of a tree stump immediately under the electric wires. The tree, of which only the stump now remains, was standing at the time of the death of the deceased girl. This tree was an oak which was easy to climb as there was a long branch which hung down towards the ground. Apart from this branch there were no others within about 9 ft. of the ground. In June, 1947, the foliage of the tree was very thick. The electric wires passed over the tree, but the density of the foliage towards the top of the tree was such that the cables could not readily be seen. They would only be discerned by some one who looked very keenly or was aware of their presence and looked specially for them. The tree was about 90 yds. from the footpath leading to the farm. The footpath was not fenced.

Coneyhurst Farm was visited two or three times a week by parties of children from Sayers Croft Camp. By arrangement they went to see milking being done. If it was fine, they used the footpath; if wet, they used the route by road. Field No. 298 is not part of Coneyhurst Farm, but was rented by the farm for use for grazing in the summer. The resident bailiff employed at Coneyhurst Farm had not given any general permission for children to use field No. 298. There were, in all, four overhead wires, and three of those were live with current. Relative to each other they were held in diamond-like formation. At approximately a height of 18 ft. 7 ins. from the ground was the non-live or earth wire. At a level approximately 2 ft. 6 ins. higher were two parallel live wires. At a level of approximately a further 2 ft. 6 ins. higher was the fourth of the wires, which was live. The line of wires was erected in about 1932. The work was done by contractors employed by the defendants. The top of the tree to which I have been referring was then cut away so as to permit of the passage of the wires. Consideration was given at the time to the question of removing the tree. The defendants' engineer, Mr. Nunnerley, stated in his evidence that he believed that there was some correspondence at the time between the consulting engineer and the owner of the land in relation to this matter, and he thought that the owner would not consent to the cutting down of the tree.

The Electricity (Supply) Act, 1926, s. 34, (1) provides :

"Where any tree or hedge obstructs or interferes with the construction, maintenance, or working of any main transmission line or other electric line which is being constructed or is owned by any authorised undertakers, or will interfere with the maintenance or working of such a line, the authorised undertakers may give notice to the owner or occupier of the land on which the tree or hedge is growing requiring him to lop or cut

it so as to prevent the obstruction or interference, subject to the payment to him by the authorised undertakers of the expenses reasonably incurred by him in complying with the notice."

Section 34 (6) provides :

"Where for the purpose of the construction or maintenance of a transmission line it is necessary to fell any trees, this section shall apply to the felling of trees in like manner as it applies to the lopping of trees."

A copy of an agreement dated Jan. 7, 1933, and made between the defendants and the owner of the land, was by agreement put before the court. Under the terms of this agreement the defendants undertook to maintain the overhead wires and installations in good repair and condition and so as not to be a danger to the owner or to his lessees or tenants or to his or their property or employees, and also that in certain circumstances they would indemnify the owner and his tenants or occupiers against losses or damages or expenses which they might suffer by reason of any wrongful act, negligence or omission on the part of the defendants. There was no danger notice on or near the tree, and there were no anti-climbing devices fixed to it. It was the practice of the defendants to send a linesman in their employ twice a year to follow the route of the wires for inspection purposes. If, as a result of such inspection, a cutting away of foliage growing near to the wires was considered necessary, such work would be, or ought to be, done. Interference with current transmission and temporary dislocation of some current supplies might result if foliage or the branches of a tree became in contact with conductor wires. Mr. Nunnerley thought that the linesman's last visit before June, 1947, would have been in about February, 1947. The linesman who made that visit is not now in the employment of the defendants, and he was not called as a witness.

On the afternoon of Saturday, June 21, 1947, Mr. Morrow, the resident farm bailiff to Coneyhurst Farm, was called to field No. 298 by some girls from Sayers Croft Camp. They led him to the tree. Looking up he saw a young girl motionless near the top. He called to her, but received no reply. Then, as he moved near to the bottom of the tree, he saw the severed head of the girl lying on the ground. The police were informed and after the current had been cut off a police officer using a ladder went to the body of the girl, who was Iris May Buckland. The density of the foliage made it difficult for him to reach her. He had to use a saw to cut his way through. The headless body of the child was in a sitting position with feet hanging downwards, leaning backwards near to the bottom or earth wire and supported by boughs and foliage which seemed to represent more than the growth of a few preceding months. Some of the girl's hair was adherent to one of the live or conductor wires. The conclusion which, I think, it is reasonable to draw from the evidence is that the girl climbed the tree without realising that she was heading towards live electric wires, and that she came into contact with them and was instantly killed. The girl was not taking part in any arranged visit to the farm.

On behalf of the plaintiff it was submitted that, having placed something of danger on the land of another, the defendants were under a duty to take steps to protect persons who might be on the land from dangers which could reasonably be anticipated. It was further contended that a climbable tree constitutes an attraction to children and that the defendants were under a duty not to permit live wires to pass so close to or above such a tree that one climbing the tree would or might come in contact with the live wires. On behalf of the defendants it was submitted that the girl was a trespasser, that the defendants owed no higher duty to her than would be owed by an occupier of land towards a trespasser, and that in the circumstances an occupier would have been under no liability to a tree-climbing trespasser. Further, it was

said that the girl was guilty of contributory negligence. Also, it was urged that nothing done by the defendants caused the existence of any allurements attractive to a child and that the defendants had no reason to anticipate that the girl would trespass, or, whether a trespasser or not, would climb the tree.

In the presentation of the careful and helpful arguments reference was made to many authorities. On the view which I have formed on the evidence it cannot be said that the girl committed any act of trespass in regard to any part of the installation of the defendants. It seems reasonable to conclude that she was unaware that, as she climbed, she was nearing death-dealing wires. There was some evidence that she was not knowledgeable about the nature of and the dangers of live overhead wires, and it is a possible view that, as she climbed, she thought she might pass through the foliage and then be somewhere near to overhead wires, which she may have deduced would be above the trees, but the danger of which she did not realise. This does not, however, seem to me to be the correct view, and, in my judgment, the girl was not a trespasser *vis-a-vis* the defendants. It is said, however, that the conclusion ought to be drawn that she was trespassing on the land, and the evidence of the farm bailiff that he did not give permission for the girls to stray from the path, is put forward as the foundation on which to base the suggested conclusion. In a case in which a plaintiff is suing the occupier of land, it must, as a rule, be for the plaintiff, as part of the proof of facts showing the existence of some particular duty, to show how he or she came to be on the land, but in the present case it is the defendants who are asserting that *vis-a-vis* the occupier of the land the girl, was a trespasser. The owner or occupier of the land has not said so. It may be that the owner or occupier did give permission, or it may be that the arrangements made in regard to farm visits had inherent in them a permission to children from the camp, even if not making one of the planned visits, to wander over the fields of the farm during a Saturday afternoon stroll. If the defendants wish to maintain that the girl was trespassing on field No. 298, they must prove it. The evidence of the farm bailiff falls short of such proof.

It becomes necessary to consider whether the defendants had any, and if so what, duty to the child, and, if they did owe a duty to her, whether they were in breach of it, with the result that the death of the child was caused. In approaching these problems it is necessary to take account of all the relevant features and circumstances surrounding the occurrence now being investigated. As LORD PORTER said ([1942] 2 All E.R. 409) in his speech in *Bourhill v. Young* (1):

"In the case of a civil action there is no such thing as negligence in the abstract: there must be neglect of the use of care towards a person towards whom the defendant owes the duty of observing care. And I am content to take the statement of LORD ATKIN in *Donoghue v. Stevenson* (2) ([1932] A.C. 580) as indicating the extent of the duty: 'You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'."

LORD RUSSELL OF KILLOWEN said ([1942] 2 All E.R. 401):

"In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are

admitted) to the question of remoteness of damages, *i.e.*, to the question of compensation not to culpability; but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, *i.e.*, to the question of culpability not to that of compensation."

LORD RUSSELL then quoted from the judgment of BRETT, M.R. (11 Q.B.D. 509) in *Heaven v. Pender* (3):

" . . . whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

After quoting from LORD ATKIN's speech ([1932] A.C. 580) in *Donoghue v. Stevenson* (2), LORD RUSSELL OF KILLOWEN continued ([1942] 2 All E.R. 401):

"A man is not liable for negligence in the air; the liability only arises 'where there is a duty to take care and where failure in that duty has caused damage'."

LORD MACMILLAN said (*ibid.*, 403):

"There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree."

LORD WRIGHT said (*ibid.*, 406):

"It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose *ex post facto*, would say it was proper to foresee."

In applying the tests indicated by the passages to which I have referred, it is proper, in my judgment, to have in mind the nature of the particular peril which is a reasonably foreseeable possibility. The defendants knew that the wires they maintained were so charged that instant death would probably be caused to anyone who came in contact with them. The regulations imposing obligations on the defendants to fix anti-climbing devices and warning notices to any poles or structures carrying wires served as an additional reminder of the need to take steps to avert any possible perils attendant on the transmission of high-voltage along wires carried overhead across the countryside. Reminder of such nature would, however, in the case of the defendants be superfluous. If underneath the wires there existed some object that reached up towards the wires, it would require no undue prescience to observe that, if the object could be climbed, then a path to peril might lie open. If, additionally, the wires—and, therefore, the peril—were hidden, the dangers of the situation would be all the greater. Endeavouring to apply reasonable standards, and not seeking to require any unique gifts of pre-vision, I consider that the defendants ought to have known that it was dangerous to have their high-voltage wires immediately above a tree which could easily be climbed and whose foliage was so dense that the presence of the wires above could not readily be seen. The fact that the tree was about 90 yds. from a footpath is merely a particular additional feature of the circumstances. Applying the words of LORD ATKIN ([1932] A.C. 580) in *Donoghue v. Stevenson* (2), the defendants owed a duty to take reasonable care to avoid acts or omissions which they could reasonably foresee would be likely to injure a person so closely and directly affected by their acts or omissions that the defendants ought reasonably to have had such a person in contemplation as being so affected. It required no vivid imagination on the part of anyone traversing the route of the wires to appreciate the great peril of having the wires above a tree that could be easily climbed, and whose foliage, being dense in the month of June would obscure the wires. If any one did climb the tree, he would with every

step approach a hidden peril of the direst kind. The facts of the present case show all too dramatically the nature of the peril. It was, in my judgment, easily foreseeable that some one might climb the tree and so might become in close proximity to an unseen deadly peril. The tree might have been felled when the wires were being erected. The tree was, in fact, cut down on some date after June 21, 1947. This, however, is not a circumstance that of itself involves any inherent admission of the prior necessity for cutting down, and it would be wrong so to regard it. The tree not having in the first instance been felled, it is manifest that many later steps could have been taken which would have prevented the happening of the fatality.

The deceased girl was, in my judgment, within the group of those whom the defendants ought to have had in contemplation. She was a "neighbour" in the sense in which that word was used by LORD ATKIN in what LORD WRIGHT [in *Bourhill v. Young* (1) ([1942] 2 All E.R. 404)] called his "well-known aphorism . . . in *Donoghue v. Stevenson*" (2). I have given my reasons for concluding that she must not be regarded as having been a trespasser in field No. 298. It has not been proved to me that she was, but, even if, contrary to my view on the evidence before me, the inference ought to be drawn that she was not permitted to be, but was a trespasser when she was, by the tree, she was nevertheless in the circumstances of this case one to whom, in my judgment, the defendants owed a duty. The classifications into which persons may fall according to whether, in relation to the occupier of the land, they are his invitees or his licensees or whether they are trespassing, do not have decisive significance when considering in the present circumstances the position of the defendants. The occupier of field No. 298 might owe different duties to those who were his invitees from those which he owed to those who were his licensees. The duties owed by the defendants to those in the two classes would be the same. If some one trespassed on field No. 298, the duties owed to him by the occupier would be most limited: see *Hardy v. Central London Railway Co.* (4), *Latham v. Johnson* (5) and *Addie v. Dumbreck* (6). In considering whether the defendants had a duty to such a trespasser, the fact that *vis-a-vis* the occupier of the land the person was a trespasser would be a very relevant circumstance to have in mind, but it would not in all cases be a conclusive one. Broadly speaking, those whose presence the defendants ought to contemplate would, doubtless, be persons who were lawfully present on the land. Under most conditions the defendants would be entitled to assume that persons would not go unlawfully on land, and the defendants would not be under an obligation to provide against the contingency of persons trespassing. Though not occupiers of the land, the defendants are in a position closely analogous.

The group of those who must be regarded as "neighbours" from the point of view of the defendants is, however, not of rigid necessity the same as the group of those who must be regarded as invitees or licensees from the point of view of the occupier of the land. The test to be applied in considering who is a neighbour is the test indicated by LORD ATKIN in *Donoghue v. Stevenson* (2). As a general rule, a trespasser on land would not be within the group of neighbours, but whether some particular person is a neighbour depends on the circumstances of a particular case. I am, of course, dealing only with the one before me. If it were the fact that the deceased girl wandered 90 yds. from the footpath without permission and had no actual permission to be on the land under the tree or to climb the tree, I would still, in the circumstances of this case, have regarded the child as being one whom the defendants ought reasonably to have had in contemplation, and, further, that her action in climbing the tree was one which they ought reasonably to have foreseen. A tree visible from a nearby footpath which may be easily climbed may, to the gaze of a bright and healthy schoolgirl, present an alluring attraction

which would not suggest itself to those who are either no longer nimble or for whom heights have no fascination.

The cases dealing with what MORTON, J., in the Court of Appeal in *Adams v. Naylor* (7) called ([1944] 2 All E.R. 30) the "unenviable position of a trespasser at common law" are, in my judgment, not directly in point. Nor are the cases like *Excelsior Wire Rope Co., Ltd. v. Callan* (8) or *Mourton v. Poulter* (9), where the plaintiffs recovered even though they had been trespassing. Liability in those two cases resulted from the fact that some dangerous act was done with reckless disregard of the presence of the trespassing children. It was, however, forcibly contended that, in as much as the occupier of land is not, save on the basis to which I have just referred, liable if a trespassing child meets with injury, the liability of some one in the position of the defendants ought to be no greater. In my judgment, this does not necessarily follow. The liability, if any, of an occupier of land arises out of the fact of his occupancy and of some action of his while occupying. The extent of the liability towards children was fully stated by LORD HAILSHAM, L.C., in his speech in *Addie v. Dumbreck* (6) ([1929] A.C. 364, 365): see also the discussion of the law in WINFIELD ON TORTS, 2nd ed., p. 626, *et seq.* But the liability, if any, of the defendants is on a somewhat different basis. It arises because of a duty to take reasonable care while maintaining highly dangerous overhead wires. If the daughter of the occupier of field No. 298 had done as the deceased girl did, then, on the facts as I have found them, the defendants would be liable, but reasonable forethought on the part of the defendants would have extended to cover, not only the daughter of the occupier of the land, but also invited playmates of the daughter, and, possibly, some others, such as the deceased girl in the circumstances of the present case.

It may be useful to mention certain cases which have been decided in different circumstances. In *Kimber v. Gas Light and Coke Co.* (10), the rewas no suggestion that the plaintiff was a trespasser, and SCRUTTON, L.J., spoke ([1918] 1 K.B. 447) of the duty of a person doing work on private premises

" . . . to carry on his work with due precautions for the safety of those whom he knows, or ought reasonably to know, may be lawfully in the vicinity of his work . . . "

So, in *Brown v. Cotterill* (11), where a monumental mason was held liable for injuries to a child on whom fell a tombstone negligently fitted by the mason, the child was lawfully in the graveyard and LAWRENCE, J., said (51 T.L.R. 22):

" These facts appear to me to create a duty in the defendants to every member of the public who might lawfully enter the churchyard and be injured by the fall of the tombstone. "

So, the injured plaintiff who recovered damages in *Haseldine v. Daw* (12) against the repairer of the lift was one lawfully on the premises. In that case, SCOTT, L.J., said ([1941] 3 All E.R. 174):

" The facts of this case, therefore, in my opinion, clearly show that [the engineers] did owe a duty of care to any person using the lift in the ordinary way up to the time of their next examination of it . . . "

GODDARD, L.J., said (*ibid.*, 185):

" It follows that, where the facts show that no intermediate inspection is practicable or is contemplated, a repairer of a chattel stands in no different position from that of a manufacturer, and does owe a duty to a person who, in the ordinary course, may be expected to make use of the thing repaired. "

So, also, the plaintiffs in *Barnes v. Irwell Valley Water Board* (13) were lawfully on the premises. But would a duty to take reasonable care to supply power and wholesome water not exist towards the wife of one who wrongly

continued to occupy a house at the end of a lease? Or, if a person entered particular premises by mistake, and, having taken the lift, was injured in circumstances rendering a negligent repairer liable to persons entitled to use the lift, would the repairer be exempt from responsibility to the injured person? Or, would a companion of the appellants Donoghue who, in the cafe at Paisley, had without her permission picked up her tumbler and drunk out of it and become ill have been without remedy against the respondent Stevenson? In my judgment, each of these questions and each set of facts would require separate examination, but liability such as that being considered in this case would not rigidly, automatically and inevitably be excluded merely because an injured person was one towards whom the occupier of the land would owe no greater duties than those very limited ones that he would owe towards a trespasser.

If the matter had to be looked at on the assumption that it was the occupier of the land who was maintaining the overhead wires and had the responsibility for their positions, their height and their supervision, then, on such basis and on the facts as I have found them, but assuming no express invitation to a child to leave the footpath, there might nevertheless be liability for an accident. In *Liddle v. North Riding of Yorkshire County Council* (14), where the Court of Appeal dealt fully with the law in regard to infant trespassers, SCRUTTON, L.J., referred to the decision of HOLMES, J., in a case in the Supreme Court of the United States. SCRUTTON, L.J., said ([1934] 2 K.B. 109) :

"HOLMES, J., whose views on English as well as on American law are entitled to the most respectful consideration, has said in *United Zinc and Chemical Co. v. van Britt* (15) 'Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied.'"

If, then, the position of an occupier of land who maintained overhead wires were being considered, there would arise the question whether there was the legal effect of an invitation to children in a case where a tree which is easy to climb is within 90 yds. of a footpath. A fair way to test the argument now being considered is to assume that the defendants were the owners and occupiers of field No. 298 and to assume that the deceased girl had no actual permission to leave the footpath or to be on any of the nearby fields. On that footing, with cautious approach it would have to be considered whether the exposing, unfenced and unprotected, of a tempting, climbable tree did not have the legal effect of an invitation to a child. On the view of the case which I am expressing, I am not called on to decide this. It is sufficient to point out that, even if it were thought that the defendants could not be in any different position from that which they would be in if they both maintained the wires and occupied the land under them, it does not by any means follow that on the latter hypothesis they might not be liable. The defendants are, however, in a different position from the occupier of the land. They do not know, save to the extent that knowledge may come to them in the course of periodical inspections of their system, how much traversed the land may be. They do not know how much the occupier or members of his family or his friends use the land. They do not know the extent to which the occupier may give permission to people to be on the land. They have no control over any of these matters, and they cannot limit or restrict the number of those who,

either with or without permission, may be on the land at the foot of the tree which is in question. If the occupier of the land invited people to go on to the land for some purpose and made a charge to them for admission, he might owe a higher duty to such persons than to others who came on the land as invitees. He would owe a lesser duty to licensees than he would owe to invitees, but the defendants would not be affected by these considerations. It would not appear to be reasonable if the duty owed by the defendants depended for its existence on the particular relationship (of which the defendants would be ignorant) existing between persons on the land and the occupier, or if that duty varied in quality according to that relationship.

For the reasons which I have assigned I consider that the defendants, in the circumstances which existed, owed a duty to the deceased girl to take all reasonable steps to prevent the existence of a hidden peril. The defendants could easily have taken various steps which would have avoided the grave risks of lurking, unseen danger. By breach of duty amounting to negligence they are, in my judgment, liable for the event which happened. I do not consider that contributory negligence on the part of the deceased girl is established. It was said that, being a bright, intelligent girl, aged 13, who was, as the evidence showed, competent to look after a younger child aged 8, she ought to have realised that she was approaching overhead wires. It was submitted that she could and should have seen that there were overhead wires and that they went towards the hedge where the tree was, and that, accordingly, she ought to have deduced when at the foot of the tree that the wires would be overhead and to have remembered their direction of approach, but a possible failure to recall the existence of the wires or a failure to make a correct deduction ought not, in the case of a girl of 13, to be held to be negligence. If she saw the wires and thought that she could climb up to them by going up the tree, in that event she might have regarded them as being telephone wires or some wires of a harmless character. There was no notice on or near the tree conveying a warning that, concealed above the foliage, there were wires which would kill at a touch. If, as seems more probable, she did not remember when she was under the tree that she had previously seen wires going towards the direction of the tree, this ought not to be imputed to her as negligence. Contributory negligence is not made out.

[His LORDSHIP then assessed the damages to the plaintiff's daughter's estate, under the Law Reform (Miscellaneous Provisions) Act, 1934, as £300, and awarded £200 under the Fatal Accidents Act, 1846, with £19 for funeral expenses.]

Judgment for the plaintiff with costs.

Solicitors: *J. R. Cort Bathurst* (for the plaintiff); *Blount, Petre & Co.* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

[*Reversed.* H.L. [1950] 2 All E.R. 314.

ATKINSON (INSPECTOR OF TAXES) v. GOODLASS WALL AND LEAD INDUSTRIES, LTD.

[COURT OF APPEAL (Tucker, Cohen and Asquith, L.JJ.), November 18, 19, 26, 1948.]

Income Tax—Income from foreign possessions—New source in year of assessment—Shares in foreign company—Acquired prior to 1942-43—Income first received in 1942-43—Finance Act, 1926 (c. 22), s. 30, proviso (ii).

By s. 30 of the Finance Act, 1926: "All profits or income in respect of which any person is chargeable . . . under . . . Case V of sched. D may respectively be assessed and charged in one sum: Provided that . . . (ii) If in any year of assessment any person acquires a new source of any

such profits or income or an addition to any source of any such profits or income, income tax in respect of the profits or income from that source or from the addition to that source shall be computed separately . . . and in the case of profits or income chargeable under . . . Case V of sched. D the provisions of proviso (b) to sub-s. (1) of the last preceding section of this Act shall apply." By s. 29 (1), proviso (b): "(i) income tax shall be computed, as respects the year of assessment in which the income first arises, on the full amount of the income arising within that year."

Before the income tax year 1942-43 the taxpayers acquired shares in an Argentine company. For some years they had also owned shares in other foreign companies producing dividends and had been assessed to income tax under sched. D, Case V, in respect of the income from such other shares on the preceding year's basis without differentiating between the items making up their foreign possessions in accordance with s. 30 of the Finance Act, 1926. In January, 1943, the taxpayers for the first time received a dividend on their shares in the Argentine company, in respect of which an assessment was made for the year 1942-43. The taxpayers contended that this dividend should not be treated separately from their other income arising from foreign possessions, but should be treated as part of such income arising in the year 1942-43, and, accordingly, assessable in the following year.

HELD: the words "if in any year of assessment" in s. 30, proviso (ii), of the Finance Act, 1926, were not confined to the year of assessment in which the income first arose, but meant "if at any time," and, therefore, the taxpayers had acquired a new source of income within the meaning of proviso (ii) to s. 30, so that income tax was to be computed in respect of the year 1942-43 in accordance with the Finance Act, 1926, s. 29 (1) proviso (b) (i) on the full amount of the income arising within that year.

Decision of SINGLETON, J. ([1948] 2 All E.R. 653), reversed.

[FOR THE FINANCE ACT, 1926, s. 30, proviso (ii), see HALSBURY'S STATUTES, Vol. 9, p. 670.]

Case referred to :

- (1) *Diggines v. Forestal Land, Timber & Railways Co.*, [1931] A.C. 380 ; 100 L.J.K.B. 145 ; 144 L.T. 514 ; 15 Tax Cas. 630 ; Digest Supp.

APPEAL by the Crown from a decision of SINGLETON, J., dated July 8, 1948, ([1948] 2 All E.R. 653) on a Case stated by the Special Commissioners of Income Tax. The assessment had been discharged both by the Special Commissioners and the learned judge. The Court of Appeal restored the assessment.

Millard Tucker, K.C., J. H. Stamp and R. P. Hills for the Crown.

Donovan, K.C. and Graham-Dixon for the taxpayers.

Cur. adv. vult.

Nov. 26. **COHEN, L.J.**, read the following judgment. This is an appeal from an order of SINGLETON, J., dated July 8, 1948, whereby he affirmed the decision of the Special Commissioners who had discharged an additional assessment of £7,434 made on the taxpayers for the year ending Apr. 5, 1943.

The facts which gave rise to this assessment are as follows. The taxpayers owned the whole of the issued capital of an Argentine company, Goodlass Wall y Cie, having acquired that capital over a series of years ending with 1936. No dividend was declared on those shares until January, 1943. The taxpayers, however, owned shares in other foreign companies in the income tax year 1942-43 and in the preceding year and had been assessed to income tax thereon. At the time the assessment for the year 1942-43 was made the inspector was unaware of the receipt of the dividend on the shares in Goodlass Wall y Cie. When he heard of it, he made an additional assessment under the

power conferred by the Income Tax Act, 1918, s. 125, to cover the sterling equivalent of that dividend. It is the validity of this assessment which is now in question.

The Crown contend that the income in question was chargeable under the Rules Applicable to Case V of sched. D to the Income Tax Act, 1918, which relates to tax in respect of income from possessions out of the United Kingdom.

A The original r. 1 dealt with tax in respect of stocks, shares and rents in any place outside the United Kingdom, and the original r. 2 dealt with tax in respect of income arising from possessions out of the United Kingdom other than stocks, shares and rents. The division into categories was altered by the Finance Act, 1940, s. 19, and rr. 1 and 2, which I will read, are now as follows :

B “The tax in respect of income arising from possessions out of the United Kingdom other than income which—(a) is immediately derived by a person from the carrying on by him of any trade, profession or vocation either solely or in partnership; or (b) arises from any office, employment or pension, shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I, whether the income has been or will be received in the United Kingdom or not, subject, in the case of income not received in the United Kingdom, to the same deductions and allowances as are provided in r. 1 of the Rules applicable to Case IV, and the provisions of this Act, including those relating to the delivery of statements, shall apply accordingly.”

Rule 2 :

D “The tax in respect of income arising from possessions out of the United Kingdom, other than income to which r. 1 applies, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of
E any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceding years as directed in Case I, without any deduction or abatement other than is therein allowed.”

The relevance of r. 2 to the question now before us is that in *Diggines v. Forestal Land Co.* (1) it was decided that the income, the full amount whereof
F had to be computed under r. 1 of the Rules Applicable to Case V, was the full amount of all the income arising from stocks, shares and rents, and that there was no justification for further sub-division or for treating each separate holding separately. Certain decisions of this court indicated some loopholes in the provisions applicable to Case V and the law was altered in 1926 to fill the gaps. Counsel for the Crown invited us to bear this in mind when considering the case now before us, but the cases to which he referred us do not indicate that the precise point with which we have to deal was before the court in any of them. I think counsel for the taxpayers was right when he said that the intention and effect of the Finance Act, 1926, was to impose a tax on the subject where no tax was previously payable and that we must construe the relevant sections of the Act of 1926 like any other section imposing a tax on the subject.
G

H I turn, therefore, to the Finance Act, 1926. Section 29 (1), read with s. 37 (2) so far as it relates to Case V of sched. D, in substance provides that any income tax chargeable thereunder which would theretofore have been computed on the basis of a three years average shall, as from Apr. 6, 1927, be computed, subject to the other provisions of Part IV of the Finance Act, 1926, and subject as thereafter in s. 29 provided, on the full amount of the profits or gains or income of the year preceding the year of assessment. The proviso to s. 29 referred to, so far as relevant, is in the following terms :

"Provided that . . . (b) In the case of income tax chargeable under . . . Case V of sched. D—(i) income tax shall be computed, as respects the year of assessment in which the income first arises, on the full amount of the income arising within that year; (ii) where the income first arose on some day in the year preceding the year of assessment other than the sixth day of April, income tax shall be computed on the income of the year of assessment; (iii) where the income first arose on the sixth day of April in the year preceding the year of assessment, or on some day in the year next before the year preceding the year of assessment other than the sixth day of April, the person charged shall be entitled, on giving notice in writing to the surveyor within twelve months after the end of the year of assessment, to be charged on the amount of the income of that year, and if the tax charged has been paid, any tax overpaid shall be repaid."

It is to be observed that this proviso deals with computation in three different years of assessment.

Had the shares in Goodlass Wall y Cie been the only possession held by the taxpayers which came under r. 1, this proviso would have been applicable to the dividend now in question, but in view of the decision in the *Forrestal Land* case (1) and of the fact that the taxpayers at the material dates held other foreign stocks or shares, the proviso would not be applicable if the matter rested on s. 29 alone. Section 30, however, provides :

"All profits or income in respect of which any person is chargeable either under r. 1 of the Rules Applicable to Case III of sched. D, or under Case IV of sched. D or under Case V of sched. D may respectively be assessed and charged in one sum."

I pause here to observe that the power there given is, no doubt, a power exercisable in each year of assessment as regards the profits or income of that year. It is subject to two provisos. The first proviso reads as follows :

"If in any year of assessment any person charged or chargeable in respect of any such profits or income as aforesaid ceases to possess any particular source of any such profits or income or any part of any such source, income tax in respect of the profits or income from that source or that part shall be computed separately, and the provisions of the section in this Part of this Act which relates to the discontinuance of a trade, profession or vocation, shall, subject to the necessary modifications, apply in any such case as if the cesser of the possession of the source or part were the discontinuance of a trade."

The section there referred to is s. 31, which is in these terms :

"(1) Where in any year of assessment a trade, profession or vocation is permanently discontinued, then, notwithstanding anything in this Part of this Act—(a) the person charged or chargeable with tax in respect thereof shall be charged for that year on the amount of the profits or gains of the period beginning on the sixth day of April in that year and ending on the date of the discontinuance, subject to any deduction or set-off to which he may be entitled under the section of this Part of this Act which provides for relief in respect of certain losses or under r. 13 of the Rules Applicable to Cases I and II of sched. D, and, if he has been charged otherwise than in accordance with this provision, any tax overpaid shall be repaid, or an additional assessment may be made upon him, as the case may require."

Paragraph (b) provides for the re-opening of the accounts, if necessary, for the previous year, and for an additional assessment, but I do not think I need refer

to it in detail, or to sub-s. (2) of that section. I return to proviso (ii) to s. 30, which is in these terms :

“ If in any year of assessment any person acquires a new source of any such profits or income or an addition to any source of any such profits or income, income tax in respect of the profits or income from that source or from the addition to that source shall be computed separately, and in the case of profits or income chargeable under r. 1 of the Rules Applicable to Case III the provisions of para. (1) of r. 2 of those rules shall apply, and in the case of profits or income chargeable under Case IV or Case V of sched. D the provisions of proviso (b) to sub-s. (1) of the last preceding section of this Act shall apply.”

B That is the important proviso for the matter we have to consider.

Counsel for the taxpayers says, first, that the expression “ the year of assessment ” must bear the same meaning in each paragraph of the proviso to s. 30 and must in each case mean the year in which the assessment in question is made. Secondly, he says that the income tax to be computed separately must be the income tax for that year on the profits or income from a source or part of a source or addition to a source, whichever be in question. Applying those principles to the facts of this case, he says that in the year of assessment 1942-43 the taxpayers acquired no new source, and, therefore, proviso (ii) is not applicable and no additional assessment is justifiable. Before the Special Commissioners the Crown argued that the income received from Goodlass Wall y Cie in 1942-43 was, within the meaning of proviso (ii), an addition to a source of income. The commissioners rejected that argument, and before the learned judge and before us the Crown has admitted that they were right in so doing. Counsel for the Crown, however, relies on an alternative point which was taken before the commissioners and was the only point argued before the learned judge. It is stated in the Case, as follows :

E “ . . . that even if the shares in the Argentine company were an addition acquired by the appellant company in a year of assessment before 1942-43 to a source of income chargeable under Case V of sched. D, nevertheless under s. 30, proviso (ii), of the Finance Act, 1926, the income from the shares in the Argentine company had to be computed separately and the provisions of proviso (b) of sub-s. (1) of s. 29 of the said Act applied, with the result that as respects the year of assessment in which income from the Argentine shares first arose, namely 1942-43, income tax had to be computed on the full amount of the income arising within that year, namely, £7,434.”

G Counsel for the Crown elaborated the argument on the following lines. First, he admitted that, if possible, the words “ in any year of assessment ” should be given the same meaning in both paragraphs of the proviso, but he said the natural meaning was that the inspector when making his assessment in year 1 must look and see whether the events referred to in the provisos had occurred in year 1 or in any preceding year of assessment. If any such event had occurred, the inspector must give effect to the provisos. He did not agree that only the income tax for year 1 could be affected by proviso (i). He submitted that it was the proviso which made it clear that in year 2 nothing could be included for income received in year 1 from a source which ceased to be possessed in that year. He added that even if he was wrong on this point, it did not follow that a restricted meaning should be placed on the expression “ year of assessment ” but merely that owing to the subject-matter with which the first paragraph of the proviso was dealing, the proviso might in operation have a limited effect. Turning to the second paragraph of the proviso, he pointed out that, if the argument of counsel for the taxpayers was well founded, it meant that full effect

would not be given to the direction to apply proviso (b) to s. 29 since effect would only be given, at most, to para. (i) of proviso (b). He further pointed out that in certain circumstances no effect whatsoever would be given to proviso (b). Thus, assume that in the year 1936-37 and the preceding year the taxpayers had income from other foreign stocks and shares. In that year they acquired an addition to a source, namely, shares of the nominal value of £100,000 in Goodlass Wall y Cie. In assessing the taxpayers under Case V for that year, he would have to give effect to proviso (ii) to s. 30, but he could not apply proviso (b) (i) as directed thereby since no income was received from the £100,000 worth of shares in the year 1936-37. He contrasted that state of affairs with the position if his construction were accepted. The inspector, when making his assessment in each year after 1936-37, would have to take note of the fact that shares had been acquired in that year. In the first year in which income arose he would assess the taxpayers under proviso (b) (i) and he would give effect to paras. (ii) and (iii) of proviso (b) in each of the two following years. We were informed that a similar argument was addressed to the learned judge in the court below by the SOLICITOR-GENERAL. It was rejected by the learned judge, first, because his own *prima facie* view was that the words "if in any year of assessment" meant the year for which tax was being computed; secondly, because he was impressed by the argument of counsel for the taxpayers based on a comparison of the two paragraphs of the proviso to s. 30; and, thirdly, because he accepted an argument of counsel for the taxpayers based on the definition of "year of assessment" in the Income Tax Act, 1918, s. 237.

So far as the first two grounds are concerned, it is sufficient for me to say that I think the answer given by counsel for the Crown is correct. I do not think that the construction for which he argues involves a strained construction or involves placing a different meaning on the words in question in one proviso from that adopted in the other. True it is, that on the argument of counsel for the Crown the same result would have been achieved if each proviso had commenced "If at any time," but in a proviso dealing with method of computation it is not unnatural to refer instead to "any year of assessment." I do not think that we should be justified in adopting an interpretation which, as counsel pointed out, might involve that partial, or, indeed, no, effect would be given to proviso (b) of s. 29 when made applicable by the second paragraph of proviso (ii) to s. 30. I must say a little more about the third ground. In the Income Tax Act, 1918, s. 237, "Year of assessment" is defined as follows:

"'Year of assessment' means, with reference to any tax, the year for which such tax was granted by any Act granting duties of income tax."

Counsel for the taxpayers says the definition applies and since we are dealing with tax granted for the year 1942-43, the expression "any year of assessment" must be confined to that year, but this argument, in my opinion, ignores the fact that the definition only applies "unless the context otherwise requires." The use of the word "any" before the words "year of assessment" and the fact that the whole of proviso (b) is imported and that proviso affects more than one year of assessment, in my opinion, require that a wider meaning shall be given to the words "any year of assessment" than that of the definition. For these reasons I would allow the appeal.

TUCKER, L.J. : I agree with the judgment which has been delivered by COHEN, L.J. The construction of the words "any year of assessment" in proviso (ii) to s. 30 of the Finance Act, 1926, is, I think, assisted by re-writing the whole of s. 30 so as to give effect to s. 31 as regards proviso (i) and proviso (b) (i) to s. 29 (1) as regards proviso (ii). So re-written, s. 30, so far as material, reads as follows:

"All profits or income in respect of which any person is chargeable under r. 1 of Case III or under Case IV or Case V of sched. D may respectively be assessed and charged in one sum: Provided that—(i) If in any year of assessment any person charged or chargeable in respect of any such profits or income as aforesaid ceases to possess any particular source of any such profits or income or any part of any such source, income tax in respect of the profits or income from that source or that part shall be computed separately, and the person charged or chargeable with tax in respect thereof shall be charged for that year on the amount of the profits or gains of the period beginning on April 6 in that year and ending on the date of discontinuance: (ii) If in any year of assessment any person acquires a new source of any such profits or income or an addition to any source of any such profits or income, income tax in respect of the profits or income from that source shall be computed separately, and in the case of profits or income chargeable under Case V of sched. D income tax shall be computed as respects the year of assessment in which the income first arises on the full amount of the income arising within that year."

If in each of these provisos the words "any year of assessment" are construed as meaning "in any income tax year" the provisions seem to me to be clear and to work out naturally. Furthermore, in proviso (ii), so re-written, you get the contrast between "*any* year of assessment" in the opening line and "the year of assessment" in the concluding words where the year in which the computation to tax has to be made. I agree that the appeal succeeds.

ASQUITH, L.J.: I also agree.

Appeal allowed with costs in Court of Appeal and below.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Linklaters & Paines* (for the taxpayers).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Reversed. C.A. [1949] 1 All E.R. 874.

CAMINER AND ANOTHER v. NORTHERN AND LONDON INVESTMENT TRUST, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), November 16, 17, 26, 1948.]

Negligence—Nuisance—Tree—Elm tree adjoining road—Fall on passing car—Fall due to disease and want of lopping—Liability of occupier of land.

The defendants were lessees of a block of flats which they occupied by their tenants. In the forecourt of the flats was a row of elm trees. On Apr. 7, 1947, the plaintiffs were driving past the flats when one of the trees fell on the car, wrecking it and injuring both the plaintiffs. The fall was proved to have been due jointly to a disease of the roots, which was of long standing, but not apparent, and to the tree's large crown which had not been trimmed or lopped for many years. Evidence was given that elm trees should be inspected every five to seven years, and, if this tree had been lopped, there was no reason to suppose that it would have fallen when it did.

HELD: it is the duty of all owners of property to manage it in accordance with the principles of good estate management, so that their property may not be in a condition likely to cause damage to persons lawfully using highways in the immediate vicinity; if good estate management involves the inspection and trimming of trees from time

to time, there is a duty on landowners to carry out those operations; and, therefore, the defendants were liable to the plaintiffs.

[AS TO THE OCCUPIER'S DUTY TOWARDS THE PUBLIC IN RESPECT OF THE STATE OF PREMISES ADJOINING A PUBLIC PLACE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 619-621, para. 870.]

Cases referred to :

- (1) *Noble v. Harrison*, [1926] 2 K.B. 332; 95 L.J.K.B. 813; 135 L.T. 325; 90 J.P. 188; Digest Supp.
- (2) *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; 2nd Digest Supp.
- (3) *Brown v. Harrison*, (1947), 177 L.T. 281; 2nd Digest Supp.
- (4) *Cunliffe v. Bankes*, [1945] 1 All E.R. 459; 2nd Digest Supp.

ACTION for damages for negligence and/or nuisance.

The first plaintiff and his wife, the second plaintiff, were injured by the fall of an elm tree standing on property occupied by the defendants. It was contended that the defendants were negligent in not having caused the tree to be cut. The defendants maintained that, although an expert might have been aware of the necessity of taking such precautions, this would not be apparent to an ordinary landowner. LORD GODDARD, C.J., held that it was a reasonable and proper precaution for the occupier of property to top elm trees bordering the highway and gave judgment for the plaintiffs. The facts appear fully in the judgment.

Fox-Andrews, K.C., and *Rees-Davies* for the plaintiffs.

Marven Everett for the defendants.

Cur. adv. vult.

Nov. 26. LORD GODDARD, C.J., read the following judgment. On Apr. 7, 1947, soon after mid-day, Mr. and Mrs. Caminer, the plaintiffs, were driving along Prince Albert Road, St. John's Wood, in their car. The day was fine, and, though there was nothing exceptional about the wind, it was, no doubt, blowing in strong squally gusts from time to time. As they were passing a block of flats known as St. James's Close, which is situate by the corner of Prince Albert Road and Wells Rise, a large elm tree in the forecourt of the flats and more or less in the corner formed by the two roads fell on the car, wrecking it and injuring both the plaintiffs. The defendants are the lessees of the flats and occupied them by their tenants. They became the lessees in 1940, and the premises were requisitioned by the Air Ministry in June, 1941. The Ministry remained in occupation till some time in April, 1946. when the premises were returned to the defendants, who thereupon set about repairing some bomb damage to the side of the block of flats facing on Wells Rise, but I do not think it necessary to enter into any detail with regard to the damage or the repairs, as there is nothing in the evidence to suggest that either has any real connection with the fall of the tree.

The tree in question was a large, well-grown elm, between 120 and 130 years old, and, when it fell, it was apparent from the base of the tree that it had been affected by a disease not uncommon in elm trees known as elm butt rot. I accept the evidence of a forestry expert called by the defendants, Mr. Le Sueur, who had an opportunity of inspecting its base and roots after the tree had been removed. Three roots had been badly affected by rot, and the other three showed signs of rot, but were not so badly affected and had snapped when the tree fell. The disease is caused by a fungus which attacks the roots if there has been any wound which permits the fungus to enter. The wounding may happen in a variety of ways, but I am unable to find here that there had been any cutting of the roots, as Mr. Le Sueur, who is the only witness who made anything like a close inspection, was unable to find any indication that

the roots had at any time been cut. Moreover, the disease that he found was of long standing and must have been in the roots long before the defendants took possession of the property. There was no indication from the condition of the tree above ground that it was suffering from this disease, and, in fact, according to Mr. Le Sueur, the disease in this case had not taken a normal course, for the fungus was working out sideways along the main roots and did not affect the trunk of the tree. A section of the trunk, which had been cut quite close to and above the ground, was exhibited in court, and appeared to show that the wood was in sound condition. I am quite satisfied that there was nothing in the appearance of the tree to indicate that it was in any way diseased. The tree, however, carried a considerable crown, the extent of which was estimated by the witness Dunk, the garden superintendent of the St. Marylebone Borough Council, who saw the tree, at some 35 feet. The tree had never been trimmed or lopped, at any rate for a great many years. Indeed, it is doubtful if it ever had been in the course of its life. Elms are shallow-rooted trees and are said to be notoriously treacherous and apt to fall, partly, I suppose, because they are susceptible to rot and partly because of the shallowness of their roots.

Having carefully considered the evidence of both experts and the evidence of the timber merchant or contractor who was called before me, I have come to the conclusion that the fall was due to a combination of circumstances, namely, the action of the wind on a tree bearing a large crown or tophammer when the roots of the tree had rotted to a greater or lesser extent. Had it not been for the condition of the roots, it is probable that the wind was not heavy enough on the day in question to cause the tree to fall. On the other hand, had the tree not been bearing the amount of tophammer that it, in fact, was, and if it had been topped or pollarded, there is no reason to suppose that the tree would have fallen when it did, and it might have stood for a very considerable time.

For the purpose of this case, it seems to me to be immaterial whether the cause of action is laid in negligence or in nuisance, for it is now well settled that the owner of property on which a nuisance exists, but which has not been caused by him, is not liable for injury caused thereby unless he omits to remedy it within a reasonable time after he became aware or ought to have become aware of the danger: *Noble v. Harrison* (1), *Sedleigh-Denfield v. O'Callaghan* (2). This property was managed for the defendants by a firm of London estate agents, who had, shortly before the accident, given orders to a contractor, who was called before me, to lop and top the trees which were in the forecourt of St. James's Close. This work had progressed some way, and, had it not been for the Easter holidays, this tree, which they had left along with one other to the end, would probably have been pollarded or topped before the day in question, and, in that case, this unfortunate accident would not, in my opinion, have happened. I have, therefore, to consider whether the defendants are responsible for allowing this tree to be in the condition in which it was and whether they had taken steps within a reasonable time to remedy what I think was a danger. As I have said, elms are notoriously treacherous trees. Whether I ought to impute this knowledge to the defendants or their agents may, perhaps, be open to question, but it is the duty of all owners of property to manage it in accordance with the principles of good estate management so that their property may not be in a condition likely to cause damage to persons lawfully using highways in the immediate vicinity, and, if good estate management involves the inspection and trimming of trees from time to time, there is a duty on landowners to carry out those operations. Mr. Le Sueur, who was called by the defendants, and who gave his evidence with a frankness which was most refreshing, said that elm trees should be inspected every five to seven years, and that if this tree had been lopped it

is very unlikely that it would have fallen when it did. If, therefore, principles of good estate management require periodical inspection and cutting, it is not open to an occupier of property who maintains on his land trees which immediately adjoin or are very close to a highway to say: "Well, I did not know that I ought to have done it." Mr. Dunk, a witness to whom I have already referred, told me that the elms on the other side of the road had been pollarded. The defendants' agents had given instructions for these trees to be cut, it was said, because the repair of the war damage had been finished and it was thought there should be a general tidying up of the property. I must, however, point out that the defendants had had ample opportunity of topping these trees both before the requisitioning by the Air Ministry and since they regained possession in April, 1946.

That there must be a duty to take precautions with regard to trees adjoining a highway cannot be doubted. What would amount to an adequate performance of that duty varies, no doubt, with the circumstances. It may well be that trees in the vicinity of a country lane would not require to be inspected or cut so often as those which adjoin busy thoroughfares, and it must be remembered that, while, no doubt, some squares in London are planted with elms, they are not a common feature of the landscape in the ordinary London street. The defendants strongly contended that, though an expert might be aware of the danger or of the necessity of taking such precautions as those to which I have referred in the way of pollarding or lopping, the necessity would not be apparent to an ordinary landowner, and, in this connection, reliance was placed on *Brown v. Harrison and Another* (3), in which the Court of Appeal approved of a ruling by STABLE, J., that the test was whether the danger was one which was apparent to an ordinary layman and not only to an expert. That, however, was a case where a dead tree fell, and it is true that in that case the judge found that it was apparent to the owner that the top boughs were dead and, therefore, likely to blow down. In this case the evidence satisfies me that it is a reasonable and proper precaution for the occupier of property on which there are elm trees bordering or near to the road to top or pollard them as an ordinary incident of good estate management. I may say that this was the opinion of SINGLETON, J., in *Cunliffe v. Bankes* (4). The learned judge in that case concluded his judgment by saying ([1945] 1 All E.R. 465):

"Those who have property of this kind have to realise there is a duty to the public."

He emphasised that the duty was there, though in that case he held that the owner had adequately performed the duty by periodical inspection. In this case, I think that the defendants did not realise their duty, and, though, with another object in view, namely, to get a tidy appearance, they had begun to do what good management required, unfortunately they had not done so in time. Consequently, in my opinion, the plaintiffs are entitled to recover, and there will be judgment for the agreed amounts of £550 in the case of the male plaintiff and £850 in the case of his wife.

Judgment for the plaintiffs with costs.

Solicitors: *G. Howard & Co.* (for the plaintiffs); *Barlow, Lyde & Gilbert* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re KRIS CRUISERS, LTD.

CHANCERY DIVISION (Vaisey, J.), November 29, 1948.]

Company—Charge—Registration—Extension of time—Companies Act, 1948 (c. 38), s. 101.

The power of the court to grant an extension of time for the registration of charges, under the Companies Act, 1948, s. 101, is a discretionary power in that the statutory right in the chargee to be relieved of the consequences of his negligence is subject to his proving to the satisfaction of the court that the omission to register within the proper time was not fraudulent, but was accidental or due to inadvertence or to some other sufficient cause, and, therefore, the court should be fully informed of the circumstances which gave rise to the omission, and the evidence should not merely state that the matter was accidental or due to inadvertence.

On an application by the chargees, under s. 101 of the Act of 1948, for extension of time for the registration of charges, evidence was given that the failure to register within the proper time was due to the fact that the secretary of the company thought that the chargees had registered, while the chargees thought that the secretary of the company had registered. The company was not solvent at the time of the application.

HELD: (i) the evidence, though meagre, was just sufficient to satisfy the provisions of s. 101, and the extension should be granted.

(ii) the insolvency of the company was not a matter to which the court need pay attention.

Observations of ROMER, L.J., in Re M.I.G. Trust, Ltd. ([1933] Ch. 570; 149 L.T. 63), applied.

Re Charles (L.H.) & Co., Ltd. ([1935] W.N. 15), distinguished.

[AS TO EXTENSION OF TIME FOR REGISTRATION, see HALSBURY, Halsbury's Laws of England, Vol. 5, pp. 512, 513; and FOR CASES, see DIGEST, Vol. 10, pp. 790, 791, Nos. 4952-4970.]

Cases referred to:

- (1) *Re Charles (L.H.) & Co., Ltd.*, [1935] W.N. 15; Digest Supp.
- (2) *Re M.I.G. Trust, Ltd.*, [1933] Ch. 542; 102 L.J.Ch. 179; 149 L.T. 56; *affd. on other grounds, sub nom. Peat (Sir William Henry) v. Gresham Trust, Ltd.*, [1934] A.C. 252; Digest Supp.
- (3) *Re Cardiff Workmen's Cottage Co., Ltd.*, [1906] 2 Ch. 627; 75 L.J.Ch. 769; 95 L.T. 669; 10 Digest 791, 4967.

ADJOURNED SUMMONS by chargees of a company applying, under the Companies Act, 1948, s. 101, for an extension of time for registering two charges with the Registrar of Companies. VAISEY, J., granted the application and made an order in the usual form. The facts appear in the judgment.

R. Hunt for the chargees.

The company was not represented.

VAISEY, J.: This is an application, under the Companies Act, 1948, s. 101, asking the court to extend the time for delivering to the Registrar of Companies, for registration, two instruments of charge, dated Mar. 7, 1947. In this case, as in others which have come before me, I desire to call attention to the meagre character of the evidence filed in support, which, however, in this case seems to me to be just, though only just, sufficient to satisfy the provisions of the section. I think it is most important that the court should be fully informed of the circumstances which have given rise to the omission to register within the proper time and that the evidence should not, as is so often the case, merely state that the matter was accidental and due to inadvertence.

tence without particularising the reasons for the breach of the statutory requirements and the surrounding circumstances. People seem to be under the impression that, on their merely saying that the omission was "due to inadvertence," the court is practically obliged to exercise the power, which I hold to be a discretionary power, under the Companies Act, 1948, s. 101. This section replaced the Companies Act, 1929, s. 85, which itself was taken from s. 96 of the Act of 1908, and that, in turn, reproduced s. 15 of the Act of 1900.

There has been some difference of judicial opinion as to the principles on which this discretionary power should be exercised, and there is no doubt that in *Re Charles (L.H.) & Co., Ltd.* (1), the latest of the reported cases, CLAUSON, J., indicated that the solvency or insolvency of the company was a matter to be taken into special consideration when applications of this description were brought before the court. In my view, however, that decision of a learned judge whose experience in company matters was almost unequalled must be regarded as exceptional, for there, be it observed, notices convening a meeting to consider a resolution for voluntary winding-up had actually been sent out at the time when the matter came before the court for decision. In my judgment, that case and the order which was made therein must not be followed except, possibly, in a case where the facts are precisely identical.

The authority by which I consider myself bound is *Re M.I.G. Trust, Ltd.* (2). In that case there was an appeal to the House of Lords where the judgment of the Court of Appeal was affirmed without, as I understand, anything being said in the speeches to the House to throw more light on the matter than appears in the report of the decision of the Court of Appeal. I propose to accept as accurate and to follow the observations made in that case by ROMER, L.J. After calling attention to the fact that BUCKLEY, J., in *Re Cardiff Workmen's Cottage Co., Ltd.* (3) had suggested that provisions ought to be inserted, at any rate, in certain cases, for the protection of unsecured creditors as such, ROMER, L.J. ([1933] Ch. 570; 149 L.T. 63) expressed dissent from that proposition. For many years it has been the practice to insert in orders of this character, where the period for registration has been extended, a traditional and well-settled form of proviso for the protection of persons whose rights accrued between the date of the charge and its actual registration, and there has been a good deal of judicial discussion on the precise effect of those words. I do not myself propose to add to that discussion. The protecting words will go into this order, as they go into every similar order, so far as my experience goes, and the effect of them is now, I think, a matter which is beyond discussion, at any rate in this court, namely, that they are for the protection of persons to whom have accrued rights of property in the assets of a company and that they do not extend to protect the inchoate or other rights of unsecured creditors as such. The position is certainly peculiar and I think in some respects anomalous. It has been pointed out that the absence of the charge on the register may possibly have induced people to give credit to the company on the footing that the assets of the company were not subject to any registrable charge or mortgage.

There is a statutory right in the mortgagee or chargee to come to the court to be relieved of the consequences of his own negligence and lack of caution, provided that the court is satisfied that the omission to register was not with any fraudulent intention, but was, in the words of the Companies Act, 1948, s. 101, "due to inadvertence or to some other sufficient cause." Pausing there, I think that the words, "some other sufficient cause," would be satisfied if it were proved that the secretary of a company had been wrongly advised by his solicitor or counsel that registration need not be sought. There are other possible circumstances to which those additional words following the word "inadvertence" might apply. In the present case the inadvertence was

due to an obvious mistake. The solicitors of the chargees thought that the secretary of the company had registered the charges, as he ought to have done, and the secretary of the company thought that the chargees had registered the charges, as they might have done, and between the two of them, each supposing the other had carried out the requirements of the section, they overlooked the fact that neither of them had done so. That seems to me to be
A inadvertence, inattention, carelessness, but very far removed from the kind of case in which this relief should be refused—a typical case of which would be one in which there was some fraudulent or improper motive in withholding the knowledge of the existence of the charge from the public, to whom its registration would have given the appropriate notice.

I have hesitated in this matter because this section always seems to me to
B be rather a benevolent section in the sense that it appears to give the mortgagee or the chargee a complete and unfettered opportunity for repentance and to place him in the same position as if he had been careful and not careless—diligent and not negligent. In the present case I propose to make an order in the usual form with the usual qualifying words, and, although I am satisfied in this case that the company is very far from solvent, I think that its solvency
C or insolvency is not a matter to which I need pay attention. For that I think I have the authority of ROMER, L.J., in *Re M.I.G. Trust, Ltd.* (2). In the present case, I think the evidence goes just far enough, but I hope that, in future, applications of this kind will be supported by evidence much more carefully framed. Otherwise, I may find myself compelled to dismiss an application merely supported by evidence copied out of a common form book
D which informs me that the omission was “due to inadvertence” without going into any particulars of the nature of the inadvertence and the excuses which can be offered for the negligence and omissions on the part of those whose duty it is to comply with the statutory requirements of registration. There will be the usual order.

Order accordingly.

Solicitors : *J. A. & H. E. Farnfield* (for the chargees).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

WILLIAM HILL (PARK LANE) LTD. v. ROSE.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Jenkins, J.), November 25, 26, 1948.]

Gaming—Debt—Promise to pay by instalments—Consideration—Promise by bookmaker not to report to Tattersalls.

The defendant owed money to the plaintiffs, a firm of bookmakers, as the result of bets made on horse races. On July 8, 1947, the defendant was interviewed by a representative of the plaintiffs and was told that he would be reported to Tattersalls if he failed to pay his debt. The defendant then promised to pay off the debt by monthly instalments, completing payment by the end of the current flat racing season. On the same day as the interview, the plaintiffs wrote the following letter to the defendant “Dear Mr. R. Amount outstanding £4,587. Week ending June 7, 1947. Further to your call of this morning, I confirm our arrangement whereby we do not take any steps against you in consideration of your promise to pay the above outstanding debt by minimum instalments of £250 per month on the 20th of this month and on the 20th of succeeding months, subject to the entire debt being cleared and satisfied by the end

of the present flat racing season and subject also to the matter being reconsidered at the end of August with a view to the monthly instalments being increased." This letter was not challenged by the defendant who did, in fact, pay £250 to the plaintiffs on July 23 and £200 on Sept. 21, After that he made no further payment. In an action by the plaintiffs for the recovery of the money,

HELD: there was a contractual promise by the plaintiffs, constituting good consideration moving from them, to take no action against the defendant if the debt was paid by instalments; the debtor, on his side, undertook to pay the money as set out in the letter; and the case, therefore, came within the principles laid down in *Hyams v. Stuart King* ([1908] 2 K.B. 696; 99 L.T. 424) and the defendant was liable on the debt.

Per DENNING, L.J.: Although there was a real consideration moving from the bookmaker, the new promise by the defendant to pay the betting debt by instalments was not a good consideration because it added nothing to the original promise, which was not enforceable, and, if it was not a good consideration, there was no new contract. The court in *Hyams v. Stuart King* (*supra*), in finding that there was a new contract, implicitly assumed that the new promise to pay was legally enforceable, whereas that was the very matter in debate, but, as that case had the authority of the Court of Appeal, it should be followed.

Hyams v. Stuart King ([1908] 2 K.B. 696; 99 L.T. 424), applied (but doubted by DENNING, L.J.).

[AS TO FRESH PROMISE FOR NEW CONSIDERATION, see HALSBURY, Hailsham Edn., Vol. 15, pp. 476, 477, para. 873; and FOR CASES, see DIGEST, Vol. 25, pp. 400-403, Nos. 54-70.]

EDITORIAL NOTE. We are informed that the case referred to by DENNING, L.J., in his judgment (*infra*) as pending in the House of Lords and one in which the validity of *Hyams v. Stuart King* is to be tested is *William Hill (Park Lane) Ltd. v. Hill* which came before HALLETT, J. on July 7, 1947, and the Court of Appeal (LORD GODDARD, C.J., TUCKER, L.J., and EVERSHED, L.J.) on May 13, 1948.]

Cases referred to:

- (1) *Norreys v. Zeffert*, [1939] 2 All E.R. 187; Digest Supp.
- (2) *Hyams v. Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 25 Digest 401, 58.
- (3) *Poteliakhoff v. Teakle*, [1938] 3 All E.R. 686; [1938] 2 K.B. 816; 107 L.J.K.B. 678; 160 L.T. 1; Digest Supp.
- (4) *Guinness (Bob), Ltd. v. Salomonsen*, [1948] 2 K.B. 42.
- (5) *Vanbergen v. St. Edmunds Properties, Ltd.*, [1933] 2 K.B. 223; 102 L.J.K.B. 369; 149 L.T. 182; Digest Supp.
- (6) *Alberg v. Chandler*, (1948), 64 T.L.R. 394.

APPEAL by defendant from a decision of HALLETT, J., dated Apr. 30, 1948.

The plaintiffs, a firm of bookmakers, claimed £4,137 damages for breach of contract, this sum being the balance alleged to be due to the plaintiffs from the defendant under an agreement dated July 8, 1947. HALLETT, J., gave judgment for the plaintiffs, and the Court of Appeal now affirmed his decision. The facts appear in the judgment of BUCKNILL, L.J.

Salmon, K.C., and *Gallop, K.C.*, for the defendant.

Barry, K.C., and *Fearnley-Whittingstall* for the plaintiffs.

BUCKNILL, L.J.: This is an appeal from a judgment of HALLETT, J., in favour of the plaintiffs for the sum of £4,137. The plaintiffs are a company whose business is that of bookmakers, and for some considerable time the

defendant had been gambling with the plaintiff company in large sums on racehorses. In 1945 the defendant owed a large sum of money to the plaintiffs, and the debt eventually was put into the hands of a society which, I understand, is mainly occupied in collecting debts due to bookmakers. Eventually, a letter was written in December, 1945, by this society to the defendant in the following terms :

A "Please be good enough to let us have your cheque in settlement by return, as in the event of this matter not being arranged amicably, it will be open to our principals to report your default to the committee of Tattersalls, and a failure on your part to comply with any order which may be made by that committee may result in your being 'Warned off'."

B In consequence of that letter, the defendant paid. That letter shows that the defendant then learned what would be the effect of a report to the committee of Tattersalls of failure on his part to pay his racing debts, namely, that he would be warned off the turf with all the results that would follow, one of the results being that he would not be allowed to run any racehorse belonging to him at any recognised meeting. The defendant continued to bet with the plaintiffs, and at the end of May, 1947, he had incurred further heavy losses

C to the plaintiffs, ending with a disastrous week at Epsom, so that by the end of the racing week at Epsom—June 7—he owed £4,587. At that time the defendant owned two or three racehorses which were in training. On July 8, 1947, the defendant went to see the plaintiffs' representative, Mr. Marrison. Mr. Marrison had been a solicitor, and he had been, among other things, engaged as solicitor for a bookmaker in a case which came before ATKINSON, J., in 1939—*Norreys v. Zeffert* (1). The bookmaker in that case sued in respect of certain gambling debts, but he failed in his action. I mention that to show that Mr. Marrison was well aware of the legal position of debtor and creditor in respect of gambling debts. What happened at that interview, according to the evidence of Mr. Marrison was this: "I told him [the defendant] that,

D according to the instructions I had from Mr. Hill [a shareholder in the plaintiff company], he would not be able to have any winners because he would not even be able to have any runners. He said 'What do you mean by that?' I said: 'Well, if we report you to Tattersalls and you do not pay, you will be warned off and you know then that you will not be able to enter any of your horses at all.' He said to me—I cannot remember the exact words, but they were something like—"Surely Bill would not do that to me?" I told him that I had definite instructions that this must be done unless we came to some arrangement which was satisfactory to ourselves, to the company that is. Mr. Rose then said (it was his own idea as a matter of fact) that he could pay £250 a month. He said that it might be possible for him to make these payments bigger, but the minimum would be £250." The evidence then proceeds:

E " (Q) That would take about 18 months to pay it off? (A) Yes, about 18 months. (Q) That was July 8, 1947, and, therefore, on that basis, the whole amount would not have been paid by this time? (A) No. I pointed out to him it would take approximately 18 months and that would be too long. (Q) You did point that out to him? (A) Yes. He said: 'Well, I can definitely promise that I will pay the lot by the end of the flat season'."

F "I then said: 'What about increasing the monthly instalments after a couple of months or so?' and he agreed that after August the amount of the monthly instalments should be reconsidered. We parted in a very friendly way. He shook hands with me and thanked me for the assistance I had given him." Then counsel for the plaintiffs asked: "When this conversation ended what was the position in regard to Tattersalls? (A) That we would not report him to Tattersalls because of the promise he had made to settle this debt." In cross-examination there was some further evidence on this point. Mr.

G " (Q) That would take about 18 months to pay it off? (A) Yes, about 18 months. (Q) That was July 8, 1947, and, therefore, on that basis, the whole amount would not have been paid by this time? (A) No. I pointed out to him it would take approximately 18 months and that would be too long. (Q) You did point that out to him? (A) Yes. He said: 'Well, I can definitely promise that I will pay the lot by the end of the flat season'."

H "I then said: 'What about increasing the monthly instalments after a couple of months or so?' and he agreed that after August the amount of the monthly instalments should be reconsidered. We parted in a very friendly way. He shook hands with me and thanked me for the assistance I had given him." Then counsel for the plaintiffs asked: "When this conversation ended what was the position in regard to Tattersalls? (A) That we would not report him to Tattersalls because of the promise he had made to settle this debt." In cross-examination there was some further evidence on this point. Mr.

Marrison was asked whether any court proceedings had been mentioned at the interview and he replied: "Never mentioned at all." Counsel for the defendant then asked:

"(Q) I suggest you said: 'We would not like to take you to court'? (A) No, there was no mention of court proceedings. (Q) Never any suggestion of taking any steps, or any such phrase as that of "taking steps against you"? (A) No. I think there was a question of, not, I think, reporting to Tattersalls, but circulating him to the societies to which we belong, the Bookmakers' Protection Society and the National Sporting League. (Q) Was anything said about his club? (A) No, I do not know if he is a member of a club even. (Q) I used the word 'threatening' without any offensive implication. Did you intimate that, if he did not pay, in addition to informing Tattersalls you would report him to some other racing society? (A) Yes, the three societies, two of which were mentioned. (Q) Did you mention them all? (A) I said the societies, the bookmakers' societies. (Q) Did you use that phrase? (A) I think so."

On the same day as that interview the plaintiffs wrote this letter, signed by Mr. Marrison as general manager:

"Dear Mr. Rose, Amount outstanding £4,587 0s. 0d. Week ending June 7, 1947. Further to your call of this morning, I confirm our arrangement whereby we do not take any steps against you in consideration of your promise to pay the above outstanding debt by minimum instalments of £250 per month on the 20th of this month and on the 20th of succeeding months, subject to the entire debt being cleared and satisfied by the end of the present flat racing season and subject also to the matter being reconsidered at the end of August with a view to the monthly instalments being increased."

Apparently there was no answer to that letter by the defendant. He did not challenge in any way that it accurately stated the arrangement that had been made at the interview, and in pursuance of the arrangement he did, in fact, pay £250 to the plaintiffs on July 23, and on Sept. 21 he paid another £200, making a total of £450 in all. After that, he paid no more.

The defendant's version of the interview was quite different. He said that there was no reference to Tattersalls, and no reference to paying by the end of the flat racing season, and he said that at the end of the interview Mr. Marrison said: "Thank you very much, Mr. Rose. I am glad you agree with this because we would not like to take you into court on this matter." Counsel for the defendant then asked:

"(Q) Was anything said at all on the subject of Tattersalls? (A) Not a word. (Q) By either of you? (A) I beg your pardon. (Q) Did you say anything about Tattersalls? (A) No. Nothing about Tattersalls was mentioned at all. (Q) Did he say anything about Tattersalls? (A) No. (Q) Was anything said about the Bookmakers' Association? (A) No, of course not. Nothing at all."

There was that important issue of fact between those two people, both of whom I am satisfied were fully aware of the legal position of persons who incur gaming debts. It was for the learned judge to decide which of the two he believed, and he believed Mr. Marrison. The learned judge, apparently, thought nothing of the defendant as a witness. He said he was a "a deplorable witness," and that he saw no ground for disbelieving the evidence of the witness, Marrison. It seems to me that the subsequent events—the letter which I have read and the failure to challenge the statements therein—all bear out the substantial truth of Mr. Marrison's account.

The question arises whether this case comes within the principle laid down in *Hyams v. Stuart King* (2), or whether it comes within the principle of the other cases to which we have been referred, of which I think the most important is *Poteliakhoff v. Teakle* (3). As I understand the principle laid down in *Hyams v. Stuart King* (2) the question which arises is: Was there a separate contract made between the parties whereby, for good consideration, the debtor agreed to pay the sum which was due, either as a lump sum or by instalments? It is said, in the first place, that there was no such contract made in this case because there was no consideration for the promise by the defendant to pay the money as set out in the letter. As to that, the learned judge states quite correctly that the first issue is this: "What was the consideration moving from the plaintiffs for the promise which, on the evidence, I hold to have been made by the defendant?" and on that point the judge said:

"I take the view that the evidence here is sufficient to bring the case within the *Hyams v. Stuart King* (2) doctrine. I think here there was a contracting mind on both sides. I think the defendant was promising to pay, and was promising to pay, as he very well knew, in return for a promise on behalf of the plaintiffs that they would not report him to Tattersalls with the disastrous consequences which the defendant knew might well follow a racehorse owner so reported."

It seems to me that that really is a question of fact, and that, if the learned judge believed the evidence of Mr. Marrison (and he did believe it), clearly there was a promise by the plaintiffs through Mr. Marrison that, if Mr. Rose would pay the sums which are set out in the letter, the plaintiffs would not put the matter before Tattersalls or the societies mentioned.

The other point which is made on behalf of the defendant is that the agreement was void in point of law for uncertainty. It is said that the phrase: "We do not take any steps against you", is vague in point of time and vague in point of matter. Standing by itself, no doubt, the words are vague, but I think they must be read in conjunction with the interview which took place on that day. The letter says: "I confirm our arrangement whereby we do not take any steps against you . . ." and, linking the letter with the evidence of the interview, it is clear that the steps referred to there are those of not putting the matter before Tattersalls and the societies. The way I read this document is: "So long as you pay at least £250 per month on the 20th of each month, and so long as you clear the whole debt by the end of the present flat racing season," which was Nov. 22 and could be ascertained by looking at the RACING CALENDAR—"we will not take the steps which we have threatened to take. If you do not carry out your promise, either by failure to pay the instalments or by failure to clear the whole debt by Nov. 22, then we are relieved of our undertaking not to take steps and we shall hold ourselves at liberty to do so." That is a valid contract. In my view, this case clearly comes within the principles laid down by the majority of the court in *Hyams v. Stuart King* (2). I do not think it would be helpful to look at the other cases referred to in argument. They turn largely on questions of fact. I would dismiss this appeal.

DENNING, L.J.: The question is whether this case comes within *Hyams v. Stuart King* (2), i.e., whether there was a new and distinct contract for real consideration. The first question is whether there was a real consideration moving from the bookmaker. It is clear that mere forbearance from reporting to Tattersalls is not enough. There must be a contractual promise by the bookmaker to forbear: see *Bob Guinness, Ltd. v. Salomonsen* (4). On this point, I decline to have regard to the oral conversation. I look only at the document in which the bookmaker confirmed the arrangement. He put it into writing and presumably set down everything which was definitely arranged. He said:

"I confirm our arrangement whereby we do not take any steps against you in consideration of your promise to pay the above outstanding debt by . . . instalments."

There is there a definite promise by the bookmaker not to take any steps against the backer. It has been urged that that is too vague to be a contractual promise. I cannot take that view. On a proper interpretation of that document, the bookmaker promises not to take any steps against the backer, whether by way of posting at Tattersalls or otherwise, so long as the backer keeps up his instalments and pays the outstanding balance by the end of the flat racing season. On the authority of *Hyams v. Stuart King* (2) I accept the view that the promise was a real consideration moving from the bookmaker.

The second question is one which was not considered in *Hyams v. Stuart King* (2). It is this: Was there any consideration moving from the backer? If this had been a legal debt owing by the backer to the bookmaker, the new promise to pay by instalments would not have been a good consideration. A new promise by a debtor to pay his debt, even though accompanied by variations for his benefit such as to pay by instalments, is not a good consideration for a new promise by the creditor, as, for instance, a promise to forbear from taking bankruptcy proceedings: see *Vanbergen v. St. Edmunds Properties* (5). Is it any different when the original debt is not a legal debt but a betting debt? Speaking for myself, I should have thought that a new promise to pay a betting debt, even a new promise to pay by instalments, was of the same quality as the original promise to pay it, no better and no worse, and enforceable to the same extent, no more and no less. It has been held that a new promise to pay a betting debt, as, for instance, a promise contained in an account stated, is of the same quality as the original promise and is not enforceable by action at law: see *Alberg v. Chandler* (6). If this is correct, as I think it is, then the new promise here to pay the betting debt by instalments was not a good consideration because it added nothing to the original promise, and, if it was not a good consideration, there was no new contract. It was a mere *nudum pactum*. When I put this point to counsel for the plaintiffs, he answered that the new promise was a good consideration, because it was enforceable at law, whereas the original promise was not. That answer, however, exposes the fallacy. It assumes that the new promise by the backer is enforceable at law, whereas that is the very question to be determined. Once it is assumed, as I think it should be, that the new promise has the same quality as the original promise, then the new promise is no consideration because it adds nothing. I cannot help thinking that the same fallacy underlies the reasoning of the majority in *Hyams v. Stuart King* (2). In finding that there was a new contract, they implicitly assumed that the new promise to pay was legally enforceable, whereas that was the very matter in debate. Counsel for the defendants has told us that a case is already pending in the House of Lords in which the validity of *Hyams v. Stuart King* (2) is to be tested, and that, even if for any reason that appeal is not effective, the present case will be taken there. I am content, therefore, simply to say that *Hyams v. Stuart King* (2) has at present the authority of this court, and we should on this occasion follow it, even though its reasoning is open to question. On this ground, I agree that the appeal should be dismissed.

JENKINS, J. : I also agree.

Appeal dismissed with costs.

Solicitors: *Albin Hunt & Stein* (for the defendant); *Hardcastle Sanders & Co.* (for the plaintiffs).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

TILLEY v. TILLEY.

[COURT OF APPEAL (Bucknill and Denning, L.J.J., and Hodson, J.), October 26, 27, November 29, 1948.]

Condonation—Evidence—Presumption against—Displacement by uncorroborated evidence of spouse.

A *Divorce—Evidence—Proceedings instituted in consequence of adultery—Plea of condonation by co-respondent—Respondent a compellable witness—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 198.*

B By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 198 :
 “The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.”

C In January, 1948, a wife, after confessing to her husband that she had committed adultery, left the matrimonial home. On Feb. 12, 1948, the husband petitioned for divorce on the ground of the wife's adultery. The suit was undefended except by the co-respondent on the issue of damages, but at the trial for the first time the co-respondent raised the issue of condonation, alleging that sexual intercourse had taken place between husband and wife on the occasion of two visits by the husband to her on Feb. 21 and 22, 1948. The co-respondent called the wife on subpoena, and the learned commissioner before whom the case was tried compelled her to answer, against her will, the question whether there had been any sexual relations between her and her husband since the petition was served. Her answer was in the affirmative, and the commissioner, thereupon, found that the husband had condoned the matrimonial offence and dismissed the petition.

E HELD : (i) a witness who is competent by virtue of the Judicature Act, 1925, s. 198, is also compellable, and, therefore, the steps taken by the judge to compel the wife to answer were lawful.

F (ii) there is a provisional presumption against condonation, and the uncorroborated evidence of the wife was insufficient to dispel this presumption.

[FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, see HALSBURY'S STATUTES, Vol. 9, p. 391.]

Cases referred to :

- G (1) *R. v. Lapworth*, [1931] 1 K.B. 117; 100 L.J.K.B. 52; 144 L.T. 126; 95 J.P. 2; Digest Supp.
 (2) *Leach v. R.*, [1912] A.C. 305; *sub nom. Leach v. Public Prosecutions Director*, 81 L.J.K.B. 616; 106 L.T. 281; 76 J.P. 203; 14 Digest 453, 4800.
 (3) *Cavendish v. Cavendish*, [1926] P. 10; 27 Digest 425, 4313.
 (4) *Redfern v. Redfern*, [1891] P. 139; 60 L.J.P. 9; 64 L.T. 68; 55 J.P. 37; 27 Digest 263, 2317.
 H (5) *Churchman v. Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 L.J.P. 17; 173 L.T. 108; 2nd Digest Supp.
 (6) *Nottingham Guardians v. Tomkinson*, (1879), 4 C.P.D. 343; 48 L.J.M.C. 171; 43 J.P. 735; 3 Digest 366, 68.
 (7) *Campbell v. Campbell, Lewis & Keith*, [1939] 4 All E.R. 529; [1940] P. 90; 109 L.J.P. 37; 162 L.T. 152; 2nd Digest Supp.
 (8) *Sneyd v. Sneyd & Burgess*, (1925), 42 T.L.R. 106; 27 Digest 431, 4391.

- (9) *Blunt v. Park Lane Hotel, Ltd.*, [1942] 2 All E.R. 187; [1942] 2 K.B. 253; 111 L.J.K.B. 706; 167 L.T. 359; 2nd Digest Supp.
- (10) *Mordaunt v. Moncreiffe*, (1874), L.R. 2 Sc. & Div. 374; 43 L.J.P. & M. 49; 30 L.T. 649; 39 J.P. 4; 27 Digest 384, 3770.
- (11) *Emanuel v. Emanuel*, [1945] 2 All E.R. 494; [1946] P. 115; 114 L.J.P. 60; 173 L.T. 118; 2nd Digest Supp.
- (12) *Durant v. Durant*, (1825), 1 Hag. Ecc. 733; 162 E.R. 734; *previous proceedings*, (1824), 2 Add. 267; 27 Digest 337, 3171.
- (13) *Elwes v. Elwes*, (1794), 1 Hag. Con. 269; 161 E.R. 549; 27 Digest 296, 2726.
- (14) *Joseph v. Joseph*, [1915] P. 122; 84 L.J.P. 104; 112 L.T. 170; 27 Digest 562, 6183.
- (15) *Winscom v. Winscom & Plowden*, (1864), 3 Sw. & Tr. 380; 33 L.J.P.M. & A. 45; 10 L.T. 100; 27 Digest 345, 3264.
- (16) *Ridgeway v. Ridgeway*, (1881), 29 W.R. 612; 27 Digest 338, 3174.
- (17) *Beard v. Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 2nd Digest Supp.
- (18) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 2nd Digest Supp.
- (19) *Roberts v. Roberts & Temple*, (1917), 117 L.T. 157; 27 Digest 339, 3182.

APPEAL by the husband from a decision of His Honour Judge SHOVE, sitting as a commissioner to hear divorce cases at Lincoln Assizes, dismissing the husband's petition for divorce on the ground that he had condoned his wife's adultery. The Court of Appeal ordered a new trial.

J. C. Lawrence and *I. S. Warren* for the husband.

S. L. Elborne (*P. Lewis* with him) for the co-respondent.

Cur. adv. vult.

Nov. 29. The following judgments were read.

BUCKNILL, L.J. : I have had the opportunity of reading the judgments of DENNING, L.J., and HODSON, J. I agree with their conclusion that the learned commissioner compelled the wife to answer the question put to her: "Has there been any sexual relation between you and your husband since the petition was served in this case?" The first question which the court has to decide is whether the learned commissioner was right in exercising this compulsion. The question turns on the proper interpretation to be placed on the Supreme Court of Judicature (Consolidation) Act, 1925, s. 198, which provides:

"The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery."

These were proceedings instituted in consequence of adultery and the witness was the wife of the petitioner, who was charging her with adultery with the co-respondent. In these circumstances the section provides that she was competent to give evidence in the proceedings. The question is whether she was also compellable.

Under normal conditions a person who is a competent witness is also compellable. This was stated in the judgment of the Court of Criminal Appeal in *R. v. Lapworth* (1). In that case a man was indicted for inflicting personal injury on his wife. The wife declined to give evidence against her husband, but the court held that she was a compellable witness. She was competent, because a wife had always been competent to give evidence in a criminal

court against her husband that he had committed an assault upon her. Being competent, she was also compellable. AVORY, J., giving the judgment of the court, said ([1931] 1 K.B. 121) :

A “Once it is established that she is a competent witness, it follows that she is a compellable witness ; that is to say that she, having made her complaint of, or independent evidence having been given of, an assault on her by her husband, and she having been summoned, as she may be, she is, like all other witnesses, bound to answer any questions put to her. In other words, she becomes a compellable witness.”

B There is, however, an important exception to this rule, an exception which was the basis of the decision of the House of Lords in *Leach v. R.* (2). In that case the wife of a man charged with the crime of incest refused to give evidence against her husband, and the House of Lords held that she could not be compelled to do so. The case turned on the interpretation of the Criminal Evidence Act, 1898, s. 4 (1), by which the wife of a person charged with an offence may be called as a witness either by the prosecution or the defence and without the consent of the person charged. The question for decision was whether the wife, who was a competent witness by reason of the section, was also compellable. Counsel for the Crown put forward the same argument as that which subsequently succeeded in *R. v. Lapworth* (1). He said ([1912] A.C. 309) :

D “If a person may be called the legal consequence is that he must submit to examination. There is no standing rule that a wife if competent is not compellable to give evidence. The Act of 1898 eschews the use of the word ‘compellable’ and that controversy. The words of the earlier statutes are ‘competent but not compellable’ not ‘competent and compellable,’ and where the word ‘competent’ is used without more the inference is that the witness is compellable.”

E The House of Lords, however, did not accept that argument. EARL LOREBURN, L.C., at the commencement of his speech said (*ibid.*) :

F “It is very desirable that in a certain class of cases justice should not be thwarted by the absence of the necessary evidence, but upon the other hand it is a fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband in matters of a criminal kind.”

G Apart from the words of the material statutes, to which I must refer, one would think that, if a husband cannot be compelled to answer questions tending to show that he has committed adultery, his wife ought not to be compelled to answer questions tending to show that her husband has committed adultery. The law has always regarded, and still regards, adultery as allied to a criminal offence, as is shown by the decision of LORD MERRIVALE, P., in *Cavendish v. Cavendish* (3) ([1926] P. 13), where the court held that an order for discovery cannot be made against a party to divorce proceedings when it is sought for no other purpose than to prove that party guilty of adultery. LORD MERRIVALE, P., in his judgment quotes from the classic judgment of BOWEN, L.J., in *Redfern v. Redfern* (4) (*ibid.*) :

H “It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure. In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form ; but adultery is a charge of such gravity as to render it not unnatural that we should find the doctrine still applicable to it—that ‘no one is bound to criminate himself’.”

It is true that the question which the wife refused to answer in the present case was not directed to the question whether she had herself committed adultery, but, if the word "competent" in s. 198 of the Act of 1925 infers compulsion, then it seems to me that the wife of the co-respondent might be called by the petitioner husband and compelled to give evidence that her husband, the co-respondent, had committed adultery. The interpretation to be placed on this section in that instance goes far beyond the particular facts of the present case.

I now turn to consider the history of the Judicature Act, 1925, s. 198. That section repeated in practically identical terms s. 3 of the Evidence Act, 1869, which was itself repealed by the Judicature Act, 1925, so far as it related to the High Court. Section 1 of the Evidence Further Amendment Act, 1869, repealed s. 4 of the Evidence Act, 1851, and so much of s. 2 of the Evidence Amendment Act, 1853, as is contained in the words "or in any proceeding instituted in consequence of adultery." By the Act of 1851, s. 2 the parties to an action, with the exception contained in s. 4, were made competent and compellable to give evidence. Section 4 of the Act provided :

"Nothing herein contained shall apply to any proceeding instituted in consequence of adultery, or to any action for breach of promise of marriage."

Section 2 of the Evidence Amendment Act, 1853, subsequently repealed by the Act of 1869, provided :

"Nothing herein contained shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceedings or in any proceeding instituted in consequence of adultery."

The result, therefore, of the Act of 1869 was to remove the disability of the parties or the wife or husband of a party in any proceeding instituted in consequence of adultery to give evidence and to render them competent to give evidence in such proceedings, with this protection, that the witness was not bound to answer questions tending to show that he or she had been guilty of adultery. There is no such protection in the case of a question tending to show that his or her spouse has been guilty of adultery. Having regard to the fact that s. 1 of the Act of 1853 makes the husbands and wives of the parties competent and compellable in any proceeding other than one instituted in consequence of adultery, I should have thought, if it is legitimate to speculate as to the intentions of the legislature except as shown by the actual words of the statute, that, if the legislature had intended in 1869 to make the parties and spouses of parties competent and compellable as witnesses in proceedings as to which they had been excluded as witnesses by the Acts of 1851 and 1853, the legislature would have said "competent and compellable" and not merely "competent." However, after considering the reasons contained in the judgments of DENNING, L.J., and HODSON, J., on this point, I have reluctantly come to the conclusion that a witness who is competent by virtue of s. 198 of the Act of 1925 is also compellable. I now have to consider what is the proper order to make on this appeal. The trial of the issue of condonation was, in my opinion, very unsatisfactory. First, because the co-respondent's legal advisers gave no notice to the petitioner that they intended to raise the issue of condonation until after the case had been called on, although it appears from the statement of counsel for the co-respondent to the learned commissioner at the start of the trial that the wife had twice admitted intercourse to the co-respondent's solicitor after the filing of the petition. Mr. Stephen Dale, managing clerk to the solicitor for the co-respondent, was also called to prove that the wife made a statement to him on Apr. 5, and that when he served her with a subpoena on Apr. 30, she said her statement was true.

The trial took place on May 6. Having regard to the fact that the co-respondent admitted the adultery, I think it was the duty of the co-respondent's advisers to notify the petitioner in ample time before the trial that they intended to raise the issue of condonation. Secondly, when counsel for the co-respondent informed the court that he proposed to raise the issue of condonation, he gave the date of the alleged intercourse as Mar. 21, 1948, whereas it subsequently appeared from the evidence that the alleged dates were Saturday and Sunday, Feb. 21 and 22. Thirdly, the learned commissioner, on hearing that the issue of condonation was to be raised, said that he supposed the proper procedure was for him to hear the evidence of the petitioner, and counsel for the co-respondent could then call the wife on the question of condonation. With great respect to the learned commissioner, I think the proper procedure would have been for the counsel for the petitioner to ask for particulars of time and place of the alleged condonation and to have asked for an adjournment for the matter to be inquired into after those particulars had been given. Fourthly, I think that the learned commissioner did not apparently attach any importance to the contents of the letters to and from the co-respondent to the wife, of which the husband said he obtained possession on Feb. 22, letters which appear to me to have considerable importance on certain aspects of the issue of condonation. For these reasons, in my opinion, a serious miscarriage of justice may have taken place in this case owing to the way in which the issue of condonation was raised and tried. I, therefore, think that this court should set aside the judgment and order a new trial. I am anxious to say nothing which should in any way seem to indicate my opinion as to where the truth lies in this difficult and obscure case, and which might in any way tend to prejudice the trial. I think the trial should take place either locally or in London before another judge.

Having regard to the arguments on points of law addressed to us on this appeal, it may possibly be helpful to the trial judge if I indicate what those points were, and some at any rate of the considerations which may properly be borne in mind with reference thereto.

The first point taken was that there was no corroboration of the wife's evidence. As to that point, in my opinion, where the issue is one which depends entirely on the evidence of one spouse, which is denied by the evidence of the other spouse, especially where the evidence of each is equally credible or substantially so, the court naturally looks to see what corroboration, if any, there is of the evidence of either or both and in the absence of any corroboration looks to see where the burden of proof lies. I think it erroneous to say that the evidence of the wife in this case alleging sexual intercourse with her husband should not be acted on either as a matter of law or practice unless there is corroboration of her evidence. The decision in this case must ultimately depend on the relative credibility of the spouses as witnesses, on the probabilities of the case, and on the corroborative evidence, if any.

As regards the burden of proof, the principle has, I think, been laid down clearly by the Court of Appeal in *Churchman v. Churchman* (5). That was a case of alleged connivance at adultery, an act which one would think in the ordinary course of things required a higher degree of proof that the fact of marital intercourse between husband and wife, even after a confession of adultery. Be that as it may, in *Churchman's* case (5) the judgment of the court made it clear that, if at the end of the trial the evidence as to condonation is so evenly balanced that the court can come to no definite conclusion about it, then s. 4 of the Matrimonial Causes Act, 1937, comes into play, and the court, not being satisfied that there has been no condonation, is bound to dismiss the petition.

The second point argued before us was that the correspondence between the wife and the co-respondent, of which the husband took possession on Feb. 23,

was some evidence of adultery between the wife and the co-respondent after the confession of adultery by the wife and their written admissions on Jan. 21, and that the alleged intercourse could not be taken as condonation of that later adultery. That is an issue which will need careful consideration at the new trial. It received no consideration at the first trial. I think that a husband only condones that which he knows, or ought as a reasonable man to expect at the time of the condonation. It seems to me to be a question of fact in this case whether the adultery, if any, which took place after the confession, should not have been anticipated by the husband as having taken place before he had the alleged intercourse with his wife on Feb. 22 and 23.

DENNING, L.J. : Two questions are raised in this case : (1) whether a wife is compellable to give evidence for or against her husband in proceedings instituted by him in consequence of her adultery ; (2) whether in the circumstances of this case the commissioner was right in dismissing the petition on the ground of condonation.

The husband is a signalman now aged 32. He married his wife on Mar. 23, 1940, when he was 24 and she was 18. They lived at Stamford in Lincolnshire and have two children aged 7 and 4. The marriage was happy until 1947, when the wife went to help in the shop of Mr. Hall, the co-respondent. He was 20 years older than she was. In January, 1948, she confessed to her husband that she had committed adultery with Mr. Hall and was expecting a baby. She left and went to her sister's house at Sutton-in-Ashfield, some 60 miles away, taking one child with her and leaving the other with her husband. On Feb. 12, 1948, he petitioned the court for a divorce on the ground of her adultery with Mr. Hall and claimed the custody of the children. He also claimed £400 damages from Mr. Hall. The wife did not enter an appearance or file an answer. Mr. Hall entered an appearance in which he did not contest the charge of adultery but limited himself to the issue of damages. On May 6, 1948, the case came on for hearing before the commissioner, sitting at Lincoln. The wife was in court, but not represented by counsel or solicitor. The co-respondent was represented by counsel, who, when the case was called on, rose and said that since the date of the petition there had been condonation on Mar. 21, 1948. The husband thereupon could, if he had wished, have asked for an adjournment, but he did not do so and the case proceeded on the basis that, although condonation was not pleaded, nevertheless the court had to be satisfied that the husband had not condoned the adultery, and, if it was not so satisfied, the petition would have to be dismissed.

The issue of condonation depended on what happened on the week-end of Feb. 21, 1948, three weeks after the wife left. The husband went over from Stamford to East Kirby (some 60 miles) to stay with his parents, and, while there, he went over to see his wife and child at her sister's house at Sutton-in-Ashfield, which was $3\frac{1}{2}$ miles away from his parents' house at East Kirby. He went over on the Saturday and Sunday afternoons for a couple of hours or so and saw his wife and 7 year old son. A young couple were also in the house on both afternoons, and the sister-in-law and her husband were in the house on the Sunday afternoon for some of the time. At these meetings with his wife and son the husband told his wife that he anticipated one day restoring the home, but he could not take her back as she was expecting a baby. On the second afternoon he found in her handbag some letters from the co-respondent to her which he did not read at the time but took away with him. He said that after he got back he read them and because of them he changed his mind and was not willing to take her back. Counsel for the co-respondent suggested to the husband in cross-examination that he had sexual intercourse with his wife on the two afternoons at Sutton-in-Ashfield, once in the bedroom and once in the kitchen. He firmly denied it, and pointed out that there were other people in the house and that he and his wife were

not alone because their son was there. Throughout the cross-examination much confusion was caused by counsel for the co-respondent being wrongly instructed about the dates. He kept putting the date of the visit as Mar. 21, when it was in fact Feb. 21. The wife had been subpoenaed by the solicitor for the co-respondent, and, after the husband's case was closed, counsel for the co-respondent called her into the witness box. The commissioner then warned

A her that she was not bound to answer any questions admitting her adultery unless she chose to do so. She said: "I don't choose to do so." She gave her name and address and was then asked: "Do you remember your husband coming to see you and your child at Sutton-in-Ashfield?" She said "I don't wish to answer." After a little discussion between the commissioner and counsel, she was next asked: "Has there been any sexual relation between

B you and your husband since the petition was served in this case?" She said again: "I don't wish to answer." The commissioner then took a hand in the matter and, to use his own words, spoke to her "quite severely" and used "extreme pressure" on her to give evidence. His actual words to her were: "Whenever a witness appears in court, they are (*sic*) not entitled to refuse to answer a question except questions of certain sorts. I shall have

C to consider what steps to take." She was in tears by this time, and then the question was again put: "Has sexual intercourse taken place between you and your husband at Sutton-in-Ashfield since the petition was served?", and she eventually answered: "Yes." She said it happened in the bedroom and the kitchen, but she was never asked whether her husband was right in saying there were other people in the house and that their own son was with them

D all the time. At all events, she never contradicted her husband on those points. The commissioner was, however, much impressed by her reluctance to give evidence against her husband. He thought it showed her to be a truthful witness. He believed what she said and dismissed the petition on the ground that the husband, after knowledge of her adultery, had had sexual intercourse with his wife on Feb. 21 and 22, and had, therefore, condoned her offence.

E On those facts it is quite plain that the wife was compelled to give evidence against her husband when she was unwilling to do so. The question is whether that was lawful.

The argument that it was unlawful is simple and attractive. At common law neither husband nor wife was competent or compellable to give evidence for or against the other. The relevant statutory provision which permits it

F in this case is the Judicature Act, 1925, s. 198, which says that:

"The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings . . ."

The section does not say they are to be competent *and compellable*. It is

G argued that the proper inference from that omission is that, although competent, they are not compellable. In support of the argument it is said that in criminal law where a statute has made a wife competent to give evidence against her husband, she is not compellable: *Leach v. R.* (2). The simplicity of the argument is, however, deceptive. It omits many relevant considerations which I will set down in historical sequence so as to show

H their bearing on the matter.

At common law the parties to an action and their husbands and wives were not competent to give evidence at all. This was changed by LORD BROUGHAM's first Evidence Act in 1851 which, by s. 2, made parties competent and compellable, but made an exception in the case of criminal proceedings (s. 3) and in the case of proceedings instituted in consequence of adultery and any action for breach of promise of marriage (s. 4). The courts held that the Act of 1851, although applying to the parties themselves, did not apply to the husbands

and wives of parties. These remained by the common law incompetent to give evidence. This was changed by LORD BROUGHAM's second Evidence Act, 1853, which, by s. 1, made the husbands and wives of parties competent and compellable, but by s. 2 made an exception in any criminal proceeding or "in any proceeding instituted in consequence of adultery." In 1857 great changes took place in the law of husband and wife. The Matrimonial Causes Act, 1857, created divorce courts to do what no court in England had ever been able to do before, namely, to pronounce decrees of divorce so as to permit re-marriage. The grounds of divorce allowed by that Act were almost exclusively adultery, with or without aggravating circumstances: s. 27; and the new courts had to observe the same rules of evidence as the common law courts: s. 48. Inasmuch as nearly all proceedings under the Act of 1857 were instituted "in consequence of adultery," that meant that in nearly every case neither the parties nor their husbands or wives were competent or compellable to give evidence. Some partial exceptions were made by ss. 43 and 46 of the Act of 1857 and by the Matrimonial Causes Act, 1859, s. 6, but these sections were obscurely worded and did not meet the situation. In particular, in most cases, though not in all, the parties were not able to give evidence in support of their own case or even of their own defence.

Then came the Evidence Act, 1869. The first thing done by that Act (s. 1) was to repeal the exceptions made in LORD BROUGHAM's Acts in respect of actions for breach of promise of marriage and proceedings instituted in consequence of adultery. The second thing was to make parties to an action for breach of promise competent to give evidence: s. 2; and the third thing was to make the parties to proceedings instituted in consequence of adultery competent to give evidence: s. 3. This clearly remedied the injustice whereby they were often not able even to give evidence, but the question is whether it did more, that is, whether it made them compellable. In order to ascertain the effect of the Act of 1869, it is necessary to consider the state of the statute book at that time. It is clear that from 1869 onwards the following sections were all in force in respect of proceedings instituted in consequence of adultery: (i) the Evidence Act, 1851, s. 2, which made parties competent and compellable; (ii) the Evidence (Amendment) Act, 1853, s. 1 which made the husbands and wives of parties competent and compellable; (iii) the Matrimonial Causes Act, 1857, s. 43, which made a petitioner competent and compellable to give evidence at the instance of the court, but said that he was not bound to answer any question tending to show that he had been guilty of adultery; (iv) the Matrimonial Causes Act, 1857, s. 46, which made the parties to a matrimonial cause competent to give evidence by affidavit subject to cross-examination in open court; (v) s. 48 of the Act of 1857, which said that the rules of evidence observed in the common law courts were to be observed in the matrimonial courts; (vi) s. 6 of the Matrimonial Causes Act, 1859, which said that, on a wife's petition for divorce for adultery with cruelty, or adultery with desertion, the husband and wife should be competent and compellable to give evidence relating to the cruelty or desertion; (vii) the Evidence Act, 1869, s. 3, which said that the parties to any proceedings instituted in consequence of adultery and the husbands and wives of such parties should be competent to give evidence in such proceedings, but gave witnesses, including parties, a privilege from answering any question tending to show that they had been guilty of adultery.

In my opinion, the result of those sections was that the parties to a suit instituted in consequence of adultery and their husbands and wives were not only competent but also compellable to give evidence subject only to the privilege from answering questions tending to show they had been guilty of adultery. My reasons are eight in number: (i) All the sections are expressed in affirmative terms and they are all consistent with one another. They must

all, therefore, be given their full effect. Ever since the time of LORD COKE it has been held that where there are two consistent affirmative Acts of Parliament, each must be given its full effect. It would be contrary to accepted rules of construction to say that because s. 3 of the Act of 1869 is expressed in narrower affirmative terms than s. 2 of the Act of 1851 and s. 1 of the Act of 1853, therefore, those wider affirmative sections are to have their meaning cut down. (ii) Furthermore, if the legislature had intended that the parties and their husbands and wives were to be competent but not compellable, it would not have repealed the exception contained in s. 4 of the Act of 1851 and s. 2 of the Act of 1853. It would have retained that exception and made an exception to the exception. That is to say, it would have omitted s. 1 of the Act of 1869, and have made both ss. 2 and 3 run as follows: "Notwithstanding anything contained in any Act, the parties, etc., shall be competent to give evidence." That would have rendered the parties competent, but would have left them by common law still not compellable. As it is, by repealing the exceptions altogether, the legislature has made the wide terms of s. 2 of the Act of 1851 and s. 1 of the Act of 1853 applicable to those proceedings. This is a striking contrast to criminal proceedings, for when the legislature in 1898 made accused persons and their husbands and wives competent to give evidence the exceptions in LORD BROUGHAM's Acts in respect of criminal proceedings were retained and not repealed, thus leaving those persons by the common law still not compellable: *Leach v. R.* (2). (iii) If s. 3 of the Act of 1869 had been a complete code in itself, there would have been much force in the contention that the parties concerned are not compellable, but I have shown that s. 3 is not a complete code in itself. The law as at that time is to be ascertained from all the unrepealed sections of the Acts, including s. 2 of the Act of 1851 and s. 1 of the Act of 1853, which now stand intact without the exception as to proceedings in consequence of adultery. (iv) By various statute law revisions from 1892 to 1937 all the sections I have mentioned have been repealed except s. 2 of the Act of 1851, s. 1 of the Act of 1853, and s. 3 of the Act of 1869 (now the Supreme Court of Judicature Act, 1925, s. 198). The legislature clearly did not intend by their revisions to say that the parties who had been compellable by s. 43 of the Act of 1857 and s. 6 of the Act of 1859 were no longer compellable. Those sections were repealed because it was realised that those parties were compellable under the wider provisions of s. 2 of the Act of 1851 and s. 1 of the Act of 1853, and that the narrower provisions were no longer necessary on the statute book. (v) The view which I have expressed is the same view as was taken by text book writers and judges from the very time that the Act of 1869 was passed, and their opinions are entitled to great weight. *Contemporanea expositio fortissima est in lege*. Mr. PITT TAYLOR's books on evidence are most illuminating on this point. The fifth edition, published in 1868, contains an elaborate exposition of the perplexities and inconsistencies that then existed, with numerous cases that had been decided on the statutes then in force: see art. 1220, A — D. The sixth edition, published in 1872, omits them all and treats it as obvious that since 1869 the parties and husbands and wives are competent by reason of s. 3 of the Act of 1869 and compellable by reason of LORD BROUGHAM's Acts of 1851 and 1853: see art. 1221. In 1878 LOPES, J., in *Nottingham Guardians v. Tomkinson* (6) (4 C.P.D. 350) said that the object of the Act of 1869 was to make them competent and compellable. In 1907, when Mr. WILLS in his book suggested that they were not compellable, Mr. PHIPSON (himself a great authority on the subject) immediately took him to task in the LAW QUARTERLY REVIEW and said they were compellable: see 24 L.Q.R. p. 214; and that view has been repeated in every edition of PHIPSON ON EVIDENCE ever since: see 8th ed., p. 451. (vi) The courts themselves have acted on the view that the parties are not only competent but also compellable. They have repeatedly compelled them to answer on oath interrogatories, and their affidavits

in answer are evidence in the suit : see R.S.C., Ord. 31, r. 24. Thus, parties to an action for breach of promise of marriage (who by s. 2 of the Act of 1869 are also "competent" to give evidence) have always been compelled to answer interrogatories as to the matters in issue in the action. In CHITTY'S KING'S BENCH FORMS there is a standard form of interrogatories for such actions : see 17th ed., p. 333. Furthermore, parties to proceedings instituted in consequence of adultery have always been compelled to answer interrogatories as to any matters in issue except in so far as they are covered by the privilege : see *Redfern v. Redfern* (4) ([1891] P. 145, 6, 149). None of these parties could have been interrogated or his answers put in evidence except on the footing that, by LORD BROUGHAM'S Acts, he is compellable to give evidence. If he were not compellable, the interrogatories would have been disallowed. (vii) The same view was implicitly accepted by the Court of Appeal in *Campbell v. Campbell* (7), where a petitioner in an adultery suit was ordered to disclose documents relating to his associations with other women, and it was left to him to claim the privilege if it was open to him. He was thus compelled to produce evidence against himself. *Cavendish v. Cavendish* (3) was there explained as being based on the privilege, and, so explained, it affords no support for the view that a respondent cannot be subpoenaed or is not compellable to give evidence. (viii) If it be said that the legislature cannot have intended to compel a wife to give evidence against her husband, the answer is that, except in criminal proceedings, the legislature has shown that it does so intend. Take this very case. If the KING'S PROCTOR had intervened and alleged that the adultery had been condoned, the wife could have been compelled to give evidence as to the condonation : see *Sneyd v. Sneyd & Burgess* (8). Why should she not be compelled then at this stage ? And it is clear that, if a husband is charged with adultery in a slander action or an action for seduction, he may be compelled to give discovery and to answer interrogatories as to it, and his wife may be compelled to give evidence against him : see *Blunt v. Park Lane Hotel* (9). The reason is that, although adultery is a high moral offence, it is not a criminal offence and is not subject to any pains and penalties : see *Mordaunt v. Moncreiffe* (10) ; and there is no reason why a wife should not be compelled to give evidence against her husband with regard to it just as she would in an action for fraud or assault or any other civil wrong, however reprehensible. Indeed, in the House of Lords, LORD HATHERLEY (L.R. 2 H.L. (Sc.) 394, 395) specially referred to the Act of 1869 as being one of the many statutes which indicate that a divorce suit for adultery is a civil, not a criminal, matter.

If the view I have expressed in this case is not right, it means that the parties to a breach of promise action and the parties to any proceedings instituted in consequence of adultery and their husbands and wives are in the same position as accused persons (and their husbands and wives) are in criminal proceedings since the Criminal Evidence Act, 1898, that is, competent, but not compellable, to give evidence, to answer interrogatories, or to make discovery. The practice of the courts since 1869 negatives any such idea. For these reasons I am satisfied that every party to a divorce suit instituted in consequence of adultery is competent and compellable to give evidence, save only in so far as he can claim the privilege. He can be subpoenaed to give evidence and must give it so that the truth may be ascertained. If, however, questions are asked tending to show that he has been guilty of adultery, the judge will warn him that he is not bound to answer, and it is then for the witness to say whether he claims the privilege or not in respect of those questions. At this stage in the history of the law of evidence, the anomaly is not that he should be compellable to give evidence, but that he should have this privilege. In the present case, therefore, the wife was a competent and compellable witness and was properly subpoenaed. She was not bound to answer any questions tending to show that she had been guilty of adultery

and she was not, in fact, compelled to do so. She was, however, bound to answer any other relevant questions, such as those which related to the visit of her husband to Sutton-in-Ashfield. The steps taken by the judge to compel her to answer were, therefore, lawful.

A The second question which arises in this case is whether the commissioner was right in dismissing the case on the ground of condonation. It was argued for the husband (1) that there was no corroboration of the wife's evidence of sexual intercourse; (2) that the husband did not have full knowledge of all the material facts. It was answered by the co-respondent that the evidence showed at least a suspicion of condonation which the husband had not dispelled. In the discussion of these points, much turns on the burden of proof. I, therefore, deal with that first.

B The effect of the statute as to burden of proof has been much misunderstood. At one time it was regarded as if it raised a presumption of connivance or condonation or collusion when there was none before, but that view was negatived by this court in *Churchman v. Churchman* (5). That case established that there was still a provisional presumption against connivance. There were circumstances of suspicion in that case ([1945] P. 55), but they were not such as to overthrow the provisional presumption against connivance. C The case shows that, in a case of connivance, it is only if the facts in evidence show, not a slight suspicion, but a reasonable suspicion amounting in effect to a provisional presumption of connivance that the burden is put on the petitioner to disprove it. The same reasoning applies to collusion: see *Emanuel v. Emanuel* (11). These principles must logically apply also to D condonation, because before the Act there was a presumption against condonation, just as there was against connivance and collusion. To be a bar, condonation had to be "clearly and distinctly proved": see per SIR JOHN NICHOLL in *Durrant v. Durrant* (12) (1 Hag. Con. 752). There is now still a presumption against condonation, but it is only a provisional presumption. E It stands a petitioner in good stead unless and until facts appear in evidence sufficient to displace it, that is, facts which are strong enough to raise a reasonable suspicion amounting in effect to a provisional presumption of condonation. Such facts, of course, will be of a different quality from those necessary to raise a provisional presumption of connivance or collusion which involve moral guilt, but the facts must still be of sufficient cogency to raise a provisional presumption of condonation. Then the petitioner, if he is wise, F will take steps to displace it, for the judge at the end of the case has to ask himself: Has the legal burden been discharged? Am I satisfied that there has been no condonation?

The question then arises: What facts are sufficient to raise a provisional presumption of condonation. An attempt at reconciliation is so much favoured by the law that it does not, in itself, give rise to any presumption of condonation. G It is only when the parties continue living together or are reinstated in one household that the judge is put on inquiry to see whether there has been condonation or not: see the judgment of SIR WILLIAM SCOTT in *Elwes v. Elwes* (13) (1 Hag. Con. 292). Short of that, if the parties have only met for a discussion on their affairs and have not spent the night together, there is no reason to suspect condonation. If that is all that has happened, and then H the rule is invoked that one act of sexual intercourse by the husband is conclusive evidence of condonation, then the party who relies on that act must at least point to a reasonable probability of it. After all, the act itself is not condonation. It is only evidence of it, albeit conclusive evidence, and it is only made conclusive because of the extreme prejudice which the wife may suffer if she has a child as the result of it. A party who relies on an act which has a conclusive effect in law (when there may have been no true reconciliation, and, therefore, no condonation in fact) must at least point to

a reasonable probability of it. Any other view would gravely prejudice any attempt at reconciliation. No husband would ever be safe in meeting his wife on any single occasion with a view to reconciliation, for it would be in her power to assert that on that occasion he had had sexual intercourse with her, and he could only answer it with his own word in denial. The allegation is so easy for a wife to make and so difficult for a husband to refute that common sense requires that in the ordinary way the wife's word on it should not be accepted unless her evidence is corroborated in a material particular. This is the course which I have acted on in trying these cases, and it is fully supported by what SIR SAMUEL EVANS, P., said in *Joseph v. Joseph* (14), and by text books such as RAYDEN ON DIVORCE, at p. 137. It is, however, a proposition of good sense and not a rule of law, and if the judge is, nevertheless, quite satisfied on the wife's evidence alone that sexual intercourse did take place, he is entitled to act on it.

Turning to the evidence in the present case, I can find nothing which is capable in law of being regarded as corroboration of the wife's story. Her tears in the witness box and her reluctance to give evidence cannot be regarded as corroboration, because no one can corroborate himself. The evidence of the husband not only supplies no corroboration, but makes it all the more imperative, for he said they were never alone. He said, indeed, that he loves her still, and he did admit that he told her that for the sake of the children he anticipated one day restoring the home. That was a very praiseworthy attitude in an injured husband who was attempting a reconciliation, but it does nothing to support the suggestion that there was sexual intercourse between them. The commissioner, however, seems to have been quite satisfied on the wife's evidence alone that sexual intercourse did take place, and, if there was nothing more in the case, I doubt whether this court would have interfered because of the absence of corroboration. Assuming, however, that there was sexual intercourse, there still will be no condonation unless the petitioner had at the time full knowledge of all the material facts relating to her adultery with the co-respondent. Now the evidence shows that on Friday, Jan. 30, the wife and the co-respondent made confessions of adultery in which they said they were still seeing one another. On Saturday, Jan. 31, she left her husband's house and stayed the night at a friend's house in Stamford. Then on Sunday, Feb. 1, she went to stay with her sister at Sutton-in-Ashfield. Three weeks later the husband went over there. That is the time on which the wife says sexual intercourse took place. The question is whether any material facts took place in those three weeks of which the husband was ignorant. He says that he did not know the contents of the letters from Mr. Hall to her (which were in her handbag) or from her to Mr. Hall (which were produced at the hearing). Those letters showed that during those three weeks, right up to the time of the husband's visit, love letters were passing daily and sometimes twice a day between Mr. Hall and the wife; that they were speaking to each other on the telephone nearly every evening; that he was sending tablets and powders to her apparently with a view to procuring her abortion; that he was worrying about the damages he might have to pay to the husband; that they both went together to see his solicitor in Peterborough on Feb. 11; that he went over to see her at Sutton-in-Ashfield on the week-ends of Feb. 8 and 15; that on these week-ends they had what each described as a "grand" and "glorious" time together; that he looked on her as his wife; and that she was assuring Mr. Hall of her love for him and was promising him to go back to him at Stamford as soon as he could find a bed for her. There was, therefore, ample evidence that the wife and the co-respondent were on very intimate terms right up to the time of the husband's visit. The question is whether that was a material fact. The relationship of husband and wife is one which requires the utmost good faith to be observed by the parties, and

the test of materiality is similar to that applied in other relationships of a confidential nature. Material facts are those which might reasonably be expected to weigh with a reasonable husband in deciding whether to forgive his wife for her offence. Applying this test, I think the continuance of the association here was a material fact. The circumstantial details do not matter, but the continuing intimate association does matter. It is one thing to forgive a wife for past adultery when the association is over and done with. It is quite another to forgive her when the association is still continuing. There is little hope of any true reconciliation if a wife, while pleading with her husband to his face for forgiveness, still keeps seeing her lover behind his back. No man can be expected to condone his wife's adultery whilst that is going on. Even if the wife did not actually commit adultery during those three weeks (as to which I say nothing) the intimate association itself was a material fact. Such an association has been held sufficient to revive an antecedent condoned adultery: *Winscom v. Winscom* (15); *Ridgway v. Ridgway* (16); *Beard v. Beard* (17); and to justify a husband in separating from his wife, *Glenister v. Glenister* (18). It must, therefore, be a material fact for him to know. If it was unknown to the husband and undisclosed by the wife, it is as good a ground for setting aside the transaction as fraud itself. At least it would be so held in the case of any other confidential relationship, and of all relationships known to the law that of husband and wife is the most confidential.

The question, therefore, becomes whether the husband knew of this continuing association. Before his petition can be dismissed on this ground, the facts in evidence must at least point to some probability that he knew of it. As SIR JOHN NICHOLL said in *Durrant v. Durrant* (12) (1 Hag. Ecc. 752):

“Knowledge and forgiveness are not legally to be presumed.”

If, however, any reasonable man in the husband's position and with the information he had would have known that the intimate association had continued right up to the time of his visit, then it may be inferred that the husband probably did know. At all events, the facts would raise a provisional presumption of knowledge sufficient to call upon the husband to displace it. That seems to have been the view of the commissioner in this case. He thought that the husband knew that the association between his wife and Mr. Hall had not ceased, and, if there was nothing more in the case, I doubt whether this court would have interfered on the ground of want of knowledge of material facts.

There is one remaining point, however, to which the commissioner has not addressed his mind. The evidence showed that, even after the husband's visit, letters had passed between the wife and Mr. Hall and, moreover, that on Apr. 5 she went with Mr. Hall to his solicitor to whom she made a statement “sort of in revenge” against her husband which was the basis of the evidence she gave in court. Those are facts which at once raise the question: Was this intimate association still continuing even after the husband's visit? For, if it was, it would operate to revive the adultery, even if it had been condoned. The letters since the visit were not produced in court, nor did the co-respondent or the wife give evidence of the nature of the association. Indeed, if it was an intimate association, they might claim privilege from saying anything about it. It was at this point, if not before, that, in my opinion, a serious miscarriage of justice may have taken place. At the close of the petitioner's case there was nothing whatever to support the suggestion that there had been condonation. The wife herself did not put it forward as part of her case. The only person who raised it was the co-respondent. He raised it, not in the interests of justice or to save the marriage, but to save his own pocket. He raised it at the last moment, taking the husband's advisers by surprise, when he could have raised it a month before. It was he who had taken the wife to his own solicitors, to whom she told her story “sort of in revenge” against her husband. It was

he who saw to it that she was subpoenaed and thus compelled to give evidence against her husband, much against her will. Up till now he has succeeded. On this point of condonation, which was not pleaded, the petition has not only been dismissed, with not a penny damages against the co-respondent who has broken up the home, but the husband has been ordered to pay the co-respondent's costs. If ever there was a case where the provisional presumption against condonation should have stood the husband in good stead until it was displaced, this was the case. It is because the commissioner does not seem to have realised this, that I think this appeal should be allowed. He did not properly direct himself on the burden of proof, but this court did not see the witnesses and cannot say what the result would have been if he had properly directed himself. There must, therefore, be a new trial.

HODSON, J. : This case raises an important question on the construction of the Judicature Act, 1925, s. 198. I will not re-read the section. The husband's contention is that the wife, respondent to the petition, was unlawfully compelled by the learned commissioner to give evidence at the trial, she not being a compellable witness. In the circumstances I think that, although no direct order was given to the witness by the commissioner, she was compelled to give evidence. Was she compellable? The section uses the word "competent" and omits the words "and compellable" which appear in the same statute in an earlier section, namely, s. 176 (now repealed), the proviso to which reads as follows :

"Provided that nothing in this Act shall affect the right of a wife to present a petition for divorce on any ground on which she might, if the Matrimonial Causes Act, 1923, had not passed, have presented such a petition, and on any petition presented by a wife for divorce on the ground of the adultery and cruelty, or adultery and desertion, of her husband, the husband and wife shall be competent and compellable to give evidence with respect to the cruelty or desertion."

Contrasting these sections in the same statute, it would appear that compellability to give evidence is not necessarily to be inferred from competence to do so. The same conclusion is reached by consideration of *Leach v. R.* (2), a decision of the House of Lords on the construction of the Criminal Evidence Act, 1898, s. 4, which provides :

"(1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged."

The argument of *Sir John Simon*, the Solicitor-General, which was read by BUCKNILL, L.J., was rejected by the House, and LORD ATKINSON said ([1912] A.C. 311) :

"The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite, and positive enactment, not by an ambiguous one such as the section relied upon in this case."

The history of the relevant legislation is as follows. The Evidence Act, 1851, ss. 2, 3 and 4, made parties to an action competent and compellable, but made exceptions in the case of criminal proceedings and proceedings instituted in consequence of adultery and actions for breach of promise of marriage. The Evidence Act, 1853, ss. 1 and 2, made the husbands and wives competent and compellable in any proceedings except criminal proceedings and proceedings instituted in consequence of adultery. At the passing of the latter Act, therefore, the husband and wife were neither competent nor compellable to give

evidence against the other in any proceedings instituted in consequence of adultery. By the Matrimonial Causes Act, 1859, s. 6, in certain cases husband and wife were made competent and compellable even though proceedings were instituted in consequence of adultery :

A "On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion."

B This section was replaced by s. 176 of the Act of 1925 to which I have previously referred. By the Evidence Further Amendment Act, 1869, the words "or in any proceedings instituted in consequence of adultery" in s. 2 of the Act of 1853 were repealed. This repeal had the effect of bringing husband and wife in such proceedings within the general provisions of the Evidence Act, 1851, s. 1. The Act of 1869, however, not only repealed the above-mentioned provision of the Act of 1853, but also dealt with the particular case of parties to any proceedings instituted in consequence of adultery, and by s. 3 made the enactment now repealed but reproduced in s. 198 of the Act of 1925.

C Parliament having, therefore, dealt with the particular subject-matter of parties to any proceedings instituted in consequence of adultery and their husbands and wives independently of the general provisions must, it is argued, be taken to have intended their competence and compellability as witnesses to be governed by the particular provision. Accordingly, the word "compellable" being omitted after the word "competent" in s. 198 of the Act of 1925, the parties are said not to be compellable witnesses at all in proceedings instituted in consequence of adultery. This argument has not hitherto been accepted and the principal text book writers are unanimous in stating that husband and wife, being competent and compellable by virtue of the provisions of s. 2 of the Act of 1851, are no less compellable by reason of the existence of the provisions of s. 3 of the Act of 1869 : see TAYLOR ON EVIDENCE, 12th ed., p. 853, and PHIPSON ON EVIDENCE, 7th ed., p. 443 ; see also WILLS ON EVIDENCE, 3rd ed., p. 134, where the author's opinion to the contrary no longer appears. The same view was accepted by LOPES, J., in *Nottingham Guardians v. Tomkinson* (6) (4 C.P.D. 349). The courts have themselves hitherto acted on the view that the parties are not only competent, but compellable (for example, to answer interrogatories), subject to the protection extended not only to them but to other witnesses in proceedings instituted in consequence of adultery in respect of questions tending to show adultery. In my judgment, this view is correct. Section 198 of the Act of 1925 is not inconsistent with s. 3 of the Act of 1851, and does not, therefore, necessarily operate so as to make an exception to the general rule of compellability contained therein. The protection extended by the second part of s. 198 limits the compellability introduced by the earlier Act by restricting the scope of admissible questions, but does not go to the extent of declaring that the witnesses (whether parties or not) are not otherwise compellable. In short, their competence is unlimited, but there is a limit to their compellability.

H In my view, therefore, the husband's contention as to the supposed wrongful admission of the evidence of the wife fails. I agree that on the issue of condonation the trial was unsatisfactory since the petitioner was taken by surprise and I agree that there should be a new trial. I also agree that, as a matter of common sense, the courts are always slow to act on the uncorroborated evidence of a woman who has become separated from her husband by reason of her adultery when she seeks to establish condonation by proving that sexual intercourse has taken place between herself and her husband after he has obtained knowledge of her adultery. I do not think, however, that there can

be said to be any rule to this effect. The corroboration obtainable in criminal cases is not likely to be available and unless the parties are living together the sexual act itself is not readily capable of proof even inferentially by evidence other than that of the parties themselves. The Matrimonial Causes Act, 1937, s. 4, casts a duty on the court to satisfy itself upon the evidence *inter alia* whether there has been condonation on the part of the petitioner. It is true that connivance and condonation are set side by side in the section, but the presumption which exists against connivance must necessarily be stronger than any presumption against condonation, since the former is a presumption of innocence and the latter is in a different category. There is nothing wrong, or, indeed, improbable, in a husband condoning his wife's adultery. Although the surrounding circumstances have to be examined in each case as well as the evidence of the parties themselves before a conclusion is reached, it is open to the court to come to the conclusion that sexual intercourse has taken place between the parties on the evidence of the woman alone.

So far as the facts of the present case were disclosed at the hearing, it appears that there were passages in the husband's evidence dealing with his intention to restore the home in the future which tended to support the probabilities of the wife's story. As for the letters passing between the wife and the co-respondent after she left the petitioner's house and before the alleged acts of sexual intercourse, I do not think that there was anything material added to the petitioner's knowledge by them. He obtained possession of the letters from the co-respondent, according to the wife, on Feb. 21, the day of the first alleged intercourse and, according to the husband, on the following day, although he did not read them until later. When she confessed her adultery on Jan. 30, 1948, she said she was still seeing the co-respondent, presumably on the same terms as before, and the co-respondent made a similar confession at the same time. There is no evidence that she practised any fraud upon her husband, such as concealing her pregnancy, as in *Roberts v. Roberts and Temple* (19), or even the extent of the meetings. The actual number of occasions on which they had met since the date of the confession could not, in my opinion, be material in the absence of fraud.

Appeal allowed with costs. Order made for new trial. Costs in court below reserved to judge in new trial.

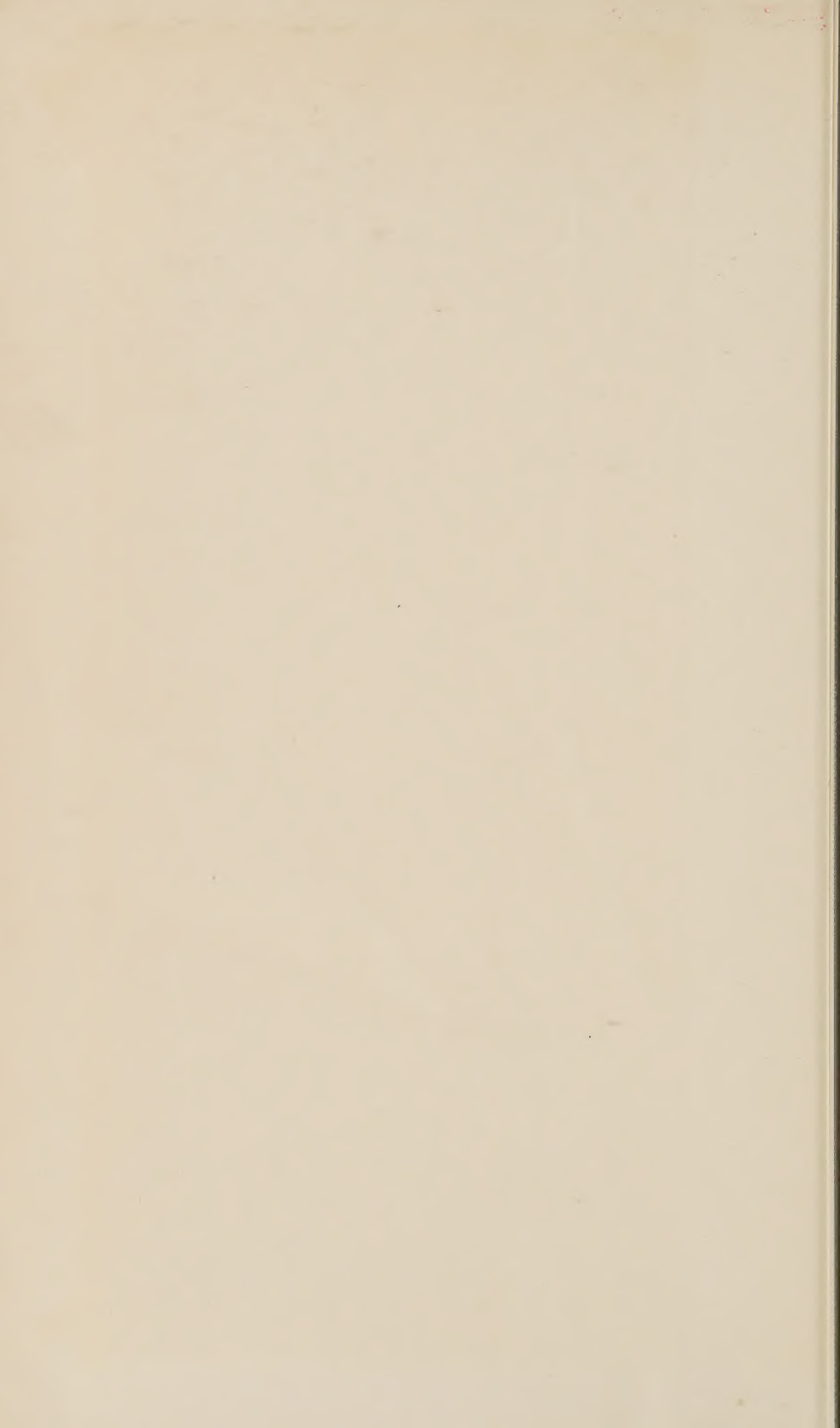
Solicitors: *S. C. Elphick*, agent for *Kelham & Sons*, Stamford (for the husband); *J. Hunt*, Peterborough (for the co-respondent).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

END OF VOLUME 2.







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